

1882

SHIVRAM
NARAYAN
MEKAL
v.
RAVJI
SAKHARAM
PRADHAN.

In the present case, assuming for the moment that the plaintiff is bound by the decree in execution of which the property was sold, it is only necessary to determine whether the defendant did not acquire a good title against the plaintiff's father, the mortgagor, on the strength of the sale and the order confirming it, followed by possession. This was decided in favour of the auction purchaser as far back as 1873 by the Calcutta Court in the case of *Rajkishan Mookerji v. Radha Madhab* (1), and we are not aware of any decision of this Court running counter to it. How far this ruling will be affected by the language of section 316 of Act XIV of 1882 remains to be determined. As no distinct issue was raised in the Courts below as to the nature of the debt secured by the mortgage, it will be necessary for the Court, on the evidence recorded and such other evidence as the parties may wish to give, to record a finding on the following issue *viz.*, whether the debt secured by the mortgage of plaintiff's father to Allarakia was contracted for a legal and moral purpose, and return the finding to this Court.

Case remanded.

(1) 21 W. R., 349.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Melvill.

1883
February 28.

VYANKATRAYA BIN RAMKRISHNAPA (ORIGINAL DEFENDANT), APPELLANT,
v. SHIVRAMBHAT BIN NAGABHAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Mulgeni tenure, history and nature of—Alienation not a necessary incident—Clause against suffering attachment and sale valid—Right of re-entry—Clause against alienation—Policy of the law—Transfer of Property Act IV of 1882.

The plaintiff sued to establish his right to attach and sell certain land in execution of a decree obtained by him against a third party who held the land from the defendant under a *mulgeni* lease. The lease contained a clause which, after forbidding the tenant from alienating it by mortgage, sale or lease, stipulated that the tenant was not to let it be sold, or attached and sold in satisfaction of judgment debts, and that if he did, the landlord might take away the land and give it to others for cultivation. The defendant contended that the land could not be attached and sold by reason of this clause. The lower Courts held that the clause was in

valid, both because such a restriction on alienation was repugnant to the *mulgeni* tenure in contemplation of law, and because, occurring in a lease which was virtually in perpetuity, it would make the land for ever inalienable, and was, therefore, against public policy. On appeal to the High Court,

Held that the clause was not invalid on either ground.

The nature and history of the *mulgeni* tenure considered.

The policy of the law, as evidenced by the Transfer of Property Act IV of 1882, with regard to clauses against alienation, considered.

Held, also, that if the tenant allowed the land to be attached and sold by not taking measures to satisfy his judgment debts, it would be a breach, both according to the letter and spirit of the clause in the lease, and would give the lessor a right of re-entry.

Held, further, that although technically there would be no breach or right of re-entry until attachment *and* sale had been suffered by the tenant; yet, as the attachment of itself could be of no use to the creditor, since the debtor was already prevented by his lease from alienating, and as it would be necessary, even if the attachment were allowed, to forbid the sale by a concurrent order, the attachment itself, which would under those circumstances be futile, should not be permitted.

THIS was a second appeal from the decision of S. Tagore, Judge of the District Court of Kanara, affirming the decree of V. V. Phadke, Subordinate Judge of Sirsi.

The plaintiff Shivrambhat sued to establish his right to attach and sell a certain piece of land in execution of a decree obtained by him against one Dodapa, who held the land from the defendant under a *mulgeni* lease. The plaint was filed on the 20th September, 1880.

The defendant Dhakapa answered (*inter alia*) that the land was not liable to be attached and sold by reason of a particular clause in the lease, which was as follows:—"You are not to let it be sold, or attached and sold in satisfaction of judgment debts: if you do let it, I shall take away the land, and give it to others for cultivation."

Both the lower Courts held that the clause was opposed to public policy, and, therefore, invalid. They, accordingly, allowed the plaintiff's claim.

The defendant appealed to the High Court.

The question argued in the High Court was whether the clause was valid or invalid. The arguments of pleaders on either side and the authorities cited by them are stated in the judgment of the Court.

1883

VYANKAT-
RAYA
v.
SHIVRAM-
BHAT.

1883
 VYANKAT-
 RAYA
 v.
 SHIVRAM-
 BHAT.

Shamrav Vithal and *N. G. Chandwarkar* appeared for the appellant.

G. N. Nadkarni appeared for the respondent.

SARGENT, C. J.—The plaintiff in this case sued to have his right established to attach a piece of land in execution of his decree against one *Dodapa Yane Timaya*, who held the land under a *mulgeni* lease from the defendant. The defendant objected to the attachment on the strength of a particular provision in the lease in question, which, after forbidding alienation by the tenant by mortgage, sale, or lease, continues thus :—“You are not to let it be sold, or attached and sold in satisfaction of judgment debts : if you do let it, I shall take away the land, and give it to others for cultivation.” The Judge held that this clause was void as being in restraint of alienation, which he held to be a necessary incident to a *mulgeni* estate, but that in any case “the creditor was not bound by it, nor the Court restrained from issuing process of attachment at his instance, and, lastly, that an assignment by operation of law, and not by the voluntary and immediate act of the parties, was not a breach of such covenant.” Mr. Tagore has not given any authority for his opinion that alienation is a necessary incident to a *mulgeni* tenure. The authorities we have had access to, point, we think, to a different conclusion.

In the minute of the Revenue Board (see p. 28 of a book, Exhibit A, in the suit of *Vyakunta Bapuji v. The Government of Bombay*(1), better known as the Kanara Case) it is said :—“The exclusive rights to the hereditary possession and usufruct of the soil is in Kanara termed *varga*, meaning separate independent property in the land, and seems originally, as in Malabar, to have been vested in the military tribe of the Nayrs, the first and, at one time, the exclusive *mulis* or landlords of that province ; for, except to unclaimed waste, and to estates escheated from want of heirs, it does not appear that the Government in Kanara at any time possessed, or even pretended to, the smallest right to property in the land. The Nayrs had under them a number of inferior rayats, called *genis* or tenants, to whom they rented out the portions of their lands which they did not cultivate by means of hired labourers or slaves ; the *genis* or tenants were of two

distinct classes—the *mulgenis*, or permanent tenants, and the *chaligenis*, or temporary tenants. The *mulgenis*, or permanent tenants of Kanara, were a class of people unknown to Malabar, who, on condition of the payment of a specified invariable rent to the *muli*, or landlord, and his successors, obtained from him a perpetual grant of a certain portion of land to be held by them and their heirs for ever. *This right could not be sold by the mulgeni or his heirs, but it might be mortgaged by them, and so long as the stipulated rent continued to be duly paid, he and his descendants inherited this land like any other part of their hereditary property. This class of people, therefore, may be considered rather as subordinate landlords than as tenants of the soil, more especially as though many of them cultivated their lands by means of hired labourers or slaves, others sub-rented them to the chali genis or temporary tenants.*”

Sir T. Munro, in his report on the condition and assessment of Kanara written in 1800 (1), describing how the land was held in the fourteenth century, so far as could be gathered from tradition and account, says that “the land was amongst a prodigious number of them parcelled out, landlords paying a fixed rent to the Sarkar” (alluding, doubtless, to the *mulis* mentioned in the preceding minute of the Revenue Board), and after saying that alienation of the land by sale or otherwise was unrestrained, he proceeds to say that “these proprietors had under them an infinite number of lesser proprietors holding their lands of them with all the same proprietary rights as those under which they held their own of Government. It was usual for the original proprietors to rent, either for a term of years or for ever, such a portion of their lands as was sufficient to discharge the whole of their public rent, and to keep the rest in their hands. The tenants for ever became a second class of proprietors whom nothing could deprive of their right of possession unless their own act of gift or sale.”

The differences between these two accounts as regards the power of alienation by the *mulgeni* may be explained by the long period which had elapsed between the establishment of the state of things in the fourteenth century, referred to by Sir T. Munro, and the existing state of things in the beginning of this century as de-

1883

 VYANKAT-
 RAYA
 &
 SHIVRAM-
 BHAT.

 (1) Life of Sir T. Munro by Sir A. J. Arbuthnot, Vol. I, p. 70.

1888

VYANKAT-
RAYA
v.
SHIVRAM-
BHAT.

scribed in the minute of the Revenue Board. This distinction is referred to in Chamier's Land Assessment and Tenures of Kanara, published at Mangalore in 1853. After stating that, "subject to the condition of paying annually a specified rent, they are at liberty to sub-rent, mortgage, or sell their interest in the land, and are rather a description of subordinate landlords than tenants," the author proceeds to say:—"In granting land upon *mulgeni* tenure many conditions are now often imposed which are never found in ancient deeds—such, for example, as that the right shall not be alienable."

These authorities show clearly that the *mulgenis* were only tenants, although tenants in perpetuity, holding under their superior landlords, the *mulgars*, whose estate, like that of tenants in fee simple in England, would appear to have been the highest estates in the land known to the law in Kanara; and, further, that although originally *mulgeni* tenants were not restricted by the terms of their leases from alienation, the practice had grown up—how soon it does not appear, but at any rate by the beginning of the present century—of leasing the land in perpetuity at a fixed rent coupled with such and other restrictions.

Lastly, it is not suggested that the law has either by Statute or judicial decision defined the *mulgeni* tenure.

Under these circumstances it would be impossible, we think, to hold that restriction against alienation is so repugnant to the *mulgeni* tenure in the contemplation of law, that a clause to that effect must be held to be void. But it was said that such a clause in a permanent lease makes the land for ever inalienable, and is, therefore, void on the ground of public policy. That view, however, would not appear to have been taken by the framers of the Transfer of Property Act, for we find that by section 105 it recognizes leases in perpetuity, and that section 10, which forbids a clause against alienation in general, makes an exception in the case of leases where it is introduced for the benefit of the lessor. As this Act determines the law in two of the presidencies, and may any day become the law in this Presidency, it would be, to say the least, highly inconvenient to regard the question as to the policy of the law as otherwise than settled. However, it was said that in the present case the Court ought to infer that the

clause was inserted with the intention to benefit the lessee, because it says:—"As our family has obtained a right over it only as a means of subsistence for our family, we or our descendants have no right on the ground of this tenancy to mortgage, sell, lease, &c." It appears that the property had been originally sold by the tenant to defendant's father in satisfaction of a judgment debt, and this clause shows clearly that the defendant's object was, whilst providing a subsistence for his debtor by the cultivation of the land, to retain full control over the property.

We have hitherto discussed the question as to alienation in the only sense in which the Judge would seem to have understood the language of the lease, *viz.*, as restrictive of alienation by act of the lessee. In the present case, however, there has been no alienation on his part, and if the defendant is entitled to re-enter, it must be in virtue of the words of the clause which forbid "the lessee letting it be sold, or attached and sold in satisfaction of judgment debts"; for otherwise, as appears from the cases, referred to in argument, of *Doe d. Mitchinson v. Carter* (1) and *Croft v. Lumley* (2), there would be no breach committed by the attachment of the property. It was contended, however, in argument that a clause to the above effect should be treated as void as against creditors, and ought not to prevent the Court from issuing its process in execution. By English law a clause in a lease is valid which gives a right of re-entry by the landlord in case the term be taken in execution, or in the event of the lessee becoming insolvent, or judgment being entered up, or *fieri facias* being sued out against him (see the cases cited in the note at p. 177, Davidson's Conveyancing, Vol. V), and we may also remark that the above rule, as regards the insolvency of the lessee, is expressly adopted by the concluding words of section 12 of the Transfer of Property Act. To hold, therefore, that the clause in question, which is *ejusdem generis* with a clause which prevents the lease from passing to the creditors of an insolvent, is not valid as against creditors, would, in our opinion, be to draw a distinction in form and not in substance. Now the words "not to let the lands be attached and sold in satisfaction

1883

VYANKAT-
BAYA
P.
SHIVRAM-
BHAT.

(1) 8 T. R., 57.

(2) 6 H. L. C., 672.

1883

VYANKAT-
RAYA
T.
SHIVRAM-
BHAT.

of judgment debts" point, we think, as well to a passive attitude as to active assistance on the part of the lessee, whilst the process of execution is going on; and in this respect the present case is essentially different from those above cited. We think, therefore, that if the lessee allowed the land to be attached and sold by not taking measures to satisfy his judgment debt, there would be a breach, both according to the letter and spirit of the proviso in the lease.

In the present case it is true that there would not, strictly speaking, be a breach of the clause and a right of re-entry until the land was both attached and sold; but as the attachment by itself can be of no use to the creditor, the debtor being already by his lease prevented from alienating, and as it would be necessary, even if the attachment were allowed, to forbid the sale by a concurrent order, the attachment, which under these circumstances would be futile, should not, we think, be permitted.

The decrees of both the Courts below must, therefore, be reversed, and the plaintiff's claim to attach the land dismissed, with costs on plaintiff throughout.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Melvill.

TAMAYA BIN ANNAYA (ORIGINAL DEFENDANT No. 5), APPELLANT, v.

TIMAPA GANPAYA (ORIGINAL PLAINTIFF) AND BAI RAPA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mulgeni tenure—Lease to an undivided Hindu family—Partition—Clauses against alienation—Alienation voluntary or by act of law—Attachment and sale—No clause of forfeiture or re-entry—Non-payment of rent—Rights of the lessor.

The plaintiff leased his land under a *mulgeni chitti*, or lease at a fixed rent, to defendant No. 1, who then lived in union with his brothers, defendants 2 and 3, and acted as manager of the family. The lease contained a clause against alienation by the lessee by mortgage, sale, gift or otherwise, but did not provide for re-entry or forfeiture in case of breach. A partition of the land among the brothers subsequently took place. The shares of defendants 1 and 2 were afterwards sold, the former at a Court sale in execution of a decree, and the latter by private contract, and were purchased respectively by defendants 4 and 5, who

* Second Appeal, No. 111 of 1882.

1883

February 28.