

APPELLATE CIVIL.

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*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.*Septem-
ber 25.

MOTIBHAI JIJIBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS
v. DESAIBHAI GOKALBHAI AND ANOTHER (ORIGINAL DEFENDANTS),
RESPONDENTS.*

Land Revenue Code (Bom. Act V of 1879), section 74—Rajinama and Kabulayat—Legal effect of Rajinama—Occupancy not subject to any valid equitable interest in the third party—Sale—Transfer of Property Act (IV of 1882), sections 2 and 54—Registration Act (XVI of 1908), sections 17 and 90.

One C as a registered Khatedar of certain unalienated lands executed a Rajinama on August 11, 1904, relinquishing the Khata of the lands in favour of D. D on the same day executed a Kabulayat to the Mannlatdar undertaking to pay land-revenue in respect of that Khata. C had not created any valid equitable interest in any third party by way of mortgage or otherwise. In 1911, he sold the lands to the plaintiffs by a registered sale deed and the plaintiffs filed a suit for the purpose of obtaining possession from D. The Subordinate Judge held that in the absence of a registered sale deed as required by section 54 of the Transfer of Property Act, 1882, the Rajinama could not by itself operate to transfer ownership in the property to D. The lower appellate Court found that by passing the Rajinama C intended to abandon all his interest in favour of D and dismissed the plaintiffs' suit.

On appeal to the High Court,

Held, confirming the decree, that the legal effect of the Rajinama was the extinguishment of the interest of C in the property and therefore the plaintiffs got nothing by their sale deed.

SECOND appeal against the decision of M. J. Yajnik, Assistant Judge at Ahmedabad, reversing the decree passed by J. N. Bhatt, Subordinate Judge at Borsad.

Suit to recover possession.

One Chatur Dharmadas was the original owner of the property in suit forming a recognised sub-division of Narva and situated at Sandesar. Chatur thought of leaving Sandesar and returning to his native village Nar which is within the jurisdiction of Baroda State.

* Second Appeal No. 659 of 1915.

So in 1904, he executed a Rajinama in which he stated to the Mamlatdar that he had relinquished the Khata of the survey numbers in favour of Desaibhai Gokalbhai (defendant No. 1). Desaibhai on the same date executed a Kabulayat to the Mamlatdar undertaking to pay the land revenue that might become due from time to time in respect of the Khata. No legal deed of transfer was executed in favour of Desaibhai. At the date of the relinquishment the property was in possession of Chatur's mortgagees.

In 1908, Desaibhai applied to the Collector to be placed in possession of the lands in possession of the mortgagee on the ground that the mortgages were void under Bom. Act V of 1862 and succeeded in having an order directing him to be placed in possession of the lands without paying anything to the mortgagees.

In 1911, Chatur (plaintiff No. 3) transferred the entire Narva the occupancy of which he had relinquished in favour of Desaibhai to the plaintiffs Nos. 1 and 2 by a registered sale deed. The plaintiffs, therefore, sued to recover possession alleging that Desaibhai managed the lands for Chatur and had no interest created in him by the Rajinama.

The defendant No. 1 contended *inter alia* that the Rajinama passed by Chatur in his favour and the Kabulayat executed by himself to the Mamlatdar undertaking to pay land revenue had the effect of transferring the interest of Chatur in the Khata to him.

The Subordinate Judge held that the only effect of the Rajinama was as mentioned in section 79 of the Land Revenue Code, viz., that the person to whose name the occupancy was transferred became liable for the land revenue. It did not by itself operate to transfer the ownership in the property in the absence of a

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registered sale deed as required by section 54 of the Transfer of Property Act, 1882. The plaintiffs' claim was, therefore, allowed.

The Assistant Judge, on appeal, found that Chatur intended to abandon all his interest in favour of Desai-bhai and that that was his intention in passing the Rajinama. He, therefore, reversed the decree on the following grounds :—

“ The lower Court while holding that Chatur did give the Rajinama, Exhibit 65, in favour of the appellant passed the Kabulayat, Exhibit 66, in respect of the whole of Chatur's Khata held that these could not dispense with the necessity of executing a document in favour of the transferees such as is required by the provisions of the Transfer of Property Act. And holding that the deed of the respondents Nos. 1 and 2 did not offend against the provisions of the Narvadari Act, it passed a decree in their favour in respect of all the properties except lot No. 11 and subject to payment of Rs. 600 in respect of the mortgage of lots Nos. 2 and 3. The appellants' main contention is that the lower Court has erred in holding that the Rajinama and the Kabulayat had the effect of transferring the interest of Chatur to the appellant. This is indeed a contention on which the whole case between the parties turns. It is clear that if by force of those documents the appellant had acquired ownership over the lands in dispute, the sale deed, Exhibit 22, passed to the respondents Nos. 1 and 2 by Chatur cannot avail them, since Chatur's interest having passed by force of the said writings to the appellant, he had really then no interest in the plaint lands that he could convey when he executed the deed, Exhibit 22, to the respondents Nos. 1 and 2. Had these Exhibits 65 and 66 the effect of transferring the interest of Chatur in his Khata to the appellant Desai Gokal? Exhibit 65 is the Rajinama given by Chatur to the Revenue Authorities under old section 74 of the Bombay Land Revenue Code of the Khata in his name containing 12 S. numbers in order that the same may be secured by Desai Gokalbai while Exhibit 66 is a complement to it, by which the said Desai takes the said lands undertaking to pay the Government assessment, that the parties intended by such Rajinama and Kabulayat to transfer the interest of one of them, Chatur, to Desai in the said lands may be seen from Exhibit 95. It is Chatur's statement made before the Patil and Talati in 1908, in which he clearly admits having already given away all his interest in the Narva of his mother's father Dharamdas by a gift to the appellant. The surrounding circumstances point to the same conclusions. The appellant Desai was an agnate of Chatur's grandfather Dharamdas. The property that had come to Chatur from the said grandfather was already

abandoned by him to a considerable extent by mortgages, &c. He was besides a resident of Nar in the Baroda territory and the years that had just preceded had been 'lean' years following a year of severe famine (A. D. 1900); under these circumstances for Chatur to relinquish his right of occupancy and transfer thereby all interest in the plaint lands to the appellant Desai as indeed expressly admitted by him in his statement, Exhibit 95, is both probable and natural. I quite admit as pointed out by the learned Sub-Judge that the entries in Revenue records are indeed for the purpose of collecting revenue, and they do not by themselves necessarily evidence title. But here you find the owner relinquishing his right of occupancy in favour of another man under a statutory provision which contemplates giving up of an interest absolutely or in favour of another person, and it is followed by delivery of possession. The notice of relinquishment contains no reservation of rights in favour of the transferor. Moreover the circumstances noted above show clearly what the intention of Chatur was in passing the Rajinama. I, therefore, hold the passing of the Rajinama and Kabulayat by Chatur and Desai respectively had the effect of transferring Chatur's interest to Desai, the appellant in the plaint lands. And this is what has been decided in cases, 16 Bom. L. Reporter, page 718, I. L. R. 1 Bom. p. 91, I. L. R. 11 Bom. p. 174. This view again is strengthened by the fact that the notice of relinquishment under section 74 of the Land Revenue Code has been expressly exempted by section 90 (c) of the Indian Registration Act from the liability of registration. But for such notice having been considered by the Legislature as amounting to a relinquishment or extinction of an interest in immoveable property, viz., the right of occupancy such exemption by an express provision of the law seems incomprehensible. I am unable to follow the learned Sub-Judge in the distinction that he has endeavoured to make for the purpose of section 74 of the Land Revenue Code between an absolute relinquishment, and a relinquishment in favour of another. Both serve equally to extinguish the right of the old occupant, while the Kabulayat passed by the new occupant or transferee serves to create or transfer the occupancy. By occupancy again is to be understood not merely the right to pay the Government assessment, but as its definition shows the bundle of rights that any occupant as such passes. In other words it means the interest which under the Rajwari tenure a holder of land is capable of possessing. Thus it is that the Rajinama and the Kabulayat have served to transfer the whole interest of Chatur in his Khata to the appellant. As to the contention that since the introduction of the Transfer of Property Act, the transfer can only be by a registered writing and that to hold that 'such relinquishment' would have 'the effect of transferring ownerships in contravention of the provisions requiring a document to be in writing, registered and stamped would simply be disastrous, as it would break the very safeguards, which the law intended to introduce.' I would observe that the mode of transfer of lands by Rajinama and Kabulayat is a mode equally recognised

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by law and in no way in conflict with the provisions of the Transfer of Property Act. That the view that it is in conflict is, I think, not correct. The transfer whether by a deed of sale or a deed of gift under the Transfer of Property Act is a transfer directly from one party to the other. In that case the Act requires that it shall be done by a deed. That is the general law. In the case of Khata lands, the transfer may be effected as well by such a deed passed directly by the transfer to the transferee or through the machinery of a Rajinama and a Kabulayat. The former extinguishes the transferor's right to the Khata and the transferee acquires it under the Kabulayat from Government. The latter is as legitimate a mode as the former. I, therefore, hold that the appellant did acquire a right to the plaint lands by the Rajinama and the Kabulayat, Exhibits 65, 66.

The plaintiffs Nos. 1 and 2 appealed to the High Court.

Gokuldas K. Parekh for the appellants:—The only question is whether Rajinama and Kabulayat under section 74 of the Land Revenue Code can, after the extension of the Transfer of Property Act, 1882, to this Presidency, pass title without a regular sale or gift deed. The provisions as to sale or gift are made in the Transfer of Property Act and its provisions are imperative. There must be a document duly registered. The lower Court relies on *Tarachand Pirchand v. Lakshman Bhavani*;⁽¹⁾ *Vishnu Sakharam Phatak v. Kashinath Bapu Shankar*;⁽²⁾ *Venkaji v. Gopal*.⁽³⁾ In these cases the Rajinama and the Kabulayat were no doubt held enough to pass the interest in the property but they were cases dealing with transactions before the Transfer of Property Act was extended to this Presidency. There it was supposed that if these were accompanied by delivery of possession it was enough, for delivery was the chief element in a transfer. These rules are however abrogated by the Transfer of Property Act. These cases, therefore, do not apply. In a recent case of *Sakharam Keshav v. Ramchandra Ganesh*⁽⁴⁾ the Court has held that those

(1) (1875) 1 Bom. 91.

(2) (1886) 11 Bom. 174.

(3) (1914) 16 Bom. L. R. 718.

(4) See post p. 178 *f. n.*

cases do not apply where the Transfer of Property Act is applicable. Again Rajinama and Kabulayat are mere entries in Collector's books which would not have the effect of passing title. They cannot serve the place of a registered document inter parties: see *Bhagoji v. Bapuji*.⁽¹⁾ There being thus no legal transfer, the defendant has no title and the plaintiffs' claim must be decreed.

T. R. Desai, for respondent No. 1 :—By passing the Rajinama Chatur intended to abandon all the rights he had to the occupancy and this he did to relieve himself of the burden of paying assessment. The question is what is the legal effect of such an abandonment. Could he after relinquishing the occupancy still assert that he had some saleable interest left in him? I submit he could not. If so, he could not pass anything to the present plaintiffs and they cannot sue. This is an ejectment suit and the plaintiffs must prove a title.

The occupancy is defined in Land Revenue Code as sum total of the bundle of rights of the occupant. By a Rajinama under section 74 of the Land Revenue Code that bundle is relinquished and nothing is left with the original holder. The Court has to determine the effect of a Rajinama only and not whether Rajinama and Kabulayat pass a title. That by giving a Rajinama there can be relinquishment is clear. Even the Legislature contemplates that it would be so, for otherwise there is no reason in section 90 (c) of the Registration Act providing that Rajinama be exempt from registration. Section 4 of the Transfer of Property Act provides that that Act is to be read as supplemental to Registration Act so far as sections 54 and 123 are concerned. The decree of the lower appellate Court can be supported on this ground and the plaintiffs having no title they cannot sue.

(1) (1888) 13 Bom. 75.

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G. K. Parekh in reply.

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SCOTT, C. J :—The facts of this case are shortly that one Chatur, being the registered Khatedar of certain unalienated lands which were subject to the provisions of the Land Revenue Code, executed a Rajinama in the year 1904, in which he stated to the Mamlatdar that he had relinquished the Khata of the Survey numbers in favour of Desaibhai Gokulbhai, and requested that the necessary mutation of names should be made in the records. Desaibhai Gokulbhai, on the same day, namely, the 11th August 1904, executed a Kabulayat to the Mamlatdar undertaking to pay the land revenue that might become due from time to time in respect of that Khata, and prayed that his name might be entered in the Government records as the registered Khatedar.

The lower appellate Court has found that Chatur intended to abandon all his interest in favour of Desaibhai, and that that was his intention in passing the Rajinama. Notwithstanding these transactions, Chatur, in 1911, purported to sell the same property to the plaintiffs by a registered sale-deed, and the plaintiffs filed this suit for the purpose of obtaining possession from Desaibhai. The plaint alleged that Chatur effected a mutation of names in favour of the defendant Desaibhai Gokulbhai to enable the latter to manage, and that Desaibhai's occupation was merely that of a manager on behalf of Chatur. That case, however, has not been made out in the lower Courts, and the facts found are, as already stated, that there was an abandonment by Chatur in favour of Desaibhai with the intention of Desaibhai becoming the owner of the property.

It is contended on behalf of the appellants-plaintiffs that Desaibhai could not acquire the interest of Chatur in the property except by registered sale deed, that the effect of the findings is a gift of immoveable property by

Chatur to Desaibhai since the application of the Transfer of Property Act to this Presidency, and that therefore, under section 123 a registered document is essential.

We have, however, to consider what is the legal effect of a Rajinama on the occupancy holding of a person who has not created any equitable interests in any third party, for in this case we have no valid equitable interests created in any third party by way of mortgage or otherwise so far as the evidence shows. The relinquishment is an abandonment by the Khatedar of his claim to hold the property, subject to the payment of the revenue, and therefore, *prima facie* his interest is extinguished. That view obtains support from the fact that relinquishments under section 74 of the Land Revenue Code are expressly mentioned in the Registration Act, section 90, whereby they are exempt from registration. Why is it necessary that they should be specifically exempt from registration unless they are or may be under certain circumstances obnoxious to the provisions of section 17 of the Registration Act. They are, we think, specifically exempt from registration because *prima facie* they extinguish the right of the relinquishing Khatedar to hold the occupancy as against Government, subject to the payment of the revenue. Of course it may often be that equitable interests are reserved by the relinquishing Khatedar by arrangement with the incoming Khatedar who takes his place, for example as was suggested in the plaint filed in this suit in order that Desaibhai might come in as manager, mutation of names being effected purely for the purpose of convenience. That is always a possibility. But the facts found in this case preclude us from holding that that is the true view of the relations of the parties, Chatur on the one hand and Desaibhai on the other. We take it, then, that the relinquishment

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was, and was intended to be, an extinguishment of the interest of Chatur in these Survey numbers, and the effect of the Kabulayat was that Desaiibhai came in by agreement with Government as an occupant in his own right. That being so, how can Chatur retain any interest which is capable of transfer in 1911? It appears to us that the plaintiff got nothing by his sale deed, since Chatur had no interest left which he could transfer. This decision does not conflict with that lately pronounced by a Bench of this Court in *Sakharam Keshav v. Ramchandra Ganesh*,⁽¹⁾ for there the abandoning Khatedar had already created a mortgage in

(1) The following judgment was delivered by Scott, C. J. and Shah J. in in L. P. Appeal No. 31 of 1914, on the 30th August 1915:—

SCOTT, C. J.—This is an appeal under the Letters Patent against a judgment in a redemption suit under the Dekkhan Agriculturists' Relief Act. On the 3rd of May 1904, a document in form of a sale-deed was executed by the plaintiff to the defendant, and that document was taken to the Registrar's office, but in the office an endorsement at the instance of the plaintiff was added to the effect that the plaintiff was to have the right to repay the purchase-money and redeem within three years. The fact of an agreement to that effect does not appear to have been seriously disputed in the Court of the Subordinate Judge, and therefore that, as we understand, is the explanation of the opening passage of his judgment where he says: "The oral agreement being admitted there is no question of the applicability of section 92 of the Indian Evidence Act, or section 10 A of the Dekkhan Agriculturists' Relief Act. The Court has to start with the deed as subject to that agreement, and only to declare what construction it is capable of, i.e., whether it amounted to a mortgage or to an absolute sale with condition of repurchase." The learned Judge held that it amounted to a mortgage on the ground that the relation of debtor and creditor continued between the parties, and it has not been contended before us that the document did not amount to a mortgage. It has, however, been argued that in consideration of the mortgagee agreeing not to press for payment of three outstanding bonds in the year 1905, and to pay in addition a sum of Rs. 10 more to the mortgagor, the latter should abandon his equity of redemption; and that in consequence of that agreement the mortgagee allowed the bonds to become time-barred. To effectuate this arrangement the mortgagor executed a *rajinama* in favour of the Mamlatdar under section 74

favour of the defendant, and his abandonment was intended to operate as a transfer by way of sale to that defendant. The defendant pleaded it in answer to a claim by the Khatedar to redeem, but it was held that there had been no abandonment to Government of an unencumbered property. Therefore if the mortgage subsisted the right of redemption still subsisted, inasmuch as it had not been sold in the manner provided by the Transfer of Property Act. That is the explanation of that decision and it in no way conflicts with the decision in this case. We, therefore, affirm the decree and dismiss the appeal with costs.

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of the Land Revenue Code, and the mortgagee executed a *kabulayat*. It is contended upon the authority of various decisions in this Court that the *rajinama* combined with the *kabulayat* operated to transfer the title of the mortgagor to the mortgagee. Now none of those decisions touch the points which have been argued here. The point raised upon section 54 of the Transfer of Property Act (a section which appears to have escaped notice in some of those cases) is that it being established in this case that an equity of redemption remained in the mortgagor, that equity of redemption on being transferred to the mortgagee for consideration would amount to a sale. But it could only be a valid sale if effected by a registered instrument. Here there is no instrument of any kind between the mortgagor and the mortgagee with reference to the transfer of the equity of redemption. Therefore there has been no transfer.

Then it is argued that the abandonment of his right of suit in respect of the money-bonds by the creditor in consequence of the agreement between the parties raises a case of estoppel against the mortgagor seeking redemption. With regard to that, it is sufficient to repeat what is said by the Assistant Judge in his judgment: "The facts might have given rise to a question of estoppel but this has not been pleaded in the lower Court nor made a ground of appeal nor argued before the Assistant Judge." There being no issue of estoppel, and the evidence not having been directed to the point, we cannot in this fourth judicial investigation decide upon such a new point. The mortgagee is not really prejudiced in the matter because an account has been taken under the Dekkhan Agriculturists' Relief Act and the sums secured by the money-bonds, action upon which is now barred, have been allowed to him in the account of principal under section 18. We, therefore, affirm the decree of the lower Court and dismiss the appeal with costs.

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HEATON, J.:—I agree that the appeal in this case must be dismissed. As has been shown, and it is perfectly plain, if the Rajinama of 1904 did operate as a relinquishment of Chatur's rights in this property, then neither he nor the plaintiffs Nos. 1 and 2, who are subsequent assignees from him, can recover anything ; for all the rights they seek to recover were parted with in 1904. The method of relinquishment adopted in 1904 was that provided by section 74 of the Land Revenue Code, made more easy of accomplishment by the provision of section 90 of the Registration Act which exempts such Rajinamas from registration. It is a particular method provided by law for the relinquishment of an occupancy namely the giving up, the annihilation in fact, so far as the occupant is concerned, of his occupancy rights. Therefore, it seems to me, in virtue of clause (a) of section 2 of the Transfer of Property Act, nothing provided in that Act can affect a relinquishment made in this way. That is sufficient for our decision in this appeal, and it is not desirable to say anything on the more difficult questions that would arise if we had to consider the total effect of a Rajinama and a Kabulayat taken together, instead of having, as here, to consider only the effect of the Rajinama.

Decree confirmed.

J. G. R.
