

## [APPELLATE CIVIL JURISDICTION.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

RANCHODDA'S DAYA' LDA'S (PLAINTIFF, APPELLANT) v.  
RANCHODDA'S NA'NA'BHA'I (DEFENDANT, RESPONDENT).\*

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March 5.

*Bhágdári and Narvádári—Bombay Act V. of 1862, Sections 1 and 3—Unrecognized portion mortgaged before the passing of the Act—San mortgage—Court's sale.*

The plaintiff, in 1874, sued on a *San* mortgage, dated 15th November 1861, *i.e.*, five months before the passing of Bombay Act V. of 1862, to recover a sum of money by sale of the mortgaged property, which formed part of a *bhág* in a *Bhágdári* village, which *bhág* the defendant had purchased at a Court's sale subsequent to the date of the mortgage.

*Held*, (assuming Section 1 of the Act to apply,) that it does not bar the right of action; that, therefore, a Civil Court would be bound to make a decree, even though it might anticipate that Section 1 of the Act would stand in the way of the execution of that decree.

*Semble*, that, after a decree has been passed against a portion of a *bhág*, the Collector might recognize such portion as a division of the *bhág*, if assured that justice required that the decree should be executed.

*Held* further that no retrospective operation can be given to Section 1 of the Act, so as prejudicially to affect existing rights. The words "attachment or sale by the process of any civil court," used therein, were intended to prevent attachment and sale under simple money decrees, and not to prevent the sale of mortgaged property in satisfaction of a valid mortgage.

*Held* also that the purchaser at a Court's sale buys only the right, title, and interest of the debtor, burdened with all valid liens, such as a previous *San* mortgage. *Mathurádás v. Kália* (7 Bom. H. C. Rep. 24, A. C. J.) and *Ohintaman v. Shivráam* (9 Bom. H. C. Rep. 304) followed.

THIS was a special appeal from the decision of H. Birdwood, Judge of Surat, reversing the decree of the 2nd Class Subordinate Judge of Ankleswar.

The plaintiff sued in 1874 on a mortgage deed, dated 15th November 1861, to recover Rs. 110 from the mortgaged property of a deceased *Bhágdár* named *Vishráam*, from his heirs, and from *Ranchoddás Nánábhái*, the purchaser in possession at a sale by the Court, at a date subsequent to the mortgage, of the whole of *Vishráam's bhág*, of which the property mortgaged formed a part.

*Vishráam's* heirs did not defend the suit. The purchaser *Ranchoddás Nánábhái* answered that he had no knowledge of the

\* Special Appeal No. 364 of 1875.

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The Subordinate Judge awarded the claim, finding the mortgage proved, and holding that under the Bhágdári Act, Section 1, there was no objection to the enforcement of the claim against the mortgaged property, as the bhág had already been dismembered before the passing of the Act, and defendant Ranchoddás Nánabhái's purchase was long after it, that is, in October 1873.

The Judge, in appeal, was of opinion that the claim could not be enforced against the mortgaged land. He said: "I cannot find that the bhág which the defendant purchased had been so dismembered before Bombay Act V. of 1862 came into force, by the mortgage of a portion of it to the plaintiff, that Section 1 of the Act could not be applied to it. It is admitted that the mortgaged portion is a portion of the bhág; the bhág, therefore, was property for the protection of which the Act was passed. And, after the Act had become law, no portion of Vishrá'm's bhág was liable to attachment or sale by the process of any civil court. Such protection, it seems to me, is extended to all Bhágdári land, whether it had been mortgaged or not before the Act came into force."

*Nagindás Tulsidás* for the plaintiff, the special appellant:—The mortgage to the plaintiff was before the passing of the Bhágdári Act, which, therefore, does not apply to this case. No retrospective effect can be given to it without the express command of the Legislature. The Act does not bar the cognizance of a suit in respect of an unrecognized portion. It would be highly inequitable to deprive the plaintiff of the benefit of his security in this case, for the dismemberment of the bhág had taken place before the passing of the Act. The defendant's purchase was subject to the plaintiff's *San* mortgage, he being a purchaser at the Court's sale.

*Honourable Rao Saheb V. N. Mandlik*, Acting Government Pleader, was heard on behalf of the Collector, who was not made a party, but to whom a notice was issued by the Court, calling on him to state any objections he might have to urge against the plaintiff's claim. He contended that the Act was passed to preserve the permanency of Bhágdári tenures, and that a decree in

the plaintiff's favour would defeat the object of the Legislature. Such a decree could not be enforced, and should not be passed.

No one appeared for the defendant.

The judgment of the Court was delivered by

MELVILL, J. :—In this case the plaintiff, a mortgagee, sues to recover three instalments of his debt by the sale of the mortgaged property. The property is a portion of a share in a Bhágdári village, and it may be taken as admitted that it does not form what is called, in Bombay Act V. of 1862, a recognized subdivision of such share. Under these circumstances the District Judge has held that he is precluded by Section 1 of Bombay Act V. of 1862 from making a decree in the suit. Section 1 is as follows :—

“ No portion of a bhág or share in any bhágdári or Narwadári village, other than a recognized subdivision of such bhág or share, shall be liable to seizure, sequestration, attachment, or sale by the process of any civil court, and no process of such court shall be enforced so as to cause the dismemberment from any such bhág or share or recognized subdivision thereof, of any homestead, building-site (Gubhan), or premises appurtenant or appendant to such bhág or share or recognized subdivision thereof.”

The first observation which is suggested by this section is that, even if the District Judge were right in applying it to the present case, it does not appear to preclude the hearing of the suit, or the making of a decree. It relates only to the issue and enforcement of process of execution. The Act prohibits mortgages of fractional portions of a bhág subsequently to the date of the Act (Section 3), but it does not invalidate such mortgages made previously to that date, nor does it take away the right of action in respect to them. As, therefore, the cognizance of the suit is not barred by the statute, we apprehend that we should be bound to make a decree, even though we might anticipate, as the District Judge has done, that Section 1 of the Act would stand in the way of the execution of that decree. No doubt a Court would be unwilling to make a decree which it could not execute; but we think that we would be bound to do so, if the law gave the Court cognizance of the suit. Moreover, it seems to us that, even if Section 1 of the Act be applicable, it does not necessarily follow

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that a decree made in this suit would be incapable of execution. The term "recognized subdivision" is nowhere defined in the Act. *Non constat* that the Collector or the proper authority might not be induced to recognize the land in dispute as a subdivision if he were made aware that the plaintiff held a decree which ought in justice to be executed, and which could not otherwise be executed. Nor is it inconceivable that the Legislature, if made aware that the Act was productive of hardship which had not been contemplated, might make provision for the enforcement of decrees founded upon rights which were in existence before the passing of the Act. But in any case we think that the plaintiff (if otherwise entitled), ought to have a decree in this suit, whether such decree is worth much, or little, or nothing.

But we are prepared to go further, and to hold that Section 1 of Bombay Act V. of 1862 would not apply to the present case. Before coming to this conclusion we thought it advisable that an opportunity should be given to the Collector to be heard in the matter; and notice has accordingly been given to him, and we have had the benefit of hearing the Government Pleader in his behalf.

The mortgage to the plaintiff was made on the 15th November 1861, or about five months before Bombay Act V. of 1862 was promulgated. To hold that the Act deprives such a mortgagee of the power of making his security available in the only manner in which in many cases it can be made available, would be to give a retrospective operation to the law, and to impute to the Legislature the intention of prejudicially affecting vested rights. There is a strong legal presumption against such an intention, and it is not to be imputed, unless the terms of the Act clearly and unambiguously show that such was the intention. A careful consideration of all the provisions of Bombay Act V. of 1862 leads us to the conclusion that the words "attachment or sale by the process of any civil court" in Section 1 were intended to prevent attachment and sale under simple money decrees, and not to prevent the sale of mortgaged property in satisfaction of the mortgage debt. If the latter had been the intention, it is to be presumed that the Legislature would have taken away the right of action, and so reverted a decree from being made, instead of involving the

civil courts in the absurd dilemma of being obliged by law to hear a useless suit, and to pass a decree incapable of execution. Again, it is clear that the terms of Section 1 cannot, under any construction, preclude the execution of a decree for the foreclosure of a previously existing mortgage; and yet foreclosure, equally with sale, would operate to dismember a bhág, and so defeat the intention of the Legislature, if the intention was to preserve the mortgaged property from alienation under any and all circumstances. It is not to be presumed that the Legislature, if it wished to defeat vested rights, would have closed one door against the enforcement of those rights, and have left open another mode of access to precisely the same results. On these grounds, viz., that "out of respect to the Legislature," as said by Lord Chancellor Kent in *Dash v. Vanhleeck*,<sup>(1)</sup> it must not be presumed that it intended what would be both unjust and illogical, and that "the reason and intention of the law-giver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and obscurity,"<sup>(2)</sup> we are of opinion that we ought not to give to Section 1 of Bombay Act V. of 1862 a retrospective operation, so as prejudicially to affect existing rights; and we, accordingly, overrule the decision of the District Judge on this point.

The respondent is the purchaser, at a sale under a decree, of the entire bhág, of which the property in dispute forms a portion. He does not appear to dispute the genuineness of the plaintiff's mortgage. He denies that the plaintiff has ever had possession; but even if he be right in this contention, his liability is not lessened. The plaintiff's mortgage is a *San* mortgage; and the respondent, as purchaser at an auction sale, bought only the right, title, and interest of the debtor burdened with all valid liens created by him: *Mathuradás v. Kalía*,<sup>(3)</sup> *Chintaman v. Shivrám*.<sup>(4)</sup> The questions of possession and of notice do not, therefore, arise, and we are in a position to dispose of the case without a remand.

We reverse the decree of the District Court, and restore that of the Subordinate Judge, with costs on the special respondent throughout.

*Decree reversed.*

(1) 7 Johns. 477.

(2) 1 Kent Com. 462.

(3) 7 Bom. H. C. Rep. 24 A. C. J.

(4) 9 Bom. H. C. Rep. 304.

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