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APPEL-
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12 B 358.

of an official justification must be made out by the individual sued as a private person, and it must amount to more than a mere pretext or colour, as good faith is required in the discharge of all public functions that affect the persons or possessions of subjects of the Crown.

For these reasons, we must hold that the defendant, sued as a private person for an alleged wrong to the plaintiff, was rightly sued in the Court of the Subordinate Judge. If the plaintiff has failed to make out the essential points of his case, the District Judge should decide accordingly; but we must reverse his order for giving back the plaint, and direct him to dispose of the appeal on its merits. Costs of this appeal to abide the event.

Order reversed and case sent back.

12 B. 363.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

JIVAN BHAGA (*Original Decree-holder*), Appellant *v.* HIRA BHAIJI
(*Original Judgment-debtor*), Respondent.* [28th June, 1887.]

Civil Procedure Code (Act XIV of 1882), s. 266 (c)—Building site—Agriculturist bhagdar—Bhagdari Act (Bom. Act V of 1862)—Decree—Execution against bhag.

A having obtained a decree against B, who was a *bhagdar*, attached his *bhag* in execution, including the *gabhan* or site upon which B's house was built. B applied to have the attachment removed from the *gabhan*, on the ground that he was an agriculturist, and that, therefore, the *gabhan* of his house was protected from attachment by cl. (c) of s. 266 of the Civil Procedure Code (Act XIV of 1882).

Held, that the *gabhan* was subject to attachment, and was not protected by the above clause. B did not hold as an agriculturist. He could not have occupied the house, except as a *bhagdar*, and it was as part of a *bhag* that the site was attached. The protection of s. 266, cl. (c), was intended for agriculturists in the strictest sense, and for agriculturists in that sole character.

[R., 13 C.P.L.R. 30 (31).]

[364] SECOND appeal from the decree of A. Steward, Acting Assistant Judge at Broach, in appeal No. 93 of 1885.

One Jivan Bhaga obtained a decree against Hira Bhaiji, who was a *bhagdar*, and in execution attached his *bhag*. As a part of the *bhag* he attached the *gabhan* or site of his dwelling house. Hira applied to have the attachment raised from the *gabhan*, on the ground that he was an agriculturist, and that, therefore, the *gabhan* of his house was protected from attachment, under s. 266 (c) of the Code of Civil Procedure (Act XIV of 1882).

This application was rejected by the Subordinate Judge on the ground that the protection afforded by s. 266 (c) of Act XIV of 1882 did not extend to a building site.

In appeal, the Acting Assistant Judge held that if the house of an agriculturist judgment-debtor could not be attached under the Code of Civil Procedure, the site of the house was not liable to attachment. He, therefore, ordered the attachment to be removed from the *gabhan* in question.

Against this order the decree-holder appealed to the High Court.

Gokuldas Kahandas Parekh, for the appellant.—The Bhagdari Act (Bombay Act V of 1862) provides that a *gabhan* cannot be severed from

* Second Appeal No. 37 of 1887.

the rest of the *bhag* in execution of a decree. The Act is, no doubt, intended to prevent the dismemberment of a *bhag*, but the Legislature could never have intended that *bhags* should not be sold at all. This, however, would be the result if the lower Court's view is adopted. The lower Court has extended the protection given by s. 266 (c) of the Civil Procedure Code to a building site.

There was no appearance for the respondent.

JUDGMENT.

WEST, J.—The appellant in this case having obtained a decree against a *bhagdar* attached his *bhag* in execution. As a part of the *bhag* he attached the *gabhan* or site whereon stands the respondent's house. The Assistant Judge has held that the house itself is exempted from attachment, as being that of an agriculturist. The site, therefore, he thought must be equally exempt; [365] and he has decreed that the attachment be raised from the site, even though this should involve the consequence which he foresees that thus the attachment will be defeated altogether through the legally inseparable character of the *bhag*.

Bombay Act V of 1862 provides that a *bhag* shall not be sub-divided in execution of a decree, and that a homestead or *gabhan* appendant or appurtenant to a *bhag* shall not be attached, or sold apart from it. In s. 266 (c) of the Code of Civil Procedure, it is provided that the materials of houses belonging to, and occupied by, agriculturists shall not be liable to attachment. In the case of *Radhakisan Hakumji v. Balwant Ramji* (1) it is said that the building contemplated is one dwelt in by an agriculturist as such. There must be an occupation in good faith for the purposes of agriculture, in order to get the benefit of the exemption. Here the respondent occupies, in one sense, as an agriculturist no doubt, but in a more special sense as a *bhagdar*. Except as a *bhagdar* he could not have held the particular house in question, and it is as part of a *bhag* that the site has been attached. The site does not fall within the words of the Civil Procedure Code, s. 266 (c); but, apart from that, we have here the Bhagdari Act dealing with a special and very limited class of property. We have also the law of procedure subsequent in date, but of general application, and the terms of the two are such that taken without qualification they might together prevent any execution at all against a *bhag*. This clearly was not intended. The purpose of the more special Act was not that execution should be prevented altogether, but that it should proceed against the *bhag* as an indivisible aggregate, including the *gabhan*; and where a *bhagdar* holds in that character, it predominates over his other character as an agriculturist. He does not hold as an agriculturist, and only as such, and it was for agriculturists in the strictest sense and for an agriculturist in that sole character that the protection of s. 266 (c) of the Civil Procedure Code was intended. This section being thus construed, room is left for the operation of the other Act applicable to this case so as not to defeat the general purpose of the law, and both laws stand [366] together, the more special operating as a partial exception to the other—*Ex parte Attwater*; *In re Turner* (2); *Dowling v. Betjemann* (3); *Fenn v. Bittleston* (4); and *James v. Cochrane* (5).

For these reasons we reverse the order of the Assistant Judge and restore that of the Subordinate Judge, with costs.

Decree reversed.

(1) 7 B. 530.
(4) 7 Ex. 152.

(2) L.R. 5 Ch. Div. 27.

(3) J. & H. 544.

(5) 7 Ex. 170 (171, 174).