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## APPELLATE CIVIL.

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*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

BAI KUVARBAI (*Original Plaintiff*), Appellant v. BHAGVAN  
 ICHHARAM AND ANOTHER (*Original Defendants*), Respondents.\*  
 [3rd April, 1888.]

*Bhagadari Act (Bombay Act V of 1862), ss. 1 and 2—Sale of unascertained shares in an undivided bhag—Dismemberment—Physical dismemberment—Right to sue to set aside illegal sales.*

Section 1 of the Bombay Bhagdari Act (V of 1862) (1) does not prohibit the sale of an unascertained share of an undivided *bhag*.

The object and intention of the Act is to prevent a *physical* dismemberment of a *bhag*, or recognized sub-divisions thereof, and not a mere increase or decrease in the number of persons who may from time to time be owners of the *bhag*. Section 2 (2) of the Act does not bar the right of any person prejudicially affected by any illegal sale from suing to set aside the sale.

[204] Four brothers owned a *bhag* in common. In 1871 the right, title, and interest of three of the brothers in the *bhag* was sold in execution of decrees against them. The defendants were the auction-purchasers. They were put in joint possession of the whole *bhag*. In 1878 the plaintiff purchased the whole *bhag* from the four brothers, and filed a suit in 1883 to oust the defendants, and to obtain possession, alleging that the defendants' purchase of a portion of the *bhag* was illegal and invalid under s. 1 of the Bombay Bhagdari Act (V of 1862). The suit was dismissed, on the ground that though the defendants' purchase was illegal under the Act, the plaintiff had no right to oust the defendant until the Collector had taken action, under s. 2 of the Act, to set aside the defendants' purchase.

*Held*, reversing the decision of the lower Court, that the suit was not barred by s. 2 of the Bombay Bhagdari Act (V of 1862).

*Held*, also, that the defendants' purchase of unascertained shares in the undivided *bhag* was not opposed to s. 1 of the Act.

[*Diss.*, 15 B. 172 (174).]

SECOND appeal from the decree of W. H. Horsley, Acting Assistant Judge of Broach, in appeal No. 55 of 1884.

One Adam Bagas and his three brothers—Baji, Asmal, and Hasan—were possessed of an undivided *bhag* at Sankvad, in the Broach Collectorate.

\* Second Appeal No. 144 of 1886.

(1) "Section 1.—No portion of a *bhag* or share in any *bhagdari* or *narwadari* village other than a recognized sub-division of such *bhag* or share shall be liable to seizure, sequestration, attachment or sale by the process of any Civil Court, and no process of such Court shall be enforced so as to cause the dismemberment from any such *bhag* or share or recognized sub-division thereof, of any homestead, building-site (*gabhan*), or premises appurtenant or appendant to such *bhag* or share or recognized sub-division thereof."

(2) "Section 2.—Whenever any process has issued out of any Civil Court for the seizure, sequestration, attachment or sale of any portion of a *bhag* or share in any *bhagdari* or *narwadari* village other than a recognized sub-division of such *bhag* or share, or for the seizure, sequestration, attachment or sale of any homestead, building-site (*gabhan*) or premises appurtenant or appendant to such *bhag* or share or recognized sub-division thereof, it shall be lawful for the Collector or other chief revenue-officer of the district in which any such *bhagdari* or *narwadari* village is situated, although not a litigating party, to move in such Civil Court that such process shall be set aside or quashed, and that the provisions of this Act be put in force;

and if such Court be of opinion, on the evidence adduced by the Collector or other chief revenue-officer of the district on such motion, that the case is one falling within this Act, it shall set aside or quash such process, and cause the provisions of this Act to be put in force; any order which the said Court may make on such motion shall be appealable in the same manner as a decree of the Court in which it is made."

In 1871 the respective right, title, and interest of three of the above owners of the *bhag*, viz., Adam, Asmal and Hasan, were put up to auction in execution of decrees against them, and purchased by the defendants. The auction-purchasers were put into possession of the whole *bhag*, and it was entered in their joint names in the revenue books.

In 1878 the plaintiff purchased the whole *bhag* from Adam, Asmal, and Hasan and the widow of Baji, and in 1883 filed the present suit to eject the defendants and to obtain possession of [205] the *bhag* and the houses appurtenant thereto. The plaintiff alleged that the purchase of a portion of the *bhag* (viz., the interest of three brothers only) was illegal and invalid under s. 1 of the Bombay Bhagdari Act (V of 1862), and that, therefore, the defendants had no title to the same.

The defendants contended (*inter alia*) that the suit was barred by limitation; that the sale to the plaintiff was collusive and void for want of consideration; that at the time of the sale the plaintiff's vendors had no title to convey; and that their (the defendants') purchase of the right, title, and interest of three of the brothers was not opposed to the Bhagdari Act (Bombay) V of 1862.

The Subordinate Judge held that the suit was substantially one to set aside the Court sale of 1871, and, as such, was barred under art. 12, sch. II of the Limitation Act (XV of 1877); that the sale to the plaintiff was void for want of consideration, and that the defendants' purchase was opposed to the Bhagdari Act (V of 1862). He, therefore, dismissed the suit.

On appeal, the Assistant Judge was of opinion that the suit was not time-barred; that the sale to the plaintiff was not invalid; and that the defendants' purchase was illegal under the Bhagdari Act. But he dismissed the suit on the ground that the Collector alone had the right, under s. 2 of the Act, to take steps for setting aside the Court sale at which the defendants purchased the property. His reasons are stated in the following extract from his judgment:—"It must be remembered that Adam Bagas and his brothers had been ousted from possession of the whole of their *bhag* by process of a Civil Court in 1871. They could not recover it of their motion, or by any effort on their part at the time of the sale to the plaintiff. The Bombay High Court have ruled in *The Collector of Broach v. Desai Raghunath* (1) that "the only person who can get a sale set aside is a Collector." He alone can take action under s. 2 of the Bhagdari Act. Even if this were not so, Adam Bagas and his brothers would be barred by limitation in A.D. 1878 if they sought to set aside a Court sale of 1871: consequently it is quite clear that when plaintiff bought the [206] *bhag* from Adam and his brothers they could not sell any right to possession. It is a recognized principle that a purchaser obtains no better title than his seller had to convey. The sellers to the present plaintiff had at the time of sale no title to possession. If the Collector refused to take action under s. 2 of the Bhagdari Act, they could never get possession: consequently they could not convey to the plaintiff any title by which she can oust the defendants. They can be ousted by the Collector perhaps, and then if plaintiff can prove the validity of her purchase from the original *bhagdars*, she might perhaps get possession, but she cannot do so in this suit."

Against this decision the plaintiff preferred a second appeal to the High Court.

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*Manekshah Jehangirshah*, for the appellant.—The sale to the defendants is absolutely void. It defeats the object of the Bhagdari Act, which is intended to prevent the dismemberment of a *bhag*. The sale to the defendants cannot be effectuated without dismembering the *bhag*. The ruling in *Ardesir Nasarvanji v. Muse Natha Amiji* (1) is conclusive on the present question. The lower Court has wrongly held that this suit is not maintainable. There is nothing in s. 2 of the Bhagdari Act to prevent any other person than the Collector from suing to set aside an illegal sale. The observations of Pinhey, J., in the case of *The Collector of Broach v. Desai Raghunath* (2) are *obiter dicta*. They were not necessary for the decision of that case.

*Govardhan M. Tripati* (with him *Motilal Dalpatram*), for the respondents.—Under s. 2 of Bombay Act V of 1862 the Collector is the only person who can take steps to have an illegal sale of a *bhag* set aside. A sale of a share or portion of a *bhag* is voidable, and not void. It is good, until it is set aside. In the present case the Collector has taken no action to set aside the defendants' purchase. They are in joint possession of the whole *bhag*, and so long as it is not dismembered, neither the Collector nor any other person can oust the defendants.

#### JUDGMENT.

BIRDWOOD, J.—The plaintiff sues, as purchaser of a *bhag* in a *bhagdari* village, to recover possession, with mesne profits, of [207] the *bhag* and the houses appurtenant thereto, of which the defendants in this case and the defendants in two other cases are in joint possession under Court sales at which they severally purchased the interests of three of the four sharers in the *bhag*. The present defendants purchased the undivided one-fourth share of Adam Bagas on the 27th April, 1871, and were put into possession in 1871 or 1872, and have remained in possession ever since, without any objection from the Collector, who has entered the whole *bhag* in the names of the defendants in the three cases as an undivided *bhag*.

The plaintiff purchased the whole *bhag* from the four original sharers in 1878, and the suit was brought on the 26th April, 1883. The Assistant Judge has held that the sale to the defendants was void under s. 1 of Bombay Act V of 1862, and that the suit, regarded as one for possession and not as one to set aside the sale to the defendants, was not barred by time. He, however, rejected the claim, on the ground that the Collector had not taken action, under s. 2 of the Act, to set aside the sale, and that, as he was the only person who, according to the ruling in *The Collector of Broach v. Desai Raghunath* (2), could take any such action, the defendants could not be ousted by any one else. In the case referred to by the Assistant Judge, the point really ruled was that no law of limitation applied to proceedings taken by a Collector under s. 2. The further opinion expressed by Pinhey, J., in that case we are not prepared to adopt, inasmuch as s. 2 of the Act contains no provision barring the right of any person prejudicially affected by an illegal sale from suing to set it aside.

We think that the present suit is maintainable, and that the question really is, whether the defendants' purchase is opposed to s. 1 of the Act. In the case of *Ardesir Nasarvanji v. Muse Natha Amiji* (1), where the present plaintiff's husband, Ardesir, was the purchaser at a nominal sale

(1) 1 B. 601 (606).

(2) 7 B. 546 (551).

of a whole *bhag*, in which the judgment-debtor whose interest was sold had only an undivided share, Melvill and Kembell, JJ., declined to determine the question whether the attachment and sale of an undivided [208] share in a *bhag* would be contrary to the letter or spirit of Bombay Act V of 1862. They held it sufficient in that case to say that, even if such a sale were lawful, the purchaser would not be entitled to insist upon the possession of any particular portion of the *bhag*, house or *gabhan*, but could only sue for partition; and the question would then arise, whether, consistently with the provisions of Bombay Act V of 1862, such a partition could be made. In a previous case, *Veribhai v. Raghabhai* (1), the same Judges had held that there was nothing in the Act which debarred a Civil Court from making a decree for the partition of *narvadari* land among *narvadars*. In second appeal No. 519 of 1882, the purchaser of an undivided share sought to enforce a division of the *bhag*. The Assistant Judge, Mr. Hammick, held that the purchase was not illegal, because the *bhag* still remained entire, but that the result of the partition which the plaintiff was attempting to enforce was rendered illegal by the Act. His decision against the plaintiff was confirmed by the High Court, but there is nothing to show whether his opinion as to the legality of the purchase by the plaintiff was concurred in.

In the present case, however, we must decide the question left undecided in *Ardesir v. Muse Natha*, and we are of opinion that s. 1 of the Act does not prohibit the share of an unascertained share of an undivided *bhag*. No doubt, the language of the section seems comprehensive enough to include such shares of *bhags* within the prescribed prohibition; for the section provides that no "portion" of a *bhag* shall be liable to sale by the process of any Civil Court; and an undivided share is as strictly a portion of a *bhag* as a share actually divided off by metes and bounds; but any interference with the sale of undivided shares does not appear to be within the intended scope of the Act. The mischief at which the Act aims is the dismemberment of *bhags*,—that is, their physical dismemberment. This seems to us clear from the language of the preamble and of s. 3. The preamble sets forth the danger to the permanence of the *bhagdari* and *narvadari* tenures arising from the increasing practice of attachment and sale by civil process of the homesteads and building-sites [209] appertaining to constituted *bhags* or recognized sub-divisions of such *bhags* or shares in *bhagdari* and *narvadari* villages. The danger referred to is that of separating tangible immoveable property from other property to which it has been appendant. One of the main objects of the Act is to prevent the sale of homesteads and building-sites apart from the *bhags* to which they are appendant, because such sales would necessarily effect a dismemberment of *bhags*. But the sale of an unascertained share would not necessarily lead to a dismemberment: for the purchaser of the share might be admitted by the other sharers to joint enjoyment. In the present case, there has as yet been no dismemberment of the *bhag* by the sales to the defendants. If the purchase by the defendants in the present case is legal, as we think it is, and if they obtained peaceable possession under it of a whole *bhag*, as they did, there is no provision of the Act which would warrant their eviction by a purchaser of the whole *bhag*. The preamble shows the general scope and intention of the Act, and the view we have expressed regarding it is confirmed by a reference to the provisions of s. 3, which relates to private alienations of shares, and provides that;

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whenever the Collector or other chief revenue officer of the district finds, upon due inquiry, that any person is in possession of any portion of any *bhag*, &c., other than a recognized sub-division, it shall be lawful for him to summarily remove such person from such possession and to restore the possession to the person entitled thereto. This language could only apply to property of which it was possible to have physical possession, not to a share in undivided property; and it indicates very clearly the real intention of the Act.

We are of opinion, therefore, that the sale to the defendants cannot be set aside. If the plaintiff can induce the defendants in the three cases to give her joint possession with them, that is a matter for them to consider. Having regard to the Assistant Judge's remarks as to the nature of the plaintiff's purchase, which seems to have been of a speculative character, we are not disposed to allow her now to amend her plaint and ask for joint possession, even if it were open to us to permit such a course. We confirm the decree of the Assistant Judge with costs.

[210] PARSONS, J.—This appeal and appeals Nos. 145 and 146 may be considered together. The facts are undisputed. Four brothers—Adam Baji, Asmal, and Hasan—were joint owners of a *bhag* in the village of Sankvad, in the Broach Collectorate. In execution of decrees obtained against the brothers the *bhag* was attached, and the right, title and interest of Adam, Asmal, and Hasan respectively therein was sold in 1871 by the Collector acting under the orders of the Civil Court and purchased by the defendants. The defendants were placed in possession of the whole *bhag*, and it was entered in their names in the revenue books. The plaintiff in 1878 purchased the whole *bhag* from the three brothers aforesaid and the widow of the fourth, Baji, and in 1883 brought this suit to oust the defendants and obtain possession. Her allegation is that, as the sale to the defendants is illegal and null and void under s. 1 of Bombay Act V of 1862 as being a sale of a portion of a *bhag*, her purchase alone is legal as a purchase of the whole *bhag*. It has to be considered, therefore, whether the sale to the defendants is void under s. 1 of the Act, and whether plaintiff can rely on her purchase to oust them from their present possession of the whole *bhag*.

The object and intention of the Act, as stated in the Act itself (s. 5), is to prevent the dismemberment of *bhags* or recognized sub-divisions thereof. The dismemberment to be avoided is, I think, a physical dismemberment, and not a mere increase or decrease in the number of the persons who may from time to time be owners of the *bhag*. For instance, in a case in which there are joint owners of a *bhag*, the action of any of them in admitting partners or in selling their shares could not be said in itself to dismember the *bhag*, for the *bhag* would remain as before; the number even of its owners might be the same though it might be increased or decreased. But if the owners separated off a portion of the *bhag* and sold it, and placed the purchaser in possession, then by the sale of that portion the *bhag* would be dismembered, for it would be split up into two distinct holdings. In the same way, I must hold that a portion of a *bhag* must, for the purposes of the Act, be construed to mean a separated portion of a *bhag*,—that is, a visibly separate portion capable of distinct and separate possession,—and that a sale of a portion [211] must be a sale of such a separated portion and not a sale which merely effects a change in the position, *status* or number of those who own the *bhag* and leaves the *bhag* in exactly the same whole condition as it was before the

sale. This is clear as well from the object of the Act as from the provision in s. 3, which allows the Collector summarily to remove any person in possession of a portion of a *bhag*.

Now in this case four persons jointly owned the *bhag*; it could not, therefore, be said of any one of them that he owned a distinct portion. When the right, title, and interest of three of the sharers was sold to the two defendants, the *bhag*, in place of being owned by four persons, was owned by three. There was thus a change in the number of the owners. Still, however, the condition of the *bhag* itself remained the same, for no one of the three could say that he owned any distinct portion. As with the four owners, so with the three, each would have an interest in the whole, but no one would have the right to any specific portion. I do not think, therefore, that the alienation of the right, title, and interest of three out of the four co-sharers is contrary either to the spirit or the letter of the Act; it would not in any way dismember the *bhag*; it would not convey to any one any distinct portion of the *bhag*, and it would not place any person in possession of any such portion.

It is noteworthy that this is the first case of its kind that has come before this Court. In all the other reported cases—*Ardesir Nasarvanji v. Muse Natha Amiji* (1), *The Collector of Broach v. Rajaram Laldas* (2), *The Collector of Broach v. Desai Raghunath* (3) and *Gulab Narotam v. The Secretary of State for India in Council* (4)—the alienation was of a separated share of which there had been separate possession. In the earliest of the cases cited, however, the possibility of the legality of the alienation of an undivided share was hinted at, and I am of opinion that such an alienation is legal. The Legislature may well have enacted that it shall be unlawful to split up an estate, such as a *bhag*, into innumerable small separate holdings, just as it has enacted [212] that ordinary land shall not be divided into survey numbers of a less extent than a certain minimum (Bombay Land Revenue Code, 1879, ss. 113, 98); but very express words would be needed to enable me to hold that it intended in the case of a *bhag* held by several joint sharers to prohibit any of those sharers from alienating his undefined interest therein. There are no such words in the Act itself, and since such an alienation would in no way defeat the object or intention of the Act, I cannot hold that it is prohibited by the Act.

It has been argued that the purchaser in such a case would acquire nothing but a right to sue for partition, which right could not be enforced under the Act; but the Courts have nothing to do with that, as has been held in *Veribhai v. Raghobhai* (5). The *bhag*, moreover, might be one with recognized sub-divisions, and a partition might be capable of being so carried out as to give one to each sharer, so that no provision of the Act would be infringed. It might also happen that the purchaser might be allowed by the other sharer or sharers to obtain possession of the whole *bhag* as was done in the present case, so that his possession under the Act would be legal. I hold, therefore, that the sale, in 1871, of the title of the three brothers in the joint *bhag* was not a sale of a portion of a *bhag* such as would be void under s. 1 of the Act. Clearly, then, the plaintiff cannot rely on her purchase to oust the defendants from the possession of the whole *bhag*. In the undivided three-fourths of the *bhag* she has no title at all, since the right, title and interest therein of her vendors had been sold long prior to her purchase. In any claim she may have under her purchase to the remaining one-fourth, I am not disposed in this suit to

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assist her, if I could, by allowing any amendment of the plaint or otherwise, seeing that the sale to the defendants took place in 1871, that they have been in possession of the whole *bhag* ever since that time, that the Collector has not moved to have the sale set aside, but has entered the names of the defendants in his register, and that according to the findings of the lower Courts, the plaintiff has taken the sale-deed from the three brothers and the widow of the fourth, not for any [213] consideration, but with a view to raise up litigation and to defraud the defendants by depriving them of the property they have purchased. I concur, therefore, in confirming the decree of the lower appellate Court with costs.

*Decree confirmed.*

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APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

GULABBHAI GOPALJI AND OTHERS (*Original Defendants*), *Applicants v.*  
JINABHAI RATANJI (*Original Plaintiff*), *Opponent.\**  
[3rd May, 1888.]

*Mamlatdars' Act (Bombay Act III of 1876), s. 15, cl. (c)—Suit for injunction—Person dispossessed in execution of decree—His remedy by suit or application under s. 332 of the Code of Civil Procedure (Act XIV of 1882)—*

A person is not entitled to claim relief (by way of injunction) under s. 15, cl. (c) of the Bombay Mamlatdars' Act (III of 1876), if he is not in possession at the time of the suit.

A person, dispossessed of his land in execution of a decree of a Civil Court against a third party, should proceed for the alleged obstruction of his possession, not by a suit in the Mamlatdar's Court, but by an application under s. 332 of the Code of Civil Procedure (Act XIV of 1882), or by a regular suit.

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

One Jinabhai Ratanji filed a suit in the Mamlatdar's Court for an injunction restraining the defendants from obstructing him in his possession and enjoyment of certain lands. The Mamlatdar found that the defendants had obtained possession through the Civil Court in execution of a decree against a third person. But he was of opinion that the possession had been improperly obtained, as the bailiff, who executed the decree, had made no inquiry whatever of the village officers as to ownership of the lands in question. He, therefore, granted the injunction prayed for.

Against this decision the defendants applied to the High Court under its revisional jurisdiction.

[214] A rule *nisi* was issued to the plaintiff, calling upon him to show cause why the Mamlatdar's order should not be set aside as being illegal and *ultra vires*.

*Manekshah Jehangirshah* showed cause.

*Nagindas Tulsidas*, *contra*.

\*Application under Extraordinary Jurisdiction No. 3 of 1888.