

1883

RAMLINGA  
KHANAPURE  
v.VIRUPAKSHI  
KHANAPURE.

For these reasons we reverse the decree of the District Court, and restore that of the Subordinate Judge, with costs throughout on respondent.

*Decree of the District Court reversed, and that of the Subordinate Judge confirmed.*

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 APPELLATE CIVIL.
 

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*Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Pinhey.*

1883  
August 23.

THE COLLECTOR OF BROACH (ORIGINAL APPLICANT), APPELLANT, v.  
RAJARAM LALDAS AND ANOTHER (ORIGINAL OPPONENTS), RESPONDENTS.\*

*Bhagdari (Bombay) Act V of 1862, Secs. 1 and 2—Sale of unrecognized portion of a bhag—Application by Collector to set it aside—Limitation Act XV of 1877, Sec. 8.*

N. held an unrecognized fourth share in a certain *bhag*. R. obtained a decree against N., and in execution of it sold his right, title and interest in the *bhag* on the 28th February, 1876. It was purchased by B. The sale was subsequently confirmed, and B. was put in possession of a portion of the land. On the 30th September, 1880, the Collector applied to the Court to set aside the sale, on the ground that it was illegal under Bombay Act V of 1862. It appeared that the Collector did not know till November, 1877, that the land sold was an unrecognized portion of the *bhag*, and not the whole of it.

*Held* that the sale might be set aside under the provisions of section 2 of Act V of 1862 notwithstanding its confirmation and the subsequent delivery of possession.

*Held* further that the application was not barred, even if the provisions of Act XV of 1877 applied to it, inasmuch as, under section 18, time began to run against the Collector only from November, 1877.

*Quære*—Whether any provision of limitation applied to such applications under the Bhagdari Act.

THIS was a second appeal from the decision of S. Hammick Senior Assistant Judge at Broach, affirming the decree of Madhuvachram Hora, Second Class Subordinate Judge of Anklesvar, and dismissing an application by the Collector of Broach to set aside the sale of a certain unrecognized portion of *bhagdari* land. The facts are briefly stated in the head-note, and are fully set out in the judgment of the High Court. Both the lower

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\* Second Appeal, No. 432 of 1882.

Courts rejected the application, holding that it was barred by limitation. The Assistant Judge observed:—

“ This application has been made 4 years and 8 months after the sale took place, and upwards of 4 years after the purchaser obtained possession. I think it cannot be denied that, long before it was made, the matter to which it refers had passed out of the cognizance of the Civil Court, and there was no longer in existence any process of the Court referring to it. The process which had issued from the Court was one for the sale of property, and with the completion of the sale the process, in my opinion, became extinct. Section 2 of the Bhágdári Act provides for applications to set aside, not effected sales, but processes. Now, when this application was made, no process existed. The application was one for an impossibility, and, therefore, one which could not be entertained.

“ As to limitation of time, the Act has not provided any limit in distinct terms. It is clear that the Collector cannot appear after an indefinite time. We must, therefore, inquire what the limit is. I think that section 2 of the Bhágdári Act may be reasonably regarded as an addition to the provisions of the Civil Procedure Code (Act VIII of 1859) on the subject of executions by sale of immoveable property; and if there is any question (*e.g.*, that of limitation) left unprovided for by that section, the answer must be sought in the provisions of Act VIII of 1859. Section 256 of that Act appears to be the proper section to which to refer this question, and by it the limitation provided is a term of thirty days. I hold, therefore, that this application not having been made until 4 years and 8 months after the sale, is time-barred.”

The Collector appealed to the High Court.

The Hon. *V. N. Mandlik* (Government Pleader) for the appellant.—The lower Courts are wrong in holding that the Collector cannot apply to set aside a sale, under section 2 of Bombay Act V of 1862, when it has already been completed. The Assistant Judge erred in holding that the limitation prescribed by the Civil Procedure Code was applicable to the Collector's applications under that Act to set aside sales.

*Nagindas Tulsidas* for the respondents.—In the present case

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the sale is complete, and the purchaser has been put in possession. Section 2 of the Act, therefore, has no application in this case, and the Collector cannot benefit by it. This is clear from the language of that section. The words used in it are—"whenever any process has issued" it shall be lawful for the Collector to move "that such process shall be set aside." There is no process here for the Court to set aside. The application, moreover, is clearly barred by limitation, as held by the lower Courts.

The following is the judgment of the Court delivered by

PINHEY, J.—It appears that Rajaram Laldas having obtained a decree against Narotam Narsi, attached and sold the right title and interest of Narotam Narsi in the property mentioned in the Collector's application, and which constitutes a whole *bhag*. On the 28th February, 1876, Balmukan Kesardas became purchaser of the property so sold. The sale was subsequently confirmed, and the purchaser obtained possession of some portion of the property. On the 30th September, 1880, the Collector brought the present application, urging that Narotam Narsi was only entitled to a fourth share in the property, and that the sale was, therefore, illegal under the provisions of the Bhagdári Act (Bombay Act V of 1862).

That the sale was illegal under the Bhagdári Act is beyond argument—see section 1 of that Act, and the decision of this Courts in *Ardeshir Nasarvanji v. Muse Natha Amiji* (1).

The Courts below have refused to allow the Collector's application apparently on two grounds, *viz.*, that the Collector cannot apply to set aside a sale under section 2 of the Act after a sale by the Court has been confirmed, and that, even if the Collector can so apply, he can apply only within thirty days from the confirmation of the sale. According to the first contention, a series of illegal acts culminating in an illegal sale could never be set aside unless detected before the sale was confirmed. It is only necessary to read the provisions of section 2 of the Bhagdári Act to see that this contention is groundless. As to the application being barred by some legal period of limitation, we see no ground for this opinion.

(1) I. L. R., 1 Bom., 601.

The District Court seems to have considered the limitation originally prescribed in section 256 of the Code of Civil Procedure of 1859, viz., thirty days, should be applied to this case, not on the ground that this section was intended to apply to applications by the Collector under the Bhagdari Act, but as it were by analogy. Such an application of the law of limitation is, however, quite contrary to the decisions. An Act of limitation, being restrictive of the ordinary right to take legal proceedings, must be construed strictly, *i. e.* in favour of the right to proceed—*Umiyashankar Lakhmiram v. Chotalal Wajeram*(1). Moreover the limitation prescribed in section 256 of the Code of Civil Procedure of 1859 was repealed by Act IX of 1871. If we turn to the Bhagdari Act we find no period fixed for applications by the Collector under section 2, and it seems doubtful whether any period of limitation does apply to such applications. The Collector here represents the Government, the Crown, and is seeking to carry out the provisions of an Act passed for the maintenance of certain tenures in the interests of the State. It may be, then, that he is entitled to rely on the maxim *nullum tempus occurrit regi* in such a case. The Statute of Limitations, 21 Jac. 1, c. 16, has been held not to bind the king—*per Curiam* in *Lambert v. Taylor*(2). But however this may be, in this particular case the Collector's application is not barred, even if the provisions of the present Limitation Act (Act XV of 1877) govern it. In the third division of schedule II of that Act, which refers to applications, the only provision that can be made to apply is article 178. By that article, for applications for which no period of limitation is provided elsewhere in this schedule, the period of limitation is three years, and the limitation runs from the time when the right to apply accrues. By the fraudulent manner in which the sale was effected, Narotam Narsi's fourth share being represented as a whole *bhag*, it appears from the District Court's judgment that the Collector did not discover until November, 1877, that the land sold was an unrecognized portion of a *bhag*. Under section 18 of the Limitation Act, XV, of 1877, therefore time would run against the Collector only from November, 1877. As the Col-

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(1) L. L. R., 1 Bom., 19.

(2) 4 B. &amp; C., at p. 152.

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lector made the present application within three years from November 1877,—that is, on 30th September, 1880,—the application is not barred even if the Limitation Act applies to applications by the Collector under the Bhagdari Act.

We must, therefore, set aside the orders of the Courts below, and also set aside and quash the sale of the share of Narotam Narsi in the *bhag* mentioned by the Collector, and as applied for by the Collector.

Rajaram Laldas to pay the costs of the Collector, and to bear his own. Balmukan Kesardas to bear his own costs, if any.

*Orders set aside.*

*Note.*—This decision was followed in two other cases, Second Appeals 437 and 438 of 1883, decided by the same Division Bench on the same day, the 23rd August 1883.

## APPELLATE CIVIL.

*Before Mr. Justice Bayley, Acting Chief Justice and Mr. Justice Pinhey.*

THE COLLECTOR OF BROACH (ORIGINAL APPLICANT), APPELLANT, v. DESAI RAGHUNATH AND ANOTHER (ORIGINAL OPPONENTS), RESPONDENTS.\*

1883  
September 11,  
12 & 13.

*Bhagdari (Bombay) Act V of 1862, Secs. 1, 2 and 3—Sale of unrecognized portion of a bhag—Application by Collector to set it aside—Limitation Acts IX of 1871 and XV of 1877, Sch. II, Art. 178.*

No law of limitation applies to proceedings taken by a Collector under Bombay Act V of 1862.

The words in the first section of that Act, “no portion of a *bhag*, &c., shall be liable to seizure, sequestration, attachment, or sale by the process of any Civil Court,” mean that no portion of a *bhag* shall be seized, sequestered, attached, or sold by the process of any Civil Court, and any such seizure, sequestration, attachment, or sale is thereby rendered absolutely illegal and void.

Section 3 of the Act has no bearing on the sales by order of a Civil Court, but is intended to apply to unlawful sales and alienations of portions of *bhags* made out of Court, or by private individuals. It is under section 2 that the Collector is authorized and bound to move in order to get the process of a Civil Court set aside or quashed.

THIS was a second appeal from the decision of S. Hammick,

\* Second Appeal, No. 439 of 1882.