1888
JAN. 11.

CRIMINAL REVISION.

15 B. 11.

belonged were the aggressors. The appeal is dismissed, and the conviction and sentence are confirmed."

The accused applied to the High Court for a revision of the District Magistrate's order.

Branson (with him *Narayan Ganesh Chandavarkar* and *Vasudev Gopal Bhandarkar*) for the accused.—The order rejecting our appeal is clearly opposed to the provisions of s. 367 of the Code of Criminal Procedure. No reasons are given for rejecting the appeal.

JUDGMENT.

BIRDWOOD, J.—The District Magistrate in dealing with the appeal before him has failed to comply with the provisions of ss. 367 and 424 of the Code of Criminal Procedure; and from his judgment, as it stands, we are unable to say that he has duly considered the evidence in the case. He does not, for instance, refer at all to the material circumstance that the complainant Mudapa, when first complaining to the police patel, did not mention the applicant as taking part in the affray, although the applicant seems actually to have been present when the complaint was made.

[13] It is impossible to say that the applicant may not have been prejudiced by the omission of the District Magistrate to comply with the requirements of s. 367 of the Code of Criminal Procedure. This being a case, therefore, to which s. 537 does not apply, we follow the rulings in *Kamruddin Dai* v. *Sonatun Mandal* (1) and *In the matter of the Petition of Ram Das Maghi* (2); and reverse the District Magistrate's order, and direct him to rehear the appeal.

Order reversed; case remanded.

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15 B. 13.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Hart.

APPAJI BAPUJI (*Original Defendant*), *Appellant v.* KESHAV SHAMRAV AND OTHERS (*Original Plaintiffs*), *Respondents*; AND

KESHAV SHAMRAV AND OTHERS (*Original Plaintiffs*), *Appellants v.* APPAJI BAPUJI (*Original Defendant*), *Respondent.**

[20th January, 1890.]

Vatan *service land, alienation of—Gordon Settlement in the Southern Maratha Country —Effect of the application of, to service* vatan—*Alienability of such* vatan *where services have been dispensed with—Construction—Vatandars' (Bom.) Act III of* 1874—*Court sale of right, title and interest of the father, effect of.*

One Rudro and his sons were members of an undivided family. In execution of certain money decrees passed against Rudro the lands in dispute were sold to various persons, from whom they were afterwards bought by the defendant. In 1875 Rudro died, and in 1887 his sons and grandson filed this suit against the defendant to recover the lands. They alleged that the lands were service *vatan* lands and inalienable, and that the execution sales affected nothing except Rudro's life-interest, and that on Rudro's death they (the plaintiffs) became entitled. They also contended that, even if the Court should find the lands were

* Cross Appeals Nos. 72 and 79 of 1888.

(1) 11 C. 449.

(2) 13 C. 110.

1890
JAN. 20.

APPEL-
LATE
CIVIL.

15 B. 13.

not service *vatan* lands, they were at all events ancestral property, and that the plaintiffs' interests therein were not affected by execution sales under decrees to which they were not parties.

Held, on the evidence, that although the sale proclamation and sale certificate spoke only of the right, title and interest of Rudro as being offered for sale and purchased by the auction-purchasers, the entire family interest in the property was, as a fact, the subject of the auction sales.

The words "right, title and interest" of the judgment-debtor are ambiguous words, which may either mean the share which he would have obtained on [14] partition, or the amount which he might have sold to satisfy his debt; and it is in each case a mixed question of law and fact to determine what the Court intended to sell and what the purchaser expected to buy.

Held, also, on the evidence, affirming the judgment of the Court below, that, with the exception of two fields, none of the lands in question were service *vatan* lands.

Held, further, that the two fields, which were so excepted, and which had been the subject of a "Gordon Settlement" in 1864, remained inalienable *vatan* lands, although the services in respect of them had been dispensed with.

The settlements made under Acts II and VII of 1863 made the lands thenceforth transferable as the property of the holder—*Radhabai* v. *Anantrav* (1).

What is termed a "Gordon Settlement" was an arrangement—entered into in 1864 by a Committee, of which Mr. Gordon, as Collector, was chairman, acting on behalf of Government—with the *vatandars* in the Southern Maratha country, by which the Government relieved certain *vatandars* in perpetuity from liability to perform the services attached to their offices in consideration of a "*judi*" or quit-rent charged upon the *vatan* lands. These settlements were given binding legal effect by cls. 2 and 3 of s. 15 of Act III of 1874.

At the time when these settlements were made, lands were inalienable by Reg. XVI of 1827 (as construed by the Courts) beyond the life of the actual incumbent, and the Gordon Settlement of 1864 (unless where it was otherwise specially provided by a particular settlement) was not intended by either party to those settlements to convert the *vatan* lands into the private property of the *vatandar* with the necessary incident of alienability, but to leave them attached to the hereditary offices which, although freed from the performance of services, remained in tact, as shown by the definition of hereditary office in the declaratory Act III of 1874.

[R., 21 B. 616 (618); 34 B. 91=11 Bom. L.R. 1102 (1107)=4 Ind. Cas. 249; 37 B. 81=14 Bom.L.R. 797=17 Ind. Cas. 170; 3 Bom. L.R. 322; D., 25 B. 470 (475).]

THESE were cross-appeals from the decision of Rav Bahadur Jayasatyarao Bodrao, First Class Subordinate Judge of Belgaum.

Certain money decrees were passed against one Rudro, who lived with his five sons as a member of an undivided family. In execution of these decrees against him the lands in dispute were sold to various persons, from whom the defendant subsequently purchased them.

In 1875 Rudro died, and in 1887 the plaintiffs (his sons and grandson) filed this suit against the defendant to recover the lands. They alleged that the lands were service *vatan* lands and that, therefore, the sales in execution of the money decrees against Rudro passed only his life estate in them, and that on Rudro's death they (the plaintiffs) became entitled. They also contended that, even if the Court should find that the lands in [15] question were not service *vatan* lands, they were, at all events, ancestral property, and that, as they had not been parties to the suits in which decrees had been passed against Rudro, their interests were not affected by the sales in execution. They, lastly, alleged that the decrees against Rudro had been fraudulently obtained.

(1) 9 B. 198 (215).

The defendant denied that the lands were service *vatan* lands, and contended that, even if they were, the services had ceased, and that, consequently, the entire estate in the lands, including the plaintiffs' interest, could be sold in execution of the decrees against Rudro; that the absolute property in the lands had passed to the purchasers at the execution sale from whom he had bought; and, lastly, that the plaintiffs' claim was barred by limitation.

The Subordinate Judge, before whom the suit came in the first instance, was of opinion that the only ground on which the plaintiffs could impeach the decrees against Rudro in this suit was that they were passed in respect of debts contracted by loans for illegal or immoral purposes. With reference to this point he framed the first five issues. The remaining issues were as follows:—

"6. Were the lands claimed, or any of them, of the *vatan* property of the plaintiffs' family?

"7. Can the Court sales of such lands conclude the plaintiffs also beyond the death of Rudro?

"8. If not, does the Limitation Act operate adversely against the plaintiffs, and if it does, from what date?"

With regard to the nature of the lands, which were situated in the village of Amangi, the plaintiffs' case was that all the lands were service lands until the 23rd June, 1864, at which date the services were remitted in consideration of the lands being thenceforth charged with a three-anna quit-rent under what was known as the Gordon Settlement. It was not disputed that the plaintiffs' family were the *mutalik desais* of the *desai* of Wantmuri, and that a dispute had been going on for generations between the *desai* and the plaintiffs' family with regard [16] to the village of Amangi, which the *desai* had always regarded as part of his *desgat vatan*. It was proved that before the Inam Commission in 1851 the plaintiffs admitted that they held twenty-four *bighas* of *chahurat* land in the village of Amangi, as *mutalik desais*, but with that exception they claimed the entire village as their "*sarv inam*" and included it in their list of property "other than *inam*." In other proceedings at a later period a similar distinction was made by the plaintiffs between the *chahurat* lands in the village which they claimed to be their *mutalik desai vatan* and the rest of the village in respect of which they did not claim to be *vatandar*. In 1864 a settlement was arrived at with the Government, and subsequently to that date the Government treated the *mutalik* as merely respresenting the *desai* in respect of the village; but, as being independent *vatandar* in respect of *chahurat* fields, the actual payments of *judi* since 1864 were made by plaintiffs' family, but Government apparently accepted payment from them on behalf of *desai*. In 1884 the settlement *sanad* of the whole village was issued, and was in favour of the *desai*.

It appeared at the hearing that two of Rudra's sons had taken an active part in endeavouring to prevent the defendant from obtaining possession of the lands in dispute by impeaching the decrees under which the sale took place, and by setting the Collector in motion under Act III of 1874 and by carrying suit alleging the lands to be service lands.

The Subordinate Judge held that none of the lands sued for were the plaintiffs' *vatan*, except the *chahurat* lands; and that the plaintiffs had failed to show that the debts in respect of which the decrees against

1890
JAN. 20.
APPELLATE CIVIL.
15 B. 13.

Rudro had been passed, had been contracted by him for immoral or improper purposes. He accordingly dismissed the suit, except as to the *chahurat* lands.

Both parties appealed from the decree.

Telang (with *Inverarity*), for defendant:—As to the alienability of the *vatan* beyond Rudro's lifetime, the case of *Radhabai* v. *Anantrav* (1) decides that where services have ceased, the *vatan* is alienable. Here they ceased in 1864.

[17] The defendant is in possession, as purchaser, of all that was sold in execution of decrees against Rudro. At that sale all the right, title and interest of Rudro was sold. What really passed by the sale is a mixed question of law and fact, and can only be decided by having regard to the circumstances of the case; Mayne's Hindu law, (4th ed.,) para. 331. Rudro represented the plaintiffs who were aware of the sale. The plaintiffs have abandoned their contention that Rudro's debts were contracted for immoral purposes. The defendant is entitled to retain the lands, and the plaintiffs' claim must fail.

Latham (Advocate-General), *Shamrao Vithal* with him, for the plaintiffs.—Is *Radhabai* v. *Anantrav* (1) a conclusive authority as to the alienability of *vatan* lands after the services have ceased? The decision in that case was not with reference to the Survey Settlement Act II of 1863. It had no reference to Act III of 1874, which, we contend, makes the *vatan* inalienable, even though the services have been discontinued: see cl. 10 of s. 15 of Act III of 1874. The official character remains, although the services have been dispensed with. That was the effect of the "Gordon Settlement" wherever it was applied. We submit, therefore, that these lands were not alienable.

Next, we submit that, in any event, this was family property, and that by the sale in execution of decree against Rudro nothing passed except Rudro's interest in the property. He had five sons, and, therefore, his share was one-sixth. The decrees were for debts on bonds on which he was personally liable. We rely on the sale proclamation and the sale certificate as showing that only his "right, title and interest" was sold.

JUDGMENT.

SARGENT, C.J. (after stating the facts and issues continued):—The Court below found that none of the lands in question were service *vatan* lands, except fields Survey Nos. 70 and 102, that the sales of the latter fields did not affect the plaintiffs' interests in them, and that their right to recover possession of them was not barred. But that, as to the rest, the Court found that their alienation could not be disturbed, the plaintiffs having failed to show that the decrees for which they had [18] been sold were for debts contracted by Rudro for immoral or fraudulent purposes, and accordingly rejected the plaintiffs' claim, except as to fields Nos. 70 and 102, of which the Court awarded possession with mesne profits. Both parties have appealed against this decree.

The plaintiffs by their counsel have now abandoned their contention that the debts on which the decrees were passed were contracted for an illegal or immoral purpose, but they urge that, as a matter of fact, what was offered for sale and purchased at the auction sales of the several properties in question was only the life-interest of Rudro. This objection was not

(1) 9 B. 198.

taken by the plaint, which is confined to disputing the alienability of the properties beyond Rudro's interest, first, on the ground of their being service *vatan* lands, and secondly, on the ground that they were, at any rate, ancestral, and could not be sold behind the plaintiffs' backs so as to affect their interests in them. Nor was any issue expressly framed at the trial to raise the question, as it is plain that issue No. 3 was intended only to raise the question whether the plaintiffs could claim to have the decrees set aside so far as they affected their interest, and that such was the view taken of it by the Court below is shown by the judgment itself. Under these circumstances it may well be a question whether this point can now be taken for the first time on regular appeal, but, in any case, we entertain no doubt that although the proclamation and certificates of sale under which defendant claims speak only of the "right, title and interest" of Rudro as being offered for sale and purchased by the auction-purchaser, the entire family interest in the property was, as a fact, the subject of the auction sales in question. The conclusion to be deduced from the various and with all respect the somewhat conflicting decisions of the Privy Council is, we think, correctly stated by Mr. Mayne in his Hindu law and Usage, 4th ed., p. 331, *viz.*, "that the words 'right, title and interest' of the judgment-debtor are ambiguous words, which may either mean the share which he would have obtained on partition, or the amount which he might have sold to satisfy his debt, and that it is in each case a mixed question of law and fact to determine what the Court intended to sell and what the purchasers expected to buy."

[19] The correctness of this view derives corroboration from the remarks of their Lordships of the Privy Council in the most recent unreported judgment delivered on 20th November, 1889, in the case of *Rai Babu Mahibir Pershad* v. *Rai Moheshwar Nath Sahai* where the Court say: "That the Procedure Code at that time (meaning previous to 1877) required that the property sold in execution should be described as the right, title and interest of the judgment-debtor, and it has been held in many cases that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import that when the father of a joint family is the judgment-debtor nothing is sold but his interest as co-sharer." It is a question of fact in each case.

Here the documentary evidence, which is set out in detail at pages 4 and 5 of the Subordinate Judge's judgment, can leave no doubt that Narayan and Nilkanth, the two sons of Rudro, who were of age at the time of their father's death in 1875 and had taken an active part in the execution proceeding, considered that the entire property in the lands had been sold in execution of the decrees against Rudro and purchased by the auction-purchasers. That evidence shows that although Rudro's sons were most anxious to prevent the defendant both from getting and retaining possession of the lands sold under those decrees, they confined themselves either to impeaching the decrees or to setting the Collector in motion under Act III of 1874, or bringing suits on the ground that they were service lands. This conduct on the part of Rudro's sons, who were of age, and, which, as shown by the judgments in *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden*(1) and in the case above referred to, has an important bearing on the question, corroborated as it is by the

(1) 16 I. A. 1=12 M. 142.

1890
JAN. 20.

APPEL-
LATE
CIVIL.

15 B. 13.

absence of any distinct allegation in the present plaint to the contrary, can, we think, leave no doubt that all parties considered that the thing put up for sale was the entire interest of the family in the properties in question.

Passing to the important question between the parties as to the character of the lands in dispute, we see no reason to differ from [20] the conclusion arrived at by the Subordinate Judge that only fields Nos. 70 and 102 were service *vatan* lands. The plaintiffs' case is that all the lands were service lands up to 23rd June 1864, when the services were remitted in consideration of the lands being thenceforth charged with a three-anna quit-rent under what is known as the Gordon Settlement. It is not disputed that the plaintiffs' family were the *mutalik desais* of the *desai* of Wantmuri, and that a dispute had been going on between the *desai* and the *mutaliks* of plaintiffs' family for generations regarding the village of Amangi in which the lands in question are situated, and which the *desai* has always regarded as part of his *desgat vatan*. In the enquiry in 1851 before the Inam Commission the plaintiffs admitted they held 24 *bighas* of *chahurat* land in the village of Amangi as *mutalik desais*, but claimed the entire village of Amangi with that exception as their "*sarvinam*" and included it in their list of property "other than *vatan*." In 1856 Colonel Etheridge on the regular inquiry under Act XI of 1852 considered that the Government could only recognize the *desai*, but directed him to file a suit against the *mutalik* and obtain the *vahivat*, and that in the meantime "the village should be continued along with the district officer's *vatan* of the Chikodi *desai*" as *sarv inam* for ever, and since then the village has been so entered in the Government records. In 1861 the *desai* filed his suit to recover the village from the present plaintiffs. In their written statement, the plaintiffs claimed it as their *sarv inam* and not as part of their *mutalik desai vatan*, and in 1868 Mr. Shaw delivered judgment, holding that the plaintiffs had been in adverse possession of the village for thirty years and more, and that the suit was barred.

In the meantime the matter had come before Mr. Gordon in 1864, when a settlement was arrived at with Government, the details of which are stated by Dr. Pollen in his judgment in suit No. 918 of 1885. He says :—

"Exhibit 93 in this case is an intimation to the plaintiff's father Rudro from the Mamlatdar of Chikodi informing him that the settlement Committee was sitting, and that he was at liberty to appear before it. Exhibit 94 is a statement made by [21] Rudro before Mr. Gordon on 1st March, 1864, in which he agreed to pay three annas in the rupee as *judi* upon the whole village of Amangi and also upon the *chahurat* fields in lieu of service. There is nothing to show what orders were passed at the time; but from the mode in which the individual field and the entire village were shown in the Collector's books and from the settlement *sanads* which were afterwards issued it appears that Government continued to treat *the mutaliks as merely representing the desais in respect of the village, but as being independent vatandars in respect of the individual chahurat, fields*. Exhibit 199 is the *sanad* issued in 1885 in respect of fields Nos. 69, 82, 80 (and two others) in favour of plaintiffs' family. But Ex. 88 is the settlement *sanad for the whole village* issued in 1884, and is in favour of the *desai* of Wantmuri. The actual payments of *judi* since 1864 have, no doubt, been made by the plaintiffs' family ; but Government have apparently accepted payment from them *on behalf of the desais*. Such

payment since 1864 does not constitute the plaintiffs *vatandars*. Previously to 1864 it does not appear that plaintiffs rendered service on account of the village. Any service they rendered was clearly on account of the separate lands which they held as their *'mutalik desai vatan'*."

This summary of proceedings relating to the village shows that until recently plaintiffs' ancestors have never claimed to be *vatandars* in respect of the village of Amangi (except as regards certain lands which they claimed to be their *mutalik desai vatan*), and that they have never been regarded by the Government as such, and there is no evidence to show that the plaintiffs' ancestors acquired the lands as *mutalik desais* or that they ever performed service in respect of it, and we agree with Dr. Pollen in his conclusion that under these circumstances, as the plaintiffs' title to the village as against the *desai* of Wantmuri has been established by Mr. Shaw's decree, whatever the tenure of the village may originally have been, it cannot be regarded as having been service *vatan* in the hands of Rudro, with the exception of the *chahurat* lands, which were always admitted by the plaintiffs' ancestors to be part of their *mutalik desai's vatan* and were always treated as such by Government in their **[22]** dealings with them, except in the interval between 1850 and 1874.

With respect to these fields Nos. 70 and 102 forming part of the *chahurat* lands, the defendant by his appeal contends that when he purchased them in 1873 in execution of the decree of Huilgolkar they were treated by the Government as *khalsa* lands; but that even if they had been service lands, they were no longer inalienable after the settlement in 1864. As to the first point, we agree with Dr. Pollen in his judgment in suit 918 of 1885 that the circumstances of some part of the *chahurat* lands as being in excess of 24 *bighas* having had assessment levied on it by Government after 1860 for some years could not change their real character as between members of the family. It was presumably done by mistake, as it was subsequently corrected by Government in 1874.

As to the second objection, that the lands became alienable by the incumbent for the time being after the settlement, the Subordinate Judge disposed of it in favour of the plaintiffs, but quite independently of the effect of the settlement in 1864, which would appear to have escaped his attention, and has still to be considered. On this point both parties have referred to the judgment of the District Judge, Dr. Pollen, in suit 918 of 1885 in the Chikodi Court in which the question is fully discussed. It has been contended for the defendant that the Full Bench ruling in *Radhabai* v. *Anantrav* (1) is conclusive on the matter, and that it was so regarded by the Division Court in second appeal No. 224 of 1885. Dr. Pollen, however, has pointed out, and we think correctly, that the actual decision in *Radhabai* v. *Anantrav* had reference exclusively to a settlement under Act II of 1863, which it was supposed by the Court (although erroneously it is now said) was the nature of the settlement in that case; and although the Court expressed its opinion on the question as to the effect on general principles, as regards alienability of serivce lands attached to a public office, of such lands being freed by Government from liability on account of such services, we think the plaintiffs are right in their contention that the nature and effect of a Gordon Settlement has still to be determined.

[23] What is termed a Gordon Settlement was an arrangement—entered into in 1864 by a Committee, of which Mr. Gordon, as Collector,

(1) 9 B. 198.

1890
JAN. 20.
APPELLATE CIVIL
15 B. 13.

was chairman, acting on behalf of Government—with the *vatandars* in the Southern Maratha Country, by which the Government relieved certain *vatandars* in perpetuity from liability to perform the services attached to their offices in consideration of a "*judi*" or quit-rent charged upon the *vatan* lands. Any doubt there might have been as to the binding legal effect of these settlements either as regards Government or the *vatandars* or their successors was set at rest by s. 15, cls. 2 and 3 of Act III of 1874, which provides that they should have the same force as if made under s. 15 of the Act which expressly contemplates such settlements being made by the Collector. At the time when the Gordon Settlements were made, service lands were regarded as the remuneration of the hereditary officer and made inalienable by Regulation XVI of 1827 (as construed by the Courts) beyond the life of the actual incumbent and the question, therefore, is how far this quality of inalienability of *vatan* lands was affected by these settlements. The settlements made under Acts II and VII of 1863 could leave no doubt, as pointed out in *Radhabai* v. *Anantrav* (1) that the lands were thenceforth to be transferable as the property of the holders. But in the case of a Gordon Settlement, the precise nature of which is not to be gathered from any Act of the Legislature or any formal document containing the terms of the settlement, the matter is necessarily not so clear. However, the reports of Mr. Gordon's Committee on the Satara and Poona Districts and their correspondence with Government can, we think, leave no doubt that the settlements made by that Committee, unless it was otherwise specially provided by any particular settlement, were not intended by either party to those settlements to convert the *vatan* lands into the private property of the *vatandars* with the necessary incident of alienability, but to leave them attached to the hereditary offices, which although freed from the performance of service remained intact, as shown by the definition of hereditary office in the declaratory Act III of 1874. There is **[24]** no doubt, as pointed out in *Radhabai* v. *Anantrav*, a presumption against such an intention on the part of Government as creating a perpetuity, but we think it is sufficiently rebutted by the above evidence regarding these settlements in the Southern Maratha Country. In the present case there in no reason for inferring a contrary intention either from the cortemporary documentary evidence bearing on the settlement, or from the *sanad* granted by Government in 1885 in pursuance of such settlement. We must, therefore, confirm the decree of the Court below, with costs on appellants.

Decree confirmed.

(1) 9 B. 198 (215).