1872.
May 1.

[APPELLATE CIVIL JURISDICTION.]

Appeal under Letters Patent, No. I. of 1869.

THE COLLECTOR OF AHMEDABAD .....*Appellant.*
SA'MALDA'S BECHARDA'S .....*Respondent.*

Tálukdári *village—Purchaser from* Tálukdár—*Bombay Act VI. of* 1862—Res judicata—*Decision by default—Civ. Proc. Code, Sec.* 246—*Alienation of* Tálukdári *village.*

Held that the *tálukdári* Act (Bombay Act VI. of 1862) did not affect *tálukdári* villages, the right, title and interest of the Tálukdár in which had been sold before that Act came into operation, though possession of such villages had not then been obtained by the purchaser.

S., the mortgagee of a *tálukdári* village, obtained a decree upon his mortgage against his mortgagor, the *tálukdár* of the village, under which S. attached the village. The Collector of the District, in which the attached village was situated, thereupon came in under Section 246 of the Civil Procedure Code, and sought to raise the attachment, but, as he failed to appear when the matter came on for adjudication, his application was dismissed.

The village was then sold under the decree and was purchased by S., the mortgagee.

Upon S. seeking to obtain possession of the village, he was resisted by the Collector, whereupon S. (after proceedings ineffectually taken by him under Sec. 269 of the Code) filed a suit against the Collector praying to be put in possession of the village:—

Held by the Appellate Court (affirming the decision of Tucker, J.) that the right of S. to be put *in possession* of the village was, as between him and the Collector, *res judicata* by reason of the dismissal of the Collector's application under Sec. 246 of the Code (to set aside which dismissal the Collector had not filed a suit within the year allowed for that purpose), and that S. ought, therefore, to have been at once put in possession of the village without further proof of his title.

As to the right of Tálukdárs in the Ahmedabad Zilla to alienate their *tálukdári* villages—*Quære.*

THIS was an appeal, under Sec. 15 of the Letters Patent, from the decision of Tucker and Gibbs, JJ., made in Special Appeal No. 284 of 1867.

The facts fully appear from the judgment of the Appellate Court.

At the hearing of the special appeal, Tucker and Gibbs, J.J., were both of opinion that Bombay Act VI. of 1862 had

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no application to the case, and that the plaintiff had not entered into any agreement with the Tálukdári Settlement officer which deprived the plaintiff of his legal rights.

Tucker, J., was of opinion that the defendant, the Collector, had lost his remedy and was prevented from disputing the plaintiff's right to take *immediate possession* of the village under the certificate of sale granted to the plaintiff, on the 25th of July 1862, under Sec. 259 of the Civil Procedure Code, in consequence of his (the defendant's) failure to file a suit to establish his right within a year from the date (10th August 1861) when the Munsif had rejected the claim which the Collector had preferred for the release of the village from attachment under Sec. 246 of the Code. As to the effect of the plaintiff's being so put in possession, Tucker, J., said:—

My learned colleague considers that as the Collector is in possession now and the plaintiff has brought this suit to eject him, the question of the forfeiture of the judgment debtor's estate should be determined in this suit, and that the suit should be remanded that this question may be gone into and decided by the Lower Courts. It appears to me, however, that the plaintiff would be greatly prejudiced by this proceeding, as the burden of proof will be on him instead of the Collector, as it should have been, if the Munsif had acted rightly in dealing with the applications and counter applications made to him in 1861. If the word "right" used in the latter part of Section 246 be interpreted as meaning simply the right to possession, as contra-distinguished from a title to recover, it may be that the Collector will have a right, after plaintiff shall have been put in possession, to sue to establish the forfeiture of the estate of the original judgment debtors to the Government in consequence of its attachment and sale. I wish to express no decided opinion on this point, as I am of opinion that it cannot equitably be raised and adjudicated upon in the present action, and I hold that the plaintiff's present suit should be considered and treated simply as a suit for possession to which he is entitled, inasmuch as the estate, when it was put up for sale, was substantially adjudged

to be in the possession of the judgment debtors and not of the Collector, the present defendant. This will place the parties in their proper positions if the Government be still disposed to contend that the estate has lapsed in consequence of its transfer by sale, and that it has not been precluded by the Collector's default in 1861 from claiming the benefit of this lapse.

I would reverse the decrees of both the Lower Courts and direct that the plaintiff be put in possession of the Tálukdári village of Kathini Aniali mentioned in the plaint, and that the defendant pay all the plaintiff's costs in all courts.

Gibbs, J. (on this point said):—

It, therefore, remains to see what course this Court should adopt regarding the disposal of this special appeal. My learned brother wishes to give a decree against the defendant on the ground that the matter is *res judicata* and that, therefore, he cannot defend the action. This requires me to go more fully into the matter of the application by the Collector under Section 246 which is above alluded to, and to see how the rejection by the Munsif of the Collector's application affects the present suit.

The application made by the Collector under Section 246 of the Civil Procedure Code was to the effect that the lands were not liable to be sold in execution against the defendants, the Tálukdárs.

This matter was disposed of by the Munsif's order of the 10th August 1861, which, although it only dismissed the Collector's application, must, I think, be considered as deciding that the lands *could be* sold in execution of the decree; and this is all that is *res judicata* under this order. Now, since then the sale has taken place, and the purchaser seeks possession; although he is the same person who was the judgment creditor, he comes before us as it were in a new capacity,—the owner of the judgment debtor's right, title, and interest in the land, and the Collector also now appears in a new light, viz., as actually in possession of the estate. How he got into possession, we do not know; but

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that he is in possession and opposes the plaintiff having the estate made over to him is clear by the plaint, and I cannot, under these circumstances, so different from those under which the miscellaneous application under Section 246 was decided, hold that the order of the 10th August 1861 disposes of this matter. Plaintiff has chosen to bring what is really an action of ejectment against the Collector who is in possession of the estate, and this, as it appears to me, can only be decided by an inquiry into title, and as this has not been done, I consider the District Judge's decree should be reversed, and the case remanded for retrial on its merits.

The appeal was argued before WESTROPP, C.J., LLOYD and MELVILL, JJ.

Mayhew, Legal Remembrancer (with him *Dhirajlál Mathurádás,* Government Pleader) for the appellant.

McCulloch (with him *Nánábhái Haridás*) for the respondent.

Cur. adv. vult.

May 1st, WESTROPP, C.J. :—The plaintiff, as mortgagee of a *tálukdári* village*, obtained against his mortgagors, the *Tálukdárs,* on the 22nd of March 1860, a decree, from the Munsif's Court at Dhonduka, for Rs. 4,162-10-3 to be realized by sale of the village, under which decree the village was attached with a view to a sale, on notice of which attachment the Collector, in June 1861, presented a petition, under Sec. 246 of the Civil Procedure Code, seeking a removal of the attachment and prevention of the sale. On that petition the following order was made :—"10th August 1861. 'In this case the petitioner obtained time for the production of evidence. The said time expired to-day, but neither the petitioner, nor a *Muktiár,* nor *Vakil,* on his behalf, appears before the court. Such being the case, no inquiry is made in regard to the petition, and it is ordered that the petition be rejected and that the petitioner should pay the defendant's costs one rupee." After due proclamation the right, title, and interest of the *Tálukdár's* (the mortga-

* Kathini Aniali, Parganná Rampur.

gors) in the mortgaged premises (the village) were sold by the Munsif's Court on the 30th of September 1861, the mortgagee himself (plaintiff) becoming the purchaser for Rs. 2,000. The sale was confirmed under Sec. 256 of the Civil Procedure Code. On the 30th January 1862, the plaintiff applied to be put into possession, whereupon the Munsif entered into an irregular correspondence with the District Judge, the Collector, and the Tálukdári Settlement Officer. Eventually the Collector, under Sec. 269 of the Civil Procedure Code, opposed the giving of possession to the plaintiff. While the inquiry under that section was pending, the Bombay Government, on the 3rd February 1863, by proclamation under Bombay Act VI. of 1862, purported to vest the management of the village in question together with other property of the Tálukdárs in the Tálukdári Settlement Officer. The Munsif thereupon, on the 18th of February 1863, endorsed an entry or order on the papers, relating to the proceedings under Sec. 269 of the Civil Procedure Code, to the effect that Bombay Act VI. of 1862 having been applied to the village, his jurisdiction had terminated.

On the 15th of February 1864, *i.e.*, within a year after the date of that entry or order, the plaint in the present suit was filed by the plaintiff, the purchaser, against the obstructing party, the Collector, to obtain possession of the village.

The Collector filed a written statement in defence, alleging (1) that the plaintiff had agreed with the Tálukdári Settlement Officer to forego his claim to the village on receiving Rs. 3,868-12-6, an amount the payment of which Government had sanctioned, and the Mámlatdár had been ordered to pay to him; (2) that this suit was prohibited by Bombay Act VI. of 1862; (3) that the plaintiff's father being a Desái, the plaintiff acted improperly in purchasing a *tálukdári* village; (4) that a *tálukdári* village or estate was, by the terms of the lease on which it was held, and according to the preamble of Bombay Act VI. of 1862, inalienable.

The Acting Assistant Judge framed two issues, but only arrived at a finding on the first of them, namely, "Had the

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original Tálukdárs any right to sell their right of management *(vahivát)* or not?" This he found in the negative upon a document (exhibit No. 28) produced by the Collector which has been called a lease and has been alleged to have been binding on the Tálukdárs, the 7th paragraph of which contained the following passage :—"Till the time mentioned in this lease expires (ten years), the Government is to sanction the management of the village by us. If we be deprived of the management, upon attachment, either by order of the Collector, for arrears of revenue, *or on civil process at the suit of our creditors*, this management is to pass out of our hands into those of Government." The Acting Assistant Judge, being of opinion that the management of the village was inalienable without the sanction of Government, made, on September 6, 1864, a decree for the defendant with costs.

The plaintiff preferred a regular appeal against that decree to the District Judge, who framed two issues, but came to a finding upon one of them only, namely, "Act VI. of 1862 having been applied by Government to the *tálukdári* estate containing the village in dispute, can the Civil Court entertain the appellant Sámaldás's claim to be put in possession of it?" which issue the District Judge found in the negative, saying: "Once the Tálukdári Act has been made applicable to an estate, all judicial proceedings are to be stayed (Sec. 2), and the estate cannot be attached by any Civil Court (Sec. 5), and as in the present case the Act was put in force with the consent of the plaintiff, I am of opinion that he has no right either legally or morally to ask for the intervention of the Civil Courts in his favour." The District Judge accordingly affirmed the decree of the Acting Assistant Judge with costs, but, as has been seen, on grounds different from that on which the latter had proceeded.

Against the decree of the District Judge, the plaintiff specially appealed to the High Court. The special appeal was heard by a Division Court consisting of Mr. Justice Tucker and Mr. Justice Gibbs. They concurred in holding that the Tálukdári Act VI. of 1862 (Bombay) could not

affect the case, inasmuch as the Tálukdárs' right, title, and interest, in the village had been sold to the plaintiff and the sale had been confirmed before the Act was passed, which sale, moreover, had been made, notwithstanding an effort by the Collector to raise the attachment and stop the sale by an application under Sec. 246 of the Civil Procedure Code, which application was dismissed for want of prosecution on the 10th of August 1861. The Act received the assent of the Governor General upon the 1st of September 1862, and was promulgated by the Bombay Government on the 14th of October 1862. In the opinion of those learned Judges, that the Act had no application whatever to the case of this village, we fully agree. If, on the one hand, the Tálukdárs had an alienable and saleable estate in the village, it had, by the court sale, passed to the plaintiff before the Act came into force. If, on the other hand, as has been contended before us, the estate of the Tálukdárs became, under the terms of the alleged lease, wholly forfeited to Government on the attachment being placed upon it by the Civil Court, their estate had ceased to exist before the Act was passed. In either case, there would not be any interest in the village on which the Tálukdári Act could operate at the time when Government by its notification purported to place the village together with the rest of the Tálukdárs' estate under the Act.

The learned Judges also held that a completely erroneous view had been taken by the District Judge of what took place between the plaintiff and the Tálukdári Settlement Officer. The plaintiff by a petition (exhibit No. 9), presented to that officer, in substance stated that for a payment of Rs. 9,000, the amount of debts due to the plaintiff by the Tálukdárs, he would be willing to waive his purchase of the village and right of possession, but added also that he would not file a *rázinámá* until his proposal was accepted. His proposal never was accepted, as the officer, being of opinion that Rs 3,868-12-6 only were due from the Tálukdárs to the plaintiff, offered him no more than that sum. Mr. Justice Tucker and Mr. Justice Gibbs ruled that under such

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circumstances it was impossible to hold that the plaintiff consented to the bringing of the village under the Tálukdári Act. In that opinion we concur, and must express our surprise that any person should have contended that an opposite construction ought to be placed upon the conduct of the plaintiff.

Mr. Justice Tucker further held that the right of the plaintiff to possession at least became *res judicata* by the dismissal of the Collector's application under Sec. 246, and that the Munsif ought summarily to have placed the plaintiff in possession, and, therefore, that the plaintiff ought by a decree in this suit (which the learned Judge regarded as one for possession merely), to have been placed in the position in which the Munsif ought to have placed him, this suit having been brought pursuant to Sec. 269 to rectify the erroneous order of the Munsif made in the proceedings founded on that section. Mr. Justice Tucker said: "This will place the parties in their proper positions, if the Government be still disposed to contend that the estate has lapsed in consequence of its transfer by sale, and that it has not been precluded by the Collector's default in 1861 from claiming the benefit of this lapse." The learned Judge, therefore, ruled that the decrees of both of the lower courts should be reversed, that the plaintiff should be put into possession of the village, and that the defendant should pay the costs of the suit and both appeals.

On that point, Mr. Justice Gibbs differed from Mr. Justice Tucker, being of opinion that the right of the plaintiff to recover the lands was not a *res judicata* by the order of the Munsif under Sec. 246, and that the plaintiff should be required to prove his title independently of that order, and therefore, that this cause should be remanded for retrial on the merits.

Mr. Justice Tucker being the Senior Judge, the decree was made in accordance with his view.

Against that decree the defendant has appealed to a full court under Sec. 15 of the Letters Patent of December 28,

1865, which appeal has been heard by my brothers Lloyd and Melvill and myself.

In support of the view taken by Mr. Justice Tucker, on the only point on which he and Mr. Justice Gibbs differed, is the case *in re Banee Madhub Roy* (*a*) in which it was held by Norman and Mitter, JJ., that where an application under Sec. 246, had been disallowed on the ground of unnecessary and improper delay, and the attached property had been sold, and in the attempt of the purchaser to take possession he had been obstructed by the unsuccessful applicant under Sec. 246, and thereupon an investigation was held under Sec. 269, the Civil Court rightly determined that the rejection of the claim under Sec 246 was fatal to the right of the applicant, under that section, to possession. There is also a case of *Shaik Khoda Buksh* v. *Purmanund Dutt* (*b*) which shows that an order, made on default, dismissing a claim under Sec. 246, is as efficient as an order made after investigation, and that consequently the limitation of one year applies to the former as well as the latter.

The Tálukdárs were in possession until the attachment was placed upon the village. Subsequently thereto, but at what time precisely does not appear, the Collector was permitted by the Tálukdárs to take possession. Whether this occurred before or after he made his application under Sec. 246, or his abandonment of that application was occasioned by his not then being in possession, is not in evidence. One point, however, is quite manifest, and that is that the Tálukdárs here are, through the Collector, resisting their creditor, the mortagagee, who has passed from the character of creditor and mortgagee into that of purchaser so far as regards this village, and that the yielding up of the possession to the Collector is part and parcel of that contest, and was done with a view to defeat their quondam creditor the purchaser. It is, therefore, a transaction within the spirit, if not within the letter,

(*a*) 13 Calc. W. Rep. Civ. R. 431.
(*b*) I. Wyman Rep. 280; S. C. 5 Calc. W. Rep. Civ. R. 214.

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of Sec. 240 of the Civil Procedure Code. We cannot doubt that a surrender, by deed, of the village, executed by the Tálukdárs to the Collector while the village was under attachment, would be void as against the creditor. We think that Mr. Justice Tucker was right in holding that the court ought not to suffer the purchaser by such a proceeding to be placed in a worse position for the defence of his rights under the sale, whatsoever they may be, than he would have been, if the Munsif had done what the case, which we have above cited from 13 Calc. W. Rep. Civ. R. 431, shows to have been his duty, and that this action has been properly brought to remove the consequences of the Munsif's error.

But our decision does not rest upon that ground alone. With regard to the question of title, we are bound to observe that Government has estopped itself, and, therefore, estopped its officer and representative in this suit, the Collector, from maintaining that the estate of the Tálukdárs in this village has been forfeited, under the terms of the alleged lease, by the attachment and sale. So far from treating the estate in this village, which had been once vested in the Tálukdárs, as forfeited and extinct, and from claiming the village as having thus lapsed to the Crown, Government, by the notification already mentioned, made subsequently as well to the attachment as to the sale, attempted to place the village (together with the rest of the Tálukdárs' estate) under the operation of the Tálukdári Act. That Act was not passed with the intention of, and furnishes no means for, enforcing forfeitures to Government, occasioned by the non-performance of conditions in what have been called leases from Government to the Tálukdárs, but for the purposes of relieving the Tálukdárs of their debts by vesting the management of their estates temporarily in an officer of Government, who is, during that period of management (which could not in any case exceed twenty years—Sec. 16), to make an allowance out of the annual income of the estate for the decent support of the Tálukdár and his family, and to apply the balance towards the liquidation and settlement of his debts and liabilities. The Act never was meant

by the Legislature to be converted into an engine for enforcing forfeitures, and we have no suspicion that Government ever intended to, or would, apply it for such a purpose. By the notification, whereby Government attempted to place this village under the Tálukdári Act, Government not only treated the estate of the Tálukdárs as still subsisting, but must be regarded as admitting that, after the period of temporary management had expired, the management should be restored to the Tálukdárs and that they should be the absolute proprietors thereof subject to land tax (Sec. 20).

If, therefore, the right to treat the estate of the Tálukdárs as forfeited by the attachment and sale, ever existed, that right has been completely waived and remitted.

Whether it would be possible for the Tálukdárs themselves, at the present stage of affairs, by any means to contest the alienability of the village in question, it is unnecessary for us now to say. They are not parties to this suit, and cannot here raise such a question. Whensoever they do so, the burden of the contest will lie upon them. We prefer at present not to give any opinion as to how far Government could sustain the recital contained in the preamble of Bombay Act VI. of 1862 that the Tálukdárs of the Ahmedabad Zilla then held their estates "on leasehold tenure determinable at the pleasure of Government," and that they could not "be lawfully charged, encumbered or alienated," the truth of which has been denied on the part of the plaintiff, and which is perhaps scarcely consistent with the concluding part of Sec. 7. We admit that "a mere recital in an Act of Parliament" (and therefore in a Bombay Act) "either of fact or law is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital" [per Lord Campbell, C.J., in *Reg.* v. *Haughton* (c)]. In Bombay Acts, recitals of facts of a public nature are only *primâ facie* evidence of the truth of those facts. See Bombay Act X. of

(c) 1 El. & Bl. 501, 516.

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1866, Sec. 9. As to Acts of the Government of India, see Act II. of 1855, Sec. 9 (repealed by Act VIII. of 1868), Act I. of 1868, Sec. 8 (repealed by Act I. of 1872); and as to all Acts, see now Act I. of 1872. Sec. 37.

Some alarm was expressed by one of the learned Judges lest the definition of the term "Civil Court," given in Sec. 21 of the same Act, if *ultra vires*, inasmuch as it included courts established by Royal Charter, should invalidate the whole Act. We never could have participated in that alarm, as it is well-settled law that if an enactment be good in part and bad in part, and the bad be divisible from the good, the latter shall be regarded as valid and binding: *Reg.* v. *Lundie* (*d*), *Blackpool Board of Health* v. *Bennett* (*e*), *Reg.* v. *Faversham* (*f*), Forsyth's Cases and Opinions 465, and see 8 Bom. H. C. Rep. Cr. Ca. 61. The effect of holding Sec. 21, Cl. 1 in purporting to exclude the jurisdiction of courts established by Royal Charater, to have been thus far *ultra vires* on the part of the Bombay Legislature, would have been simply to have left the jurisdiction of those courts untouched. The rest of the Act is most easily separable from that provision, and was, therefore, not in anywise invalidated by it. The question has, however, recently been settled by the Legislature of India: Act XV. of 1871, Sec. 26.

We are of opinion that the decree of Mr. Justice Tucker must be affirmed with costs.

(*d*) 8 Jur. N. S. 640, 641. (*e*) 4 H. & N. 137, 138 per Watson, B.
(*f*) 8 T. R. 352, 356.