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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.

1883 *February* 28.

TAMAYA BIN ANNAYA (ORIGINAL DEFENDANT No. 5), APPELLANT, *v.* TIMAPA GANPAYA (ORIGINAL PLAINTIFF) AND BAIRAPA 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.

entered into possession. Plaintiff now sued to recover his land, contending that the breach of the covenant against alienation had worked a forfeiture, and likewise for one year's rent, claiming the whole of it from defendant No. 1.

Held, following the decision in *Vyankatraya* v. *Shivrambhat* (1) that the restriction against alienation was valid, but went no further than to prohibit alienation by the act of the parties themselves, and then even did not provide for forfeiture or re-entry on breach, and had no application to the case of an alienation by act of law, as by attachment and sale in execution of a decree. That the plaintiff had, therefore, no right to recover possession from any of the defendants,—his only remedy being in damages for breach of the covenant against alienation.

Held, further, that defendants 1, 2 and 3 were severally liable for the whole amount of the rent claimed, as the lease was taken by defendant No. 1 for the benefit of the undivided family, and the plaintiff was no party to the partition, neither had he at any time recognized defendants 4 and 5 as his tenants.

THIS was a second appeal from the decision of E. T. Candy, Judge of the District Court of Kanara, reversing the decree of V. V. Phadke, Subordinate Judge of Sirsi.

The plaintiff Timapa Hedge sued for possession of certain land, as well as for Rs. 67, the rent of the same for one year, 1879-80. He alleged that on the 2nd October, 1877, he let the land to Bhairapa, defendant No. 1, under a *mulgeni* lease for the fixed annual rent of Rs. 67 ; that he (defendant No. 1) was the brother of defendants 2 and 3, and acted as the manager of the undivided family ; that the lease stipulated that the tenant was not to mortgage, give, sell, exchange or otherwise alienate the land ; that, subsequently, a partition took place among the three brothers and the land was divided into three shares ; that afterwards defendant No. 4 purchased the share of defendant No. 1 at a Court sale in execution of a decree, and defendant No. 5 purchased by private contract the share of defendant No. 2. The plaintiff further alleged that he was entitled to resume the land by virtue of the clause against alienation above mentioned, and to recover the whole of the sum claimed for rent from defendant No. 1, and not merely a proportionate part of it from each of the first three defendants.

The Subordinate Judge held that the clause against alienation was invalid. He, accordingly, dismissed the plaintiff's claim for the land, but held him entitled to recover the rent proportionately from each of the first three defendants.

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In appeal, the District Judge held the clause against alienation to be valid. He, therefore reversed the decision of the first Court, and ordered the alienations to defendants 4 and 5 to be set aside, and the plaintiff to be restored to possession of the land, allowing the plaintiff further to recover the arrears of rent proportionately from the three brothers.

Defendant No. 5 appealed to the High Court.

G. N. Nadkarni for the appellant.—The Judge was wrong in holding the restriction against alienation to be valid and in setting aside the sales to defendants 4 and 5. The lease does not provide for forfeiture of the land by the tenant or re-entry by the landlord in the event of a breach of the covenant. The Judge, therefore, was wrong in allowing the plaintiff to resume the land. The utmost that the plaintiff can claim in this case on account of the breach is damages.

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

SARGENT, C. J.—In this case plaintiff had leased his estate in 1871 by a "*mulgeni* chitti" to the defendant at a yearly rent of Rs. 67. The defendant was then having in union with his brothers, defendants 2 and 3, and acting as manager of the family. The lease contained a clause that the *mulgenidar* had no right to transfer by mortgage, gift, sale, exchange, or otherwise, but there was no clause providing for the forfeiture of the estate on breach of the covenant. The brother subsequently became divided in estate, and the land in question was partitioned into three shares. The share of defendant No. 1 was afterwards attached and sold at a Court sale, and purchased by defendant 4. The share of defendant 2 was also sold privately to defendant 5.

The plaintiff now seeks to recover from the defendants the piece of land demised by the lease, on the ground that the stipulation against alienation has been broken, and also the rent for the year 1879-80 which, he says, he is entitled to be paid in one lump sum by defendant No. 1, and not in proportionate parts by the defendants.

The first question which arises on the pleadings is whether the clause in the lease against alienation is void. The Subordinate

Judge held it to be so, but the District Judge reversed that decision, and held the restriction to be valid, which is in accordance with the ruling of this Court in *Vyankatraya* v. *Shivrambhat* (1). The clause, however, in the lease only prevented alienation by mortgage, gift, sale, or otherwise, which last expression must, we think, be confined to some act of the lessee *ejusdem generis* with those expressly mentioned. This clause, therefore, affords no ground for impeaching the title of defendant 4, who purchased the share of defendant 1 at an auction sale, and to whom the alienation was by act of law and not of the lessee. However, as regards defendant No. 5 who purchased the share of defendant No. 2 by private sale, this alienation was undoubtedly in breach of the covenant; and as he must be taken to have purchased with full knowledge of the covenant in the lease, if the plaintiff had applied to restrain the completion of the sale by injunction, it would doubtless have been granted, but the sale has been completed, and defendant No. 5 is in possession, and as there is no clause of forfeiture or re-entry in the lease, the plaintiff cannot recover the lands, but must confine himself to such relief as the breach of the covenant not to alienate may afford him in damages. As to the rent due for 1879-80, we think the three brothers, defendants 1, 2 and 3, are severally liable for the entire amount of Rs. 67, as the lease was admittedly taken by the defendant 1 for the benefit of the undivided family, and plaintiff has not recognized the defendants 4 and 5 as his tenants in their place. The fact of the partition between the three brothers to which the plaintiff was not a party and the arrangement between themselves to pay the rent in certain proportions, cannot affect their liability to the plaintiff, and as the plaintiff was, therefore, justified in refusing to accept payment of the rent except in a lump sum, he is entitled to interest on the Rs. 67 at 9 per cent. from the date of the institution of his suit. The decree of the Court below must, therefore, be reversed, and the plaintiff's claim to recover the land comprised in the *mulgeni* lease, or any part thereof, rejected. The plaintiff to recover the rent of Rs. 67 and Rs. 2 perquisites from each of the three first defendants with interest on the same from the date of the institution of his suit.

(1) *Ante*, p. 256.

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Defendants 1, 2 and 3 to pay plaintiff half his costs throughout. Plaintiff to pay the other half of his own costs. Defendant 5 to pay his own costs. Plaintiff to pay defendant 4 his costs throughout.

Decree reversed.

ORIGINAL CIVIL.

Before Mr. Justice West.

1883
May 1.

FATMA AND OTHERS, PLAINTIFFS, *v.* SHAIKH ESSA BIN KHALIFFA AND OTHERS, DEFENDANTS.*

Mahomedan will—Probate and Administration Act V of 1881—*Necessity of probate.*

An executor of the will of a deceased Mahomedan, since the 1st April, 1881, the date of the coming into force of the Probate and Administration Act V of 1881, cannot claim to represent the estate of his testator until he has taken out probate.

MOTION for dismissal of the suit by consent of all the parties save one plaintiff; and for removal from the record of the name of the plaintiff so refusing to consent.

This suit was originally brought by the plaintiff Fatima and her brother Abdoola bin Khaliffa against the defendants, the brothers and sisters of the plaintiffs, claiming a share in alleged joint family property in the possession of the defendants.

On the 22nd March, 1881, the suit was referred by an order of Court to the arbitration of two arbitrators. On the 13th May, 1881, the plaintiff Abdoola died, leaving him surviving his widow Shaikha and his sister Fatma, and leaving an alleged will whereby he appointed his said sister Fatma, her son Ahmed bin Abdoola, and one Shaik Moosa Shaik Abdool Latiff his exe-

* Suit No. 447 of 1880.