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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.*

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 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.

Assistant Judge at Broach, confirming the order of Krishna Mukhram, Second Class Subordinate Judge of Vagra.

On the 28th September, 1874, certain *bhagdari* land, which was an unrecognized portion of a *bhag*, was sold in execution of a decree held by Desai Raghunath (respondent No. 1) against one Bhagvan Kashi, and purchased by Laldas Rajji (respondent No. 2). Bhagvan had an unrecognized fourth share in the *bhag*, and the sale extended to his right, title and interest in that share. The sale was conducted through the revenue authorities and under the orders of the Collector of Broach. It was subsequently confirmed, and the purchaser Laldas put in possession of the land. On the 21st January, 1881, the Collector applied to the Subordinate Judge of Vagra, under section 2 of Bombay Act V of 1862, to have the sale set aside, on the ground that the land sold was an unrecognized portion of a *bhag*. He alleged that he was not aware of the apportionment of the *bhag* till the 4th June, 1880.

The Subordinate Judge rejected the application on the ground that, as the sale had already been confirmed and possession given to the purchaser, there was no process in existence which the Court could set aside or quash.

In appeal, the Assistant Judge upheld the order of the first Court. He observed :—

“ I consider that the view of the law taken by the Subordinate Judge is the proper one. I agree with him that it cannot reasonably be held that there is any process before the Court when the sale, for which the process issued, has been completed and confirmed six years previously. Section 2 of the Bhagdari Act does not authorize the Collector to move the Civil Court to set aside a sale, but merely to set aside a process for seizure, sale, &c., of any unrecognized portion of a *bhag*. I consider, therefore, that this section does not justify the present application, which is an application to set aside, not a process, but a sale confirmed, and with possession. Section 3 affords the Collector a summary remedy in case he finds an outsider in possession of an unrecognized portion of a *bhag*, and the same section in its latter part contemplates an inquiry by a regular suit into the legality of the outsider's possession. But this provision would be nullified, in

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cases like the present, if the Collector were able on his mere application to have a judicial sale set aside. I think that a judicial sale cannot be set aside in the summary way in which the Collector wishes to have it done (see 12 Cal. W. R., 201)."

The Collector appealed to the High Court.

The Hon. *V. N. Mandlik* (Government Pleader) for the appellant.—The lower Courts were wrong in holding that the Collector could not apply to have the sale set aside under section 2 of the Bhagdari Act when it had already been confirmed. The provisions of the Limitation Act did not apply to such applications.

Shantaram Narayan for respondent No. 2.—The Collector can move to set aside only a process for sale, and not a sale which has been confirmed and the purchaser put in possession. After the execution of a decree has been completed, there is no process. The Court, therefore, has no jurisdiction to entertain an application like the present. The sale of an unrecognized portion is not void, but only voidable. It is valid until set aside. If it were void it would be a nullity, and there would be nothing to set aside—*Ardesar Hormasji Wadia v. The Secretary of State*(1); *Oghad Odha v. Nag Mulu*(2). Section 2 of the Bhagdari Act says that certain lands shall not be liable to sale. This, however, does not amount to an absolute prohibition to sell, nor avoid a sale when made. Section 18 of Act XV of 1877 does not protect the Collector from the operation of the law of limitation. It exempts from limitation only cases of fraud. The purchaser here has been party to no fraud. He bought from the Court. There is an essential difference between a private and a judicial sale. The purchaser derived his title neither through the judgment-creditor nor the judgment-debtor, but by operation of law—*Dinendranath Sanyal v. Ram Coomar Ghose*(3). Assuming that he derived it from either the one or the other, or from both, and is affected by the fraud (if any) of either or both of them, there is no fraud found in this case. The exemption granted by the Bhagdari Act to certain lands from attachment and sale is in itself a very severe restriction of the ordinary common-law rights of

(1) 9 Bom. H. C. Rep., 177, 197.

(2) Printed Judgments for 1881, p. 26.

(3) L. R., 8 I. A., at p. 75.

a judgment-creditor. The recognition of portions of a *bhag* is merely a matter of administrative detail, and depends upon the will and wisdom of the Revenue officers. The Collector may refuse this or that division of a *bhag*. The Civil Courts, therefore, will construe the Act narrowly. The maxim of *nullum tempus occurrit regi* does not apply to India. Government is as much bound by limitation as any private individual—see *The Government of Bengal v. Msst. Shurruffutoonnissa*(1). Even in England the doctrine is only applied to certain prerogatives of the Crown (see Hardcastle on Statutes, p. 180). In Act XV of 1877, which governs this case, sixty years' limitation is allowed for suits by the Secretary of State and three years for all applications whether by him or by private individuals. *Expressum facit cessare tacitum*. If the Legislature had wished to give him a longer period in the case of applications than it gave to ordinary litigants, it would have expressly said so, as it did in the case of suits. A Division Bench of this Court (Westrop, C. J., and Melvill, J.) held, under Act IX of 1874, three years' limitation applicable to a case where the Collector had applied for the recovery of stamp fees—*Vambri v. The Collector of Nasik*(2); see also *Appaya v. The Collector of Vizagapatam*(3). The Bhagdari Act makes the decision appealable, like any other decision, under the provisions of the Civil Procedure Code. The present application, though authorized by the Act, is, however, governed by the Code. Whether the present application is under the Code or not, the provision of limitation regarding applications is general, and applies to it. Section 647 of the Code makes the procedure applicable to all proceedings in a Civil Court. The present application is such a proceeding, and, therefore, governed by the Code, though authorized by the Bhagdari Act. [BAYLEY, A. C. J.—Suppose a sale takes place, and the Collector does not hear of it, is there no remedy? He may eject the person in possession summarily under section 3. [PINHEY, J.—He cannot do so; section 3 applies to private alienations.] He may bring a suit for ejectment. The Collector here chose to lay by for more than sixty years, and permit an innocent purchaser to remain in peaceful possession, and to deal with the property as

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(1) 8 Moo. L. A., 225.

(2) See note, *infra* p. 552.

(3) I. L. R., 4 Mad. 155.

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his own. The purchaser is not to blame. The Collector by his conduct led the purchaser to believe that he had acquired a good title. He is now estopped from denying it. He had the means of knowledge within his power before making the sale. The sale was conducted by the Mahalkari under his orders, and the proclamation of sale was struck up in the *kacheri*. [PINHEX, J. —But the Collector was not bound to examine into what he had been directed by the Court to sell.] He was as much bound as any private individual under similar circumstances. The Court would not excuse ignorance in the case of a private person who himself took a part in the sale. The Collector, therefore, had full notice of the sale. If the proclamation was a notice to all persons, it was so to the Collector. The principles of law and equity are not to be set aside in order to give effect to the Bhagdari Act.

The Hon. V. N. Mandlik (Government Pleader) was not called upon the reply.

September 13. The following is the judgment of the Court delivered by

PINHEX, J.—This case is on all fours with Second Appeals 432, 437 and 438(1) in which Mr. Nagindas Marphatya appeared for the defendants, and in which judgment was delivered on the 23rd of August last.

To that judgment we have only to add the following remarks with reference to the arguments advanced by Mr. Shantaram Narayan Bondse :—

1. We hold that the words in section 1 of Bombay Act V of 1862—"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 that any such seizure, sequestration, attachment, or sale would be absolutely illegal, and, therefore, void.

2. Then Mr. Shantaram argued that after a portion of a *bhag* has been actually sold by a Civil Court, the Collector should not

(1) *Ante*, p. 542.

proceed under section 2, but under section 3 of the Act; but we think this argument cannot be allowed for a moment. Section 3 has no bearing on sales by order of a Civil Court, but is meant to apply to unlawful sales and alienations of portions of *bhags* made out of Court, or by private individuals. It is under section 2 of the Act that the Collector is authorized and bound to move in order to get the process of a Civil Court set aside or quashed. Indeed, it is obvious that it would be a most indecent and unseemly proceeding for a Collector to take action under section 3 (even if he could), and proceed "summarily to remove" a party from possession of property which had been delivered to him by formal process of the Civil Court.

3. As to the point of limitation, which has been somewhat vehemently argued in this case, we are now, on further consideration, of opinion that neither article 178 of schedule II of Act XV of 1877, nor any portion of that Act, has any application to proceedings taken under the Bhagdari Act (Bombay Act V of 1862). Previous to the passing of the Limitation Act, IX of 1871, when any limitation was intended to be prescribed for a proceeding under any Act, the period of limitation was embodied in the Act. See, for example, section 119 of the Code of Civil Procedure of 1859 which was passed three years before the Bhagdari Act, and section 214 of Act VI of 1863 which was passed a year after the Bhagdari Act. All such provisions as to limitation were repealed by, and re-enacted in, Act IX of 1871. No limitation is prescribed in the Bhagdari Act, and the reason for this is obvious. The preamble to the Bhagdari Act declares it to be necessary, for reasons of State policy, to prevent the alienations of portions of a *bhag*, and the Act provides that portions of a *bhag* shall not be sold. If a portion of a *bhag* be sold, it is a fraud upon the Act. The only person who can get a sale set aside is the Collector. The Collector cannot act until he knows that the Act has been infringed. The collusion of parties or other cause might keep an illegal sale concealed for twenty years. If time ran against the Collector, the Bhagdari Act would be practically ineffectual. Therefore no limitation is prescribed in the Bhagdari Act, and there was no provision as to limitation which could be repealed by, and re-enacted in, Act IX of 1871, or again

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be re-enacted in Act XV of 1877. We, therefore, hold that no law of limitation applies to proceedings by the Collector under the Bhagdari Act.

Following our decision in Second Appeal No. 432 of 1882⁽¹⁾ we must set aside the orders in the Courts below, and also set aside and quash the sale of the share of Bhagvan Kashi in the *bhag* mentioned by the Collector, and as applied for by the Collector. Costs in all Courts to be borne by the defendants.

Orders reversed.

(1) *Ante*, p. 542.

Note.—*Vembai v. The Collector of Nasik*, above referred to, was Special Appeal No. 7 of 1877, decided by Westropp, C.J., and Melvill, J., on the 8th October, 1877. The following is the judgment delivered by

WESTROPP, C.J.—Section 309 of the Civil Procedure Code of 1859 directs that “on the decision of the suit, the Court shall calculate the amount of stamps which would have been paid by the plaintiff if he had not been permitted to sue as a pauper, and such amount shall be recoverable by Government from any party ordered by the decree to pay the same, in the same manner as costs of suit are recoverable.” In this case the original decree of the Subordinate Judge containing an order directing the payment of the court fees by the pauper plaintiff, was made on the 15th April, 1868, and was finally affirmed in this Court on the 28th July, 1869. The present application of the Collector to enforce the payment of those fees was made on the 25th November, 1875; so that upwards of three years have elapsed since the date of the affirmance of the decree which contained the order for the payment of the fees. The District Judge, while holding that article 167 of schedule II of Act IX of 1871 prescribes the period of limitation which is applicable to such a case, yet is of opinion that an application by a defendant, made within three years before the 25th November, 1871, for execution in respect of the costs of suit decreed to him, is the terminus whence the period of limitation (three years) should begin to run. We, however, think that the application to enforce or keep in force the decree or order mentioned in the 4th clause of article 167, which gives a fresh starting point, is an application by the party himself seeking execution, or by a party in the same interest as he who presently seeks the enforcement of the decree, and not an application by a party whose interest under the decree is totally unconnected with that of the person seeking present enforcement. The interest of the defendant Apaji Gwind, in the costs awarded to him by the decree, is not in anywise connected with that of the Collector on behalf of Government in the court fees, which the pauper plaintiff has been directed by the same decree to pay. The activity of that defendant was not exhibited in the remotest manner on behalf of Government, but solely on behalf of himself. In *Roy Preetmath Choudhry v. Prann the Roy Choudhry* (1) and *Teja Singh v. Rajavirayan Singh* (2) the early and later applicants appear to have been either jointly interested, or in the same interest, and so also in the case in *Kowar*

(1) 8 W. R., Civ. Rul. 100.

(2) 1 Beng. L. R., App. Side 62.

Narain Roy v. Sreenath Mitter(1) so far as we can understand the meagre report of it. We think that the right of Government to recover court fees under section 309 is subject to the same period of limitation as the right of a subject to enforce a decree or order would be. The Legislature in passing the Limitation Act of 1871, which is applicable to this case, where it intends that Government should have a longer period than the subject, has been careful expressly to say so; as, for instance, in article 150 of schedule II, where the period assigned to suits brought by the Secretary of State is sixty years from the time of the accrual of the cause of action; but the Legislature makes no difference between Government and its subjects in the cases of appeals or applications—see *Govind Lakshman v. Narayan Moreshtar*(2). We fully recognize the authority of *Ganpat Putaya v. The Collector of Kanara*(3), but that case relates to priority of execution, and has no bearing upon the present question of limitation. Holding, as we do, that the present application of the Collector is barred by article 167 of schedule II of Act IX of 1871, we must reverse the orders of both of the Courts below, and reject the application with costs throughout.

We are aware of the explanations annexed to article 179 of the new Limitation Act (XV of 1877), which article is the enactment therein analogous to article 167 of the Act of 1871, but we have arrived at our decision quite independently of any aid from that quarter.

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(1) 9 W. R., Civ. RuI. 485

(2) 11 Bom. H. C. Rep., 111.

(3) L. R., 1 Bom 7.