

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

1920.
September
20.

SHIDHARAJ BHOJRAJ DESAI (ORIGINAL DEFENDANT No. 1),
APPELLANT *v.* DARI BIN SANTRAM MALI (ORIGINAL PLAINTIFF),
RESPONDENT².

Rajinama—Unsurveyed alienated village—Inamdar—Rajinama executed in favour of the Inamdar—Rajinama inadmissible in evidence unless registered—Rajinama would not have the effect of extinguishing title—Inamdar's power to receive notices of relinquishment—Indian Registration Act (XVI of 1908), section 90—Land Revenue Code (Bom. Act V of 1879), sections 3, 74, 76 and 88—'Holder of alienated land', interpretation of.

The land in suit was situate in an unsurveyed alienated village. The defendant was an Inamdar of the village. The land was entered in the Inamdar's Khata book in the name of the plaintiff's father who had mortgaged it with possession to one Joti. In 1900, plaintiff's eldest brother passed a Rajinama to the defendant Inamdar relinquishing the land in suit. In 1908 the Inamdar entered into possession after redeeming the mortgage. The plaintiff having sued to recover possession of the land, the defendant contended that the Rajinama extinguished the interest of the plaintiff in the land and therefore the action in ejectment could not be sustained. A question having arisen whether the Rajinama was admissible in evidence for want of registration and whether it extinguished the rights of the plaintiff's family in suit land,

Held, that the Rajinama did not come within the exemption of section 90 of the Registration Act and was inadmissible for want of registration and therefore the rights of the plaintiff's family had not been extinguished; it was only when a survey settlement had been introduced or when powers contemplated in section 88 of the Land Revenue Code had been given to the Inamdar that he was entitled to receive notices of relinquishment under section 74 of the Land Revenue Code and only such notices were exempt from registration under section 90 of the Registration Act.

PER MACLEOD, C. J.:—Where the expression 'holder of alienated land' is used it is necessary to look at the context to see whether it refers to a superior holder or an inferior holder.

PER FAWCETT, J.:—Section 88 of the Land Revenue Code clearly shows the intention of the Legislature that the holder of an alienated village or group of

² Second Appeal No. 955 of 1919.

alienated lands shall not receive relinquishments from his inferior holders, as if he were a Mamlatdar or a Mahalkari receiving relinquishment from an occupant under section 74, unless his village or lands had been surveyed and he has been specially authorised to receive such relinquishments.

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SECOND appeal against the decision of N. B. Deshmukh, Assistant Judge of Belgaum, confirming the decree passed by R. G. Shirali, Subordinate Judge at Athni.

Suit to recover possession.

The land in suit was Gaon Khata land situate in an unsurveyed alienated village of Mangsuli of which the defendant was the Inamdar. The land stood in the Khata of the plaintiff's father Santram in the village books. Santram mortgaged it with possession to one Joti bin Khandu. In 1898 Santram died leaving three sons, Dari (plaintiff), Vithu and Naiku.

In 1900 Vithu executed a Rajinama to the defendant Inamdar relinquishing the land. The Inamdar redeemed it from the mortgagee in 1908 and obtained possession.

In 1917 the plaintiff having purchased the right, title, and interest of his brothers in the land, sued to recover possession of it from the defendant.

The defendant contended *inter alia* that by the Rajinama executed in his favour, rights of the plaintiff's family in the suit land were extinguished and therefore, the plaintiff would not be entitled to recover possession.

The Subordinate Judge held that the Rajinama was not really a Rajinama as such but evidenced a sale transaction and was therefore inadmissible in evidence for want of registration. He decreed the plaintiff's suit for possession.

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On appeal the Assistant Judge confirmed the decree holding that the Rajinama was inadmissible for want of registration. His reasons were as follows:—

“The first question therefore which arises for consideration is whether the Rajinama can be admitted in evidence for want of registration to prove the extinction of the rights of the plaintiff's family over the land in suit. In this connection it has to be borne in mind that the village of Mangsuli where the land is situate is an unsurveyed alienated village. Besides I find agreeing with the learned Subordinate Judge on a true interpretation of the Sanad, Exhibit 44, in the case that defendant No. 4 is a grantee of the share of the revenues only and not the proprietor of the soil. I am fortified in this view of the Sanad by the observations in a case (reported in 13 Bom. L. R. 1053), in which a Sanad similar to the one in question was the subject of consideration by their Lordships of the High Court. Under these circumstances the question we have to consider is whether the Rajinama, Exhibit 59, falls in the first place within the purview of either section 74 or section 76 of the Land Revenue Code for unless the Rajinama falls under either section 74 or 76 it cannot be exempt from registration under section 90 of the Registration Act.* The point involved appears to be an entirely novel and interesting one, which so far as I have been able to find has not been the subject of direct consideration in any of the various rulings relating to Rajinamas and Kabulayats. As I understand section 74 of the Land Revenue Code it appears to me that it applies to an occupant and the term “occupant” as defined in clause 16 of section 3 signifies a holder of unalienated land, &c. The land in question is obviously alienated and therefore Santram or his sons cannot be considered to be occupants of unalienated land, and they do not, therefore, fall within the term “occupant” as used in section 74 of the Land Revenue Code. Section 76 applies to the holders of alienated land. Now Santram cannot be considered to be a holder of alienated land, for the obvious reason that the rights of Government to payment of rent or land Revenue so far as the land in suit is concerned, are transferred to defendant No. 1 and not to plaintiff or his father Santram. In short plaintiff or his father was at the most an inferior holder as defined by clause 14 of section 3 of the Land Revenue Code, and he cannot be considered by any stretch of language a holder of alienated land. In my opinion the term “a holder of alienated land” as used in section 76 can only apply to a superior holder, as defined by clause 13 of section 3 of the Land Revenue Code. For these reasons on a careful consideration of the provisions of the Land Revenue Code in general and sections 74 and 76 in particular, I am inclined to hold that the Rajinama by an occupant or a holder of a land in an inam village does not come within either section 74 or section 76, as neither the term “occupant” nor the term “holder of alienated land” applies in any way to his case, as defined and understood by

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the provisions of the Land Revenue Code. Unfortunately there is no direct authority on the point, but a reference may be made to a case reported (in 22 Bom. I. L. R. 794) in which there are certain observations which give strength to the view that I have been able to form on reading the provisions of the Land Revenue Code bearing upon the question under consideration. No doubt in a case reported in 41 Bom. p. 510 which refers to an Inam village, it was assumed that a Rajinama similar to the one in the present case falls within section 74 of the Land Revenue Code, but the point was not expressly raised and the definitions of "the occupant" and "the holder of the alienated land" were not specially brought to the notice of their Lordships and the facts of the case did not require express decision on the point which is now raised before me. Section 90, clause (e) of the Registration Act refers expressly to notice of relinquishment either under section 74 or under section 76 by holders of alienated lands, and the Rajinama in question in this case not being one either by a holder of alienated land according to section 76 or by an occupant of unalienated land according to section 74 of the Land Revenue Code, cannot in my humble opinion be said to have been contemplated by section 90 of the Registration Act, and its exemption from registration must therefore depend upon ordinary considerations applicable to a case falling within the provisions of section 17 of the Registration Act. If this view of the law is correct, then this Rajinama, Exhibit 59, being undoubtedly intended to transfer the equity of redemption to the Inamdar defendant No. 1, could not validly effect the transfer without its being registered according to section 54 of the Transfer of Property Act."

The defendant appealed to the High Court.

N. M. Patwardhan with *M. V. Bhat*, for the appellant:—The lower Court has decided the case on a preliminary point and that is that the Rajinama (Exhibit 59), was not admissible in evidence for want of registration and there being no other evidence in the case to prove the transfer of the equity of redemption to defendant No. 1, it cannot be said that the rights of the plaintiff's family in the land are extinguished.

Prima facie the Rajinama does not require registration: section 90 of the Indian Registration Act.

But it is said that provision does not do away with the necessity of registration unless the case falls under sections 74 and 76 of the Bombay Land Revenue Code.

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The lower Court's view is that these provisions are not applicable to an alienated village. Section 74 applies to land in Government villages and section 76 says that the provisions of section 74 shall apply to holders of alienated land. In place of "occupant," as used in section 74, you find "holder of land" in section 76, vide the definitions of these expressions given in section 3 (11), (13) and (14). The cases of *Imam valad Ibrahim v. Bhanu Appaji*⁽¹⁾ and *Narso Ramaji v. Nagava*⁽²⁾ are conclusive on the point. The former was the case of an Inam village.

Nilkanth Atmaram, for the respondent:—The view which the lower Court has taken is the correct view of the law bearing on the point.

The village of Mangsuli where the land in suit is situate is an alienated village, of which the defendant is the Inamdar. It is wrong to say that the present case falls within the provisions of section 76 of the Bombay Land Revenue Code.

The case does not obviously fall within section 74. For it applies to a Government village.

In section 76 provision is made where an Inamdar (holder of alienated land) wishes to relinquish any portion of any Inam land (alienated land) described in section 49 (1). Section 76 puts certain restrictions upon him. That section does not apply to an occupant of land, e.g., the plaintiff in an Inam village.

Of course an Inamdar, such as the defendant is, is entitled to accept Rajinamas as in Government village under section 74, provided the village is one to which a Survey Settlement has been extended under the provisions of section 216 of the Code, and a commission

⁽¹⁾ (1917) 41 Bom. 510.

⁽²⁾ (1918) 42 Bom. 359.

is issued conferring upon him the power by the Commissioner of the Division : see sections 88, 89 and Schedule F. This village is admittedly an unsurveyed village, and no commission in the form prescribed in Schedule F as provided in sections 89 and 88 can possibly be issued to him, and it is not pretended in this case that it has been issued to him. No doubt the case of *Imam valad Ibrahim v. Bhau Appaji*⁽¹⁾ is a case of an Inam village, and it is quite possible that it is a village to which a Survey Settlement has been extended and a commission issued to the holder of the village conferring upon him the powers as provided for in sections 89 and 88 and Schedule F, and if this be not the case, I must say the case was wrongly decided and ought not to be followed. The present point did not arise in that case.

MACLEOD, C. J.:—The plaintiff sued to recover possession of the land comprised in survey No. 143 situated in Mangsuli in Athni Taluka. He obtained a decree in the trial Court, which has been confirmed in first appeal. The only questions which were argued in first appeal were whether the Rajinama was admissible in evidence for want of registration and whether it extinguished the rights of the plaintiff's family in the suit land. The appeal Court found both these questions in the negative. This village is an alienated village and unsurveyed, and so it does not appear that the persons in actual occupation of the land paying rent to the Inamdar could be said to be in the same position as occupants in unalienated villages. The definition of "holder" in section 3 (II) of the Bombay Land Revenue Code, is not a satisfactory one for it includes "superior holders" and "inferior holders" as defined in section 3 (13) and 3 (14) of that Act. Therefore where the

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word "holder" of alienated land is used it is necessary to look at the context to see whether it refers to a superior holder or an inferior holder. For instance, in section 217 the word "holders" evidently refers to inferior holders. In section 88 the word "holder" refers to superior holders, and it is further clear that in section 76 the word "holders" of alienated land also refers to superior holders. It is only when the Survey Settlement has been introduced, or when the powers contemplated in section 88 have been given to the Inamdar, that he is entitled to receive notices of relinquishment under section 74 from the persons in occupation of the Inam lands. Only such notices are exempt from registration under section 90 of the Indian Registration Act. It seems to me, therefore, that the learned appellate Judge was right in holding that in this case the Rajinama did not come within the exemption of section 90 and was inadmissible for want of registration. Therefore it could not be proved that the rights of the plaintiff's family in the plaint land had been extinguished. Therefore the appeal is dismissed with costs.

FAWCETT, J.:—I am of the same opinion. I think that section 76 only operates to apply the provisions of section 74 *mutatis mutandis* to the case of a holder of alienated land who wishes to relinquish his holding to Government. It seems to me that this is clearly supported by the proviso to the section, which, with reference to sections 49 and 51, in effect provides for the interests of Government under those two sections not being unduly prejudiced by the relinquishment. Then, again, in my opinion, section 88 clearly shows the intention of the Legislature that the holder of an alienated village or group of alienated lands shall not receive relinquishments from his inferior holders, as

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if he were a Mamlatdar or a Mahalkari receiving relinquishment from an occupant under section 74, unless his village or lands have been surveyed and he has been specially authorized to receive such relinquishments. If section 76 had the extensive effect, that the appellant's counsel contends it has, it would be quite unnecessary to provide for such an authority being conferred upon the Inamdar, inasmuch as he already has that authority under section 76; and the Court should, in accordance with an ordinary rule of interpretation where the grammatical construction of an enactment does not prevent it, construe section 76 so as to fit in with section 88 and not in a manner which makes its provisions repugnant to those of the latter section. No doubt the expression "holders of alienated land" in section 76 would ordinarily, as pointed out by the learned Chief Justice, mean superior holders. But at the same time there can be a case of a holder of a small Inam, such as a religious Inam or an Inam for duties useful to the village, where the holder himself cultivates his holding, and is neither a superior holder nor an inferior holder. The Legislature, therefore, had to use the general expression "holders of alienated land", and it is unfortunate that owing to this the section is liable to misconstruction. In the case of *Bhutia Dhondu v. Ambo*⁽¹⁾ this question of registration has not been considered; and in *Imamvalad Ibrahim v. Bhanu Appaji*⁽²⁾ the transactions took place at a time when it was not necessary according to the law that there should be any document evidencing the transfer. Also it was held that in any case the Rajinamas did not operate to extinguish an interest in land of the value of Rs. 100 or upwards. I do not think, therefore, that these cases should deter us from deciding that the lower Courts have taken a correct

⁽¹⁾ (1888) 13 Bom. 294.⁽²⁾ (1917) 41 Bom. 510.

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view of the provisions of sections 74 and 76 of the Bombay Land Revenue Code, read with section 90 of the Indian Registration Act. Accordingly the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

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Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

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ADITRAM GIRDHAR AND ANOTHER (ORIGINAL PETITIONERS), APPELLANTS
v. BAPULAL BECHARLAL AND ANOTHER (ORIGINAL OPPONENTS),
RESPONDENTS*.

Will—Revocation—Will in testator's possession—Will not forthcoming on testator's death—Presumption of revocation.

When a person, who is known to have executed a will, and to have had that will in his possession, dies and the will is not found after his death, a presumption arises that he has revoked the will during his lifetime.

Allan v. Morrison⁽¹⁾, relied on.

Anwar Hossein v. Secretary of State for India⁽²⁾, disapproved.

FIRST appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad.

The facts material for the purposes of this report are sufficiently stated in the judgment of his Lordship the Chief Justice.

M. H. Mehta, for the appellants.

G. S. Rao, for respondent No. 1.

G. N. Thakor, for respondent No. 2.

MACLEOD, C. J.:—The applicants propounded the last will of one Jaiti who died at Kapadwanj on the 11th April 1918. It is admitted that the deceased executed

* First Appeal No. 133 of 1919.

⁽¹⁾ [1900] A. C. 604.

⁽²⁾ (1904) 31 Cal. 885.