

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kamball.*

VASANJI HARIBHAI (ORIGINAL DEFENDANT), APPELLANT, v. LALLU AKHU, (ORIGINAL PLAINTIFF), RESPONDENT.\*

1885  
January 7.

*Pensions Act—Certificate—Mortgage of Desáigiri hak—Suit by mortgagee without certificate—Sale in execution of decree passed in such suit—Title of purchaser—Act XXIII of 1871, sec. 6—Jurisdiction—Res judicata—Estoppel—Practice—Objection involving point of mixed law and fact taken in second appeal.*

Where the mortgagee of a *desáigiri hak*, without obtaining the Collector's certificate under section 6 of Act XXIII of 1871, sued the representative of the mortgagor to enforce the mortgage debt by a sale of the *hak*, and obtained a decree.

*Held*, that the proceedings in the suit were without jurisdiction and that the decree could not constitute the basis of any title or estop the representative from suing for a declaration of his right to the *hak*, as a lifeholder as against the purchaser at the auction sale held in execution of the decree.

An objection involving a point of law as well as of fact, if not taken in the Court below, cannot be entertained in second appeal.

*Rádhábái v. Anantráv Bhagvant*<sup>(1)</sup> followed.

THIS was a second appeal from the decision of Shripád Bábáji Thákur, Assistant Judge of Surat, confirming the decree of Khán Bahádúr B. E. Modi, Subordinate Judge of Surat.

On the 13th of April, 1871, the father and uncle of the plaintiff mortgaged their *desáigiri hak* to the defendant's father for Rs. 400. In July, 1874, the mortgagee brought a suit against the plaintiff as the representative of his father and uncle (the mortgagors) to recover the mortgage debt by sale of the mortgaged property as well as of any other property belonging to the mortgagors. Before instituting this suit the mortgagee had not obtained from the Collector any certificate under the Pensions Act XXIII of 1871. The Court, however, passed a decree on the 3rd of November, 1876, as prayed for. In execution of that decree the *desáigiri hak* was sold by the Court, and the defendant in this suit was declared, on the 9th of August, 1877, to be the purchaser. The defendant thereupon made an application to the Collector of the district for an entry of the *hak* in his name

\* Second Appeal, No. 284 of 1883.

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on the Government records. The plaintiff opposed the application, and the Collector referred the parties to a suit in the Civil Court. The plaintiff brought this suit to establish his right to the *desúgiri hak* as a life-holder of the service *vatan*.

The defendant contended that the present suit could not be maintained by the plaintiff who had been a party to the previous suit; that the *hak* was not a service *vatan*, the Government never having demanded service; that the defendant had become sole and absolute owner of the *hak* under the decree, and that the plaintiff was estopped from disputing his title.

The Subordinate Judge held that the *desúgiri hak* was a service *vatan*; that the service attached thereto had been discontinued by Government on the 8th of July, 1868; that the holder of the *hak* had only a life-interest in it; that the *hak* was not saleable property; that the plaintiff had a good cause of action, and that the previous decree, which had been passed without obtaining the Collector's certificate, was null and void. He therefore, passed a decree in favour of the plaintiff, which the Assistant Judge confirmed.

The defendant appealed to the High Court.

*Goculdás Káhándás Párekh* for the appellant.—This case falls within the Full Bench ruling in *Rádhábái v. Anantrá Bhagvant*<sup>(1)</sup>. In the absence of any family custom, which has not been alleged or proved, the service having ceased in July, 1868, the mortgage in 1871 was valid.

*Shivshankar Govindrám* for the respondent.—Assuming the appellant's contention to be correct, he cannot succeed, as the decree obtained against the plaintiff in the previous suit was without jurisdiction, no certificate having been obtained from the Collector as required by section 6 of Act XXIII of 1871—*Vásudev Saddashiv Modak v. The Collector of Ratnágiri*<sup>(2)</sup>. The decree, being without jurisdiction, could confer no title on the appellant—*Basappa v. Dundaya*<sup>(3)</sup>.

*Goculdás Káhándás Párekh* in reply.—The plaintiff was a party to the former suit. The obligation of a purchaser to inquire

(1) *Supra*, p. 198.

(2) I. L. R. 2 Bom. 99.

(3) I. L. R. 2 Bom. 540.

into the jurisdiction of a Court to order a sale ceases when the sale is completed—*Basappa v. Dundayá*<sup>(1)</sup>. The former decree bars the maintenance of the present suit, and estops the plaintiff from taking any objection to the jurisdiction.

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SARGENT, C. J.—This suit is instituted with the permission of the Collector by the plaintiff to obtain a declaration of his right to be the holder, for the time being, of a *desáigiri hak* against the defendant, who is the purchaser at an auction sale in execution of a decree passed in a suit instituted by a mortgagee against the plaintiff as the representative of the original mortgagors (the father and grandfather of the plaintiff) to enforce the mortgage-debt by sale of the *hak*. The Courts below have found that, notwithstanding the settlement made by Government with the holders of the *hak*, the *hak* being a service *vatan* could not be mortgaged by plaintiff's father and grandfather beyond their life-interests, and that the plaintiff was entitled, therefore, to the *hak* as the present life-holder. This is opposed to the recent Full Bench decision in *Rádhábái v. Anantráv Bhagvant*, which establishes that, in the absence of any special family custom, when the office attached to the *vatan* ceases, the property may be dealt with in the usual way. And as it is not in dispute that the services attached to the *vatan* in question were discontinued on 8th July, 1868, the *hak* was no longer inalienable when the mortgage was executed on 13th April, 1871. Apart, therefore, from the question of jurisdiction by the Court which passed the decree under which defendant purchased, it is plain that the defendant obtained a title to the absolute property in the *hak* which the plaintiff could not dispute.

But it was contended for the plaintiff that the proceedings in the mortgagee's suit took place throughout without the certificate of the Collector as required by section 6 of Act XXIII of 1871, and, therefore, conferred no title on the defendant; and, secondly that the defendant, who was the son of the mortgagee, purchased without the consent of the Court, and that the sale was void. This last objection to the defendant's title was not taken in the Courts below, and cannot be taken now in second appeal, being

(1) I. L. R. 2 Bom. 540.

(2) *Supra*, p. 198.

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a mixed question of law and fact; but as to the first objection, it is, in our opinion, one which must prevail against the defendant's title. The Court had clearly no jurisdiction as regards the subject-matter to entertain the suit, and the decree was, therefore, null and void, and could not constitute the basis of any title.

But it was urged for the defendant that the plaintiff himself was a party to the mortgagee's suit, and that he was estopped from now taking the objection to the jurisdiction. But apart from the circumstance that the plaintiff was a minor at the time, there could be no question of estoppel by conduct between the judgment-debtor and the purchaser at auction, who derives his title from proceedings which are entirely *in invitum* as regards the former. The defendant not having established his title, the plaintiff, who is the holder of the *hak*, whether still subject or not to the mortgage, is entitled, as against the defendant, to a declaration that he, and not the defendant, is entitled to the *hak*. We must, therefore, confirm the decree with costs.

*Decree confirmed.*

## ORIGINAL CRIMINAL.

### FULL BENCH.

*Before Sir Charles Sargent, Knight, Chief Justice, Mr. Justice Bayley and Mr. Justice Scott.*

QUEEN EMPRESS v. A. MORTON AND MOORTEZA ALI.

1884  
November  
27 to 29.

*Jurisdiction—Practice—Procedure—Code of Criminal Procedure (X. of 1882) applicable to proceedings in the Court of the Judicial Superintendent of Railways in II. H. the Nizám's Dominions—Sanction of proceedings—Subsequent sanction of no effect—Irregular commitment accepted by High Court—Criminal Procedure Code (X. of 1882) secs. 197 and 532—Power of Court of Judicial Superintendent of Railways to commit to High Court—Charges preferred by Advocate General—Letters Patent, 1865, clause 24—European British subjects.*

The provisions of the Code of Criminal Procedure (X of 1882) apply to the Court of the Judicial Superintendent of Railways in his Highness the Nizám's Dominions held at Secunderabad.