

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

JAGJIVANDAS JAVERDAS (ORIGINAL PLAINTIFF), APPELLANT, v. IMDAD ALI, BY HIS SON AND HEIR, GULAM ZILANI (ORIGINAL DEFENDANT), RESPONDENT.*

1882
February 20.

Regulation XVI of 1827—Mortgage of *vatan* property—Mortgagor's life-interest
—Bombay Act III of 1874.

On the 3rd December, 1856, certain *vatan* property was mortgaged by the deceased defendant to the plaintiff, who obtained a decree on the mortgage in 1861, and attached the rents and profits of the *vatan* on the 6th October of the same year. On his (defendant's) death in 1869 his son succeeded to the estate, and obtained a removal of the attachment before 1874. The plaintiff thereon applied for a fresh attachment of the property.

Held that the mortgagor, having only life-interest, the *vatan* came into the hands of his son free of the mortgage.

THIS was an application, under the extraordinary jurisdiction of the High Court, against the decision of H. Batty, Acting Assistant Judge of Thana, reversing the order of Cursetji Rustomji, Second Class Subordinate Judge of Kalyan.

In 1856 one Imdad Ali mortgaged certain *vatan* property to Jagjivandas Javerdas, who in 1861 sued and obtained a decree upon the mortgage, and issued an attachment against the property. In 1869, Imdad Ali died and his son and heir, Gulam Zilani, succeeded to the estate, and subsequently obtained the removal of the attachment. In 1876, on the application of Jagjivandas, the Subordinate Judge issued a fresh order for the attachment of the rents and profits of the *vatan* as having been the property of Imdad Ali. In appeal, the District Judge of Thana reversed this order, on the ground that the mortgagor, Imdad Ali, had only a life-interest in the *vatan*, and that the property came into his son's hands free of the charge.

On the 17th December, 1877, the High Court (Westropp, C. J., and Melvill, J.,) granted a rule *nisi*, on the application of Hon. Rao Saheb V. N. Mandlik on behalf of the plaintiff, calling upon the respondent to show cause why the order of the District Judge should not be set aside.

* Extraordinary Civil Application, No. 13 of 1878,

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On the 19th June, 1878, *Branson* (with him *Manekshah Jehangirshah*) appeared to show cause before Westropp, C.J., and Kemball, J.

The following is the judgment of the Court delivered by

KEMBALL, J.—This is an application to this Court, in the exercise of its extraordinary jurisdiction, to set aside an order made, in appeal, by the Assistant Judge for the removal of an attachment placed by the Subordinate Judge of Kalyan at the suit of one Jagjivandas Javerdas.

The property in dispute is a *chaudari sardeshmukhi* and *kulkarni vatan* which was mortgaged on the 3rd December, 1856, by the then incumbent, Imdad Ali, to Jagjivandas. Jagjivandas Javerdas filed a suit against Imdad Ali in 1861, and obtained a decree on which attachment issued against the aforesaid *vatan* property on the 6th October, 1861. Imdad Ali died about the year 1869; on his death, his son, who is now showing cause and who had been no party to the suit or subsequent proceedings, succeeded to the estate, and some time subsequently—*i. e.*, before the year 1876—obtained the removal of the attachment. A fresh application was thereafter made by Jagjivan for the attachment of the rents and profits of the said *vatan* as having been the property of Imdad Ali, and the Subordinate Judge made the order prayed for on the 5th July, 1876. Against this order an appeal was made to the District Court of Thana, when the Assistant Judge, before whom the matter came, reversed the order of attachment, on the ground that the late incumbent, the mortgagor, having only a life-interest, the *vatan* came into the son's hands free of the charge.

That such estates were not, under Regulation XVI of 1827, liable for the debts of the last holder, is too clear to admit of question; and, indeed, the Subordinate Judge's order in directing the attachment to issue, proceeded on the ground that Bombay Act III of 1874 had effected a change in the character of such tenures. No provision, however, of the Act has been pointed to us as supporting this proposition, though we find, on reference to the Assistant Judge's proceedings, that section 15 of the Act was relied on before him, it being contended that that section

ratifying, as it did, settlements made by Collectors with the holders, operated to convert the life-interest into heritable and transferable property. No single authority has been shown to us in support of this view; in fact, the right of the decree-holder to have the attachment restored, was rested in argument here entirely on the wording of the decree: whereas, on the other hand, the learned counsel, who appeared to show cause against the rule, has cited a number of decisions, some by the Judicial Committee of the Privy Council and others by the High Courts of Bombay and Calcutta, which, in principle, seem conclusively to support the view taken by the Assistant Judge. In a suit to recover possession of an estate by virtue of an alleged family custom under which the estate was descendible to the eldest son to the exclusion of the other sons, and was impartible and inalienable, it was uncertain what the nature or origin of the tenure of the estate was, but there had been admittedly a settlement of it by Government at the time of the perpetual settlement. It was held by the Privy Council that, assuming the custom to have existed, although by such settlement any incidents of the old tenure of the estate were impliedly at an end, yet the settlement did not of itself operate to destroy the family usage, even though the origin of it could not be shown: *Rajkishen Singh v. Ramjoy Soorma Mozoomdar and others* (1). Again, where the *raj* of a particular place, being an ancestral ancient tributary principality, was confiscated for rebellion by the Government, and after a lapse of twenty years was bestowed on a younger brother of the expelled rajah, it was held by the Privy Council that although the *raj* was to be treated as the self-acquired estate of the said younger brother, yet that the grant, being from the ruling power, in the absence of evidence of the intention of the grantors to the contrary, carried the incidents of the family tenure as a *raj*, as the Government's intention must be taken to have been to restore the estate as it existed before its confiscation with no change other than that as affected the expelled rajah and his descendants, and was not, therefore, the creation of a new tenure but simply a change of tenant by the exercise of a *vis major*: *Baboo Beer Pertab Sahee v. Maharaja Rajender Pertab Sahee* (2).

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(1) I.L.R., 1 Calc., 186.

(2) 12 M.L.A., 1; S.C. 9 Calc. W.R.P.C. 15.

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And in a third case where lands had been granted for the performance of certain services, it was held by the Privy Council that the circumstance that there was no longer occasion for the performance of the particular services, did not justify the resumption of the lands: *Alexander John Forbes v. Meer Mahomed Taqee and others* (1). In connection with this last point it will be sufficient to note the following cases: *Baboo Kooloodeep Narain Singh v. Mahadev Singh* (2); *Savitri v. Anandrav* (3); *Keval Kuber v. The Talukdari Settlement Officer* (4); and *Naro Damodar Ghugri v. Collector of Poona* (5).

Our attention has not been drawn to any conduct on the part of the Collector, under section 15 of Bombay Act III of 1874, which can have brought that section into operation with respect to the *vatan* in the present case; and, even if there had been such conduct, we do not see how such a circumstance could act retrospectively so as to give a previous mortgage a greater degree of efficacy than it had under the law (Regulation XVI of 1827, sec. 20) in existence when that mortgage was created. The rule *nisi* must be discharged, with costs to be paid by the applicant Jagjivandas Javerdas.

Rule discharged.

(1) 13 M.L.A., 438; S.C. 14 Calc. W. R.P.C. 28.

(2) 6 Calc. W.R. (Civ. Rul.) 199.

(3) 12 Bom. H.C. Rep., 224.

(4) I.L.R., 1 Bom., 586.

(5) *Supra*, p. 209.

NOTE.—The above case was followed in Miscellaneous Appeal No. 1 of 1878 (*Jagjivandas Javerdas v. Imdad Ali Khan, deceased.*) which was between the same parties, and decided by Westropp, C.J., and Kembal, J.