

[APPELLATE CIVIL JURISDICTION.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

ARDESIR NASARVANJI (PLAINTIFF, APPELLANT) v. MUSE' NA'THA
AMIJI (DEFENDANT, RESPONDENT).

1877.
March 13.

ARDESIR NASARVANJI (DEFENDANT, APPELLANT) v. MUSE' NA'THA
AMIJI (PLAINTIFF, RESPONDENT)*.

*Bhāgdāri and Narvāddāri Tenure—Bombay Act V. of 1862—Sale of
unrecognized portion.*

The sale of a portion of a *bhāg* or share in a *Bhāgdāri* or *Narvāddāri* village other than a recognized subdivision of such *bhāg* or share, or of a building site appurtenant to it, is illegal under Section 3 of Bombay Act V. of 1862: and a judgment-creditor cannot, in execution of his decree, evade the law by describing his debtor's separate portion in a *bhāg* as his "right, title, and interest in the whole *bhāg*;" for, under Section 213 of the Code of Civil Procedure, the creditor is bound to specify the debtor's share or interest to the best of his belief, or so far as he has been able to ascertain the same.

Quære, if the sale of an undivided share in a *bhāg* be lawful; but even if it be, the purchaser cannot insist upon the possession of any particular portion of the *bhāg*, as representing the share of his debtor. All he can do is to sue for partition.

But *Quære* if such partition could be made.

THESE were special appeals from the decisions of H. F. Aston, Assistant Judge of Surat, amending the decrees of the 2nd Class Subordinate Judge of Broach.

In one suit Musé sought to recover from Ardesir possession of fields Nos. 190, 466 and 472, in the *Bhāgdāri* village of Sitpan of the Broach Collectorate. He alleged that he had bought No. 190 from his brother Mahamed, and that he was the proprietor of the other fields in his own right; and that the Civil Court, in contravention of the provisions of Bombay Act V. of 1862, sold the fields to Ardesir, and put him in possession in execution of a decree obtained against the said Mahamed by one Vijbhukan.

Ardesir contended that the alleged sale to the plaintiff by his brother was collusive; and that the other fields—supposing them to belong to the *bhāg*—had not been separated and recognized by the Collector, and the suit not being for such separation, could not lie.

* Special Appeals No. 3 and No. 5 of 1877.

1877.

ARDESIR
NASARVANJIv.
MUSÉ
NÁTHÁ
AMÍJI.

The Subordinate Judge made a decree in favour of the plaintiff for Nos. 466 and 472, dismissing the claim for No. 190.

In the second suit Ardesir sued Musé for possession of a house and building-site. At the sale by Vijbhukan, through the Court, Ardesir became the purchaser of these as well as of the land which Musé sought to recover from him in the suit above described, and which had already passed into Ardesir's possession. In his plaint Ardesir alleged—as he did in his defence to Musé's suit—that the transaction between the brothers was collusive.

Musé based his defence upon his right as a Bhágdár under the Bombay Act V. of 1862.

The Subordinate Judge awarded half of the house and the whole of the building-site.

Appeals were brought against both the decrees of the Subordinate Judge. In disposing of them the Assistant Judge, Mr. Aston, said—

“ It is admitted by the vakils of both parties that the judicial sale referred to in the plaint [of Musé] was a sale nominally of a whole *bhág*, of which Nos. 190, 466, and 472 were portions, but not recognized subdivisions. That the sale was also of the houses and building-site appertaining, also that the whole *bhág* or share previously belonged to Náthá Amíji, the father of Musé and Mahamed, and afterwards to the above two brothers, Musé and Mahamed; also that the decree under which the above judicial sale was held, was against one brother only, viz., Mahamed, and that the right, title, and interest of the said Mahamed thus brought to sale only amounted to a right to share in the *bhág* and not to a right to a *recognized* subdivision of the *bhág* * * *

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The vakil, for the defendant Ardesir, admits that the *bhág* has been dismembered, and there has also been a severance of the building-site and house from the part of the *bhág* remaining with the brother Musé. The vakils for both say that it is widely customary in the Broach district for judgment-creditors to bring to sale a whole *bhág* as the property of a judgment-debtor, when the judgment-debtor is not the sole proprietor of the *bhág*; that the Courts below allow such *bhág* to be described as the property

of the judgment-debtor, because, unless the whole *bhág* is shown as the property of the judgment-debtor, the sale would be invalid; and they believe that such nominal sales of whole *bhágs* are permitted by the Courts, knowingly, to enable the decrees to be satisfied, and to prevent the Collector's intervening * * * Both vakils further state that it is customary in the Broach district for a co-sharer to sell or mortgage nominally a whole *bhág*, and then to give possession of only that part of which he has separate possession. They are not aware of any instance in which, after decree against a co-sharer in a *bhág*, and judicial sale of the right, title, and interest of that co-sharer, any suit to separate that share by partition has been brought in the Broach district."

Mr. Aston then proceeded to find, from the admissions of the parties as well as from the evidence recorded in the case, that the defendant Ardesir purchased only the right, title, and interest of one of two co-sharers in the *bhág*, and held that the effect of Sections 1, 4, and 5 of Bombay Act V. of 1862 was to render the transaction invalid, giving no right whatever to the defendant. He, therefore, amended the decree of the 2nd class Subordinate Judge, and awarded the entire claim.

Shántarám Náráyán for the defendant, the special appellant:—The plaintiff Musé is in separate possession of the field No. 190 under the sale from his brother Mahamed. The *bona fides* of the sale was disputed; but the Assistant Judge does not go into the question, but contents himself with holding that the sale by the Civil Court of Mahamed's right, title, and interest in the *Bhág*, ostensibly put up for sale, was invalid under the *Bhágdári* Act. What actually was put up was the recognized subdivision belonging to the brothers Musé and Mahamed; the Collector did not object, and he could not do so of his own accord, as held in *Ráiji v. Purshotam*.⁽¹⁾

[KEMBALL, J.:—The entire *bhág* having been ostensibly put up for sale, the Collector had no opportunity of objecting.]

The law does not prohibit the sale of the whole *bhág*, the object of which was not to dismember the *bhág*. The Legislature could not have intended to place *Bhágdárs* at a greater disadvantage than ordinary borrowers. The Act is intended to benefit them, and

(1) 2 Bom. H. C. Rep. 231.

1877.

ARDESIR
NARSARVANJI
v.
MUSÉ
NATHA
AMIJI

1877.

ARDESIR
NASARVANJI
v.
MUSE'
NÁTHÁ
AMIJI.

the effect of the interpretation placed by the Assistant Judge would be to hamper them in their money dealings.

Gokuldás Káhándás Párekhi for the respondent:—The object of the Legislature in passing Bombay Act V. of 1862 was to prevent alienations of unrecognized *bhágs*, and to prevent civil process from affecting them. This object would be defeated by the interpretation sought to be placed by the other side.

The following judgment of the Court was delivered by

MELVILL, J. :—The only objection taken in special appeal to the decision of the Assistant Judge is that he was in error in holding that the sale of the right, title, and interest of the judgment-debtor Mahamed Náthá to Ardesir Nasarvanji was null and void, as being contrary to Bombay Act V. of 1862.

It appears that, on the application of the decree-holder, the whole of a *bhág* or share in a *bhágdári* village, together with a house and *gubhan*, standing in the name of Náthá Amiji, was attached in execution of a decree against Mahamed Náthá, one of the sons of Náthá Amiji. The proclamation and certificate of sale were made in the usual terms, and Ardesir became the purchaser of the right, title, and interest of Mahamed Náthá in the attached property. In attempting to take possession he was opposed by Musé Náthá, the brother of Mahamed Náthá, but with the assistance of the Court he succeeded in obtaining possession of three survey number fields, forming a portion of the *bhág*, but was refused possession of the house and *gubhan*. In consequence a suit was brought by Ardesir to recover the house and *gubhan* from Musé Náthá, who, in his turn, sued Ardesir for possession of the fields. The Assistant Judge in appeal held that the sale to Ardesir, being a sale of a portion of a *bhág* other than a recognized subdivision, was contrary to the provisions of Bombay Act V. of 1862, and on this ground he decided both suits in favour of Musé Náthá.

In support of the special appeals it has been contended that Section 1 of Act. V. of 1862 only prohibits the attachment and sale of a portion of a *bhág*, and that in the present case it was not a portion of a *bhág* which was sold, but the undivided share of one of two coparceners in the whole *bhág*.

This contention is, perhaps, in accordance with certain admissions said by the Assistant Judge to have been made by the pleaders of the parties in his Court; but it is certainly not in harmony with the pleadings in the case, nor, apparently, with the circumstances out of which the suits arose. Those pleadings and those circumstances negative the supposition that the two brothers, Mahamed Nátha and Musé Náthá, were undivided co-sharers. Musé claims the whole of the property in dispute, partly as being his own original and distinct share in the *bhág*, and partly as having been purchased by him from his brother Mahamed. On the other hand, Ardesir has been placed in possession of three fields, as if the same had been the separate share of Mahamed, and he is suing for the house and *gubhan* on the same hypothesis. It seems scarcely open to doubt that, at the time of the attachment and sale, Mahamed and Musé were not undivided coparceners, but were in possession of the separate shares, to which they were entitled under Muhammadan law.

If this were the case, the attempt to render Mahamed's property available to his creditors by selling, not his separate portion of the *bhág*, but his right, title, and interest in the whole *bhág*, was merely an attempt to evade the provisions of Act V. of 1862: and, if the statements of the pleaders in the Court below be correct, the Act is in this manner systematically evaded with the connivance of the Subordinate Courts. This Court is certainly not disposed to give a sanction to any such proceedings. A creditor who applies for an attachment of his judgment-debtor's property is bound to specify the debtor's share or interest therein, to the best of the applicant's belief, and so far as he has been able to ascertain the same (Act VIII. of 1859, Section 213). If the defendant has only a share in the property, the applicant ought to state whether such share is undivided or separate. When the share is stated to be undivided, then only ought the defendant's right, title, and interest in the whole property to be sold. When the share is stated to be separate, then the sale ought to extend only to the defendant's right, title, and interest in such separate portion. If the defendant has a separate portion, and the law forbids the sale of such separate portion, but allows the sale of the whole property, the law is not to be evaded by describing the

1877.

ARDESIR
NASARVANJIv.
MUSÉ'
NA'THÁ'
AMIJI.

1877.
 ARDESIR
 NASARVANJI
 v.
 MUSE'
 NA'THA'
 AMIJI.

defendant's portion as the defendant's right, title, and interest in the whole estate. What is sold under such description is the separate portion and nothing more. In the present case it seems clear, from the pleadings and the facts, that Mahamed Náthá had a separate portion of the *bhág*, and the sale of such separate portion was directly opposed to the provisions of Act V. of 1862.

It is difficult to understand how the pleaders in the Court below could have stated that Mahamed and Musé were undivided coparceners. We cannot help thinking that the Assistant Judge must have misunderstood their statements upon this point; such statements being, as we have said, inconsistent with the pleadings and with the conduct of the parties. We do not feel bound to decide this case as if those doubtful statements were correct, nor to determine the question whether the attachment and sale of an undivided share in a *bhág* would be contrary to the letter or spirit of Act V. of 1862. It is sufficient to say that, even if such a sale were lawful, and even if Ardesir were the purchaser of an undivided share, he would not be entitled to insist, as he is now doing, upon the possession of any particular portion of the *bhág*, house, or *gubhan*, as representing the share of Mahamed Náthá: *Appovier v. Ramasubha Aiyar*,⁽¹⁾ *Udárám Sitárám v. Ránu Pandúji*.⁽²⁾ All that he could do would be to sue for a partition, which admittedly he has never done, and which he is not now doing: and the question would then arise whether, consistently with the provisions of Act V. of 1862, such a partition could be made.

We confirm the decrees of the Court below, with costs on Ardesir Nasarvanji in both special appeals.

Decrees affirmed.

(1) 11 Moore I. A. 75, 85, 90.

(2) 11 Bom. H. C. Rep. 76. See p. 80.