

## APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

1916.  
December  
18.

PARSHOTTAM VERIBHAI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS v. CHHATRASANGJI MADHAVSANGJI THAKORE (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Broach and Kaira Incumbered Estates Act (XXI of 1881), section 28†—Indian Contract Act (IX of 1872), section 65—Talukdar, mortgage by—Validity of mortgage during Talukdar's life time—Mortgage void on Talukdar's death—Mortgagee not entitled to compensation for discharge of mortgage.*

A mortgage effected by a talukdar being void beyond the natural life of the mortgagor talukdar under section 28 of the Broach and Kaira Incumbered Estates Act (XXI of 1881), the mortgagee is not, in that event, entitled to recover back the money advanced by him on the mortgage under section 65 of the Indian Contract Act (IX of 1872).

*Javerbhai Jorabhai v. Gordhan Narsi*<sup>(1)</sup>, distinguished.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Ahmedabad, reversing the decree passed by M. I. Kadri, Subordinate Judge of Umreth.

Suit to recover possession of property.

On the 23rd March 1894, Madhavsangji, the then Talukdar of Kherda and the father of the plaintiff, mortgaged the property in dispute to the defendant. Madhavsangji died on the 8th November 1907 and was succeeded by the plaintiff.

The plaintiff filed the present suit to recover possession of the property free from the incumbrance created

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\* Second Appeal No. 1128 of 1915.

† The section runs as follows :—

“When a thakur has been restored under section 26 to the possession of any property, no mortgage, charge, lease or alienation of such property, or of any part thereof, made by such thakur, shall be valid as to any time beyond his natural life.”

<sup>(1)</sup> (1914) 39 Bom. 358.

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by his father on the ground that the mortgage was valid only during the life time of his father under section 28 of the Broach and Kaira Incumbered Estates Act (XXI of 1881).

The Court of first instance held that the section did not apply and dismissed the suit.

On appeal, the District Judge reversed the decree and awarded the plaintiff's claim on the ground that the section applied to the case and that the defendant was not entitled to recover back the money advanced by him on the mortgage.

The defendant appealed to the High Court.

*G. N. Thakor*, for the appellant:—The estate in question 'vested' in the Talukdari Settlement Officer in 1878 when Shivsingji was the Talukdar. The management terminated in 1891. The estate that was conveyed to Madhavsingji was not his estate, but the estate of Shivsingji. Section 28 of the Broach and Kaira Encumbered Estates Act, 1881, has therefore no application, for it applies only to a Thakor who has been 'restored' to possession under section 26.

Section 65 of the Indian Contract Act, 1872, applies. The words "becomes void" refer to contracts like the present: see *Javerbhai Jorabhai v. Gordhan Narsi*<sup>(1)</sup>; *Girraj Baksh v. Kazi Hamid Ali*<sup>(2)</sup>; *Dhuramsey v. Ahmedbhai*<sup>(3)</sup>.

*N. K. Mehta*, for the respondent, was called upon on the second point:—Section 65 cannot apply to contracts valid during the life time of the executant. A mortgage is not a contract but a conveyance. The section does not apply to a conveyance. The cases cited are cases under the Bhagdari Act, where the transaction is void *ab initio*.

*G. N. Thakor* was heard in reply.

<sup>(1)</sup> (1914) 39 Bom. 358.

<sup>(2)</sup> (1886) 9 All 340.

<sup>(3)</sup> (1898) 23 Bom. 15.

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BATCHELOR, J. :—The suit out of which this appeal arises was brought by the plaintiff for a declaration that a deed of mortgage made in March, 1894, by his father is null and void. The plaintiff also sought to recover possession of the property.

The plaint stated that the plaintiff is, and his father was, a Talukdar of Kherda, and the mortgage-deed was void under section 28 of the Broach and Kaira Incumbered Estates Act (XXI of 1881) after the death of the mortgagor, the plaintiff's father. The defendants are the representatives of the original mortgagee.

The lower appellate Court has decided in favour of the plaintiff upon the main contention; and nothing has been said in the argument before us to lead us to doubt the accuracy of that conclusion. Under section 28 of Act XXI of 1881 it is provided that in circumstances such as we have here no mortgage shall be valid as to any time beyond the natural life of the mortgagor Talukdar.

Mr. Thakor, however, on behalf of the defendants, has contended that they are entitled to recover back the money advanced by them on the mortgage and that until this restitution is made to them the plaintiff has no right to recover possession of the property. The learned pleader has relied in the first instance upon section 65 of the Contract Act. That section, however, in my judgment is of no application. For the case before us is not a case where an agreement is discovered to be void or where a contract became void. The present is a case rather of a transfer of property by way of mortgage, the transfer being perfectly valid when made and remaining valid for a certain period of time fixed by the law, i.e., the lifetime of the mortgagor.

Then the learned pleader called in aid of his contention this Court's decision in *Javerbhai Jorabhai v.*

*Gordhan Narsi*<sup>(1)</sup>. That case must, however, as I think, be distinguished. It was a case under the Bhagdari Act, 1862, and the consideration for the mortgage failed *ab initio*. In those circumstances the Court held that it was open to the plaintiff-mortgagees to recover under the covenant, which provided that if there should be any hindrance or obstruction concerning the house, the defendants and their property, their heirs and representatives would be liable for any loss which the plaintiffs might suffer and for the moneys which the plaintiffs had advanced. In other words, in that case, since the mortgage was void from the beginning, the event contemplated in the covenant had in fact happened, and the plaintiffs were entitled to take advantage of that happening. The covenant in the present case is in form very like that in *Javerbhai's case*<sup>(1)</sup>. It runs in these words: "If any manner of obstruction or hindrance be caused or any claim or right be preferred as regards this land, I personally, my heirs and representatives and children are to be answerable for your amount in respect of the mortgage." But it seems to me impossible to say here that the event contemplated in the covenant has in fact happened. For the defendants actually obtained possession of the mortgaged property and retained possession of it until the death of the mortgagor, i.e., for a total period of about nineteen years.

Now the parties to this mortgage and this covenant must, I think, be taken to have contracted with reference to the existing law, and the covenant must be read as limited to the time during which the mortgage remained valid under that law. During all that time, as I have said, there was no hindrance or obstruction or any other circumstance which could call the terms of

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the covenant into operation. It is true that the defendants' term of possession has been shorter than it would have been if the law had been otherwise. But I cannot see how the defendants can lawfully complain of that. They must, in my view, be regarded as having taken their chance as to the length of their possession. As the learned District Judge observes: "Presumably the mortgagor and mortgagee knew how they stood, and I suppose the mortgagee took proper care of his interests in view of the unsatisfactory nature of his security." I am of opinion, for these reasons, that the contract between the parties has effectually been carried out subject to the law of the country according to which they must be taken to have contracted. It follows, therefore, that the defendants are not entitled to any money compensation for handing over possession to the plaintiff.

The appeal, therefore, in my opinion, fails and should be dismissed with costs.

SHAH, J:—I am of the same opinion.

*Appeal dismissed.*

R. R.

## APPELLATE CIVIL.

*Before Mr. Justice Beaman and Mr. Justice Macleod.*

1917.  
March 14.

DAWAL PIRANSHAH AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS v. DHARMA RAJARAM MANGGARUDDI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Transfer of Property Act (IV of 1882), section 54—Indian Registration Act (XVII of 1908), sections 17, 50—Sale of land below Rs. 100 in value by unregistered deed of sale and delivery of possession—Sale valid on proof of sale and delivery of possession—Secondary evidence of unregistered deed of sale, whether admissible.*

\* Second Appeal No. 312 of 1916,