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PRIVY COUNCIL.

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PRIVY COUNCIL.

PRESENT :

Lord Hobhouse, Lord Macnaghten, Sir B. Peacock, Sir R. Couch, and Mr. Shand.

[*On appeal from the High Court at Bombay.*]

DOSIBAI (*Appellant*) *v.* ISHVARDAS JAGJIVANDAS AND ANOTHER (*Respondents*). [23rd January and 7th February, 1891.]

Construction of grant of villages "as jaghir"—Attachment in execution of decree—Sale under attachment in previous proceedings.

When a *jaghir* is granted in indefinite terms, it is taken to be for the life only of the *jaghirdar*; but when it is to the grantee "and his heirs," and there is nothing to control the ordinary meaning of the words, he takes an absolute interest.

That *jaghirs* are to be considered life tenures only, unless otherwise expressed in the grant, is laid down in Bengal Reg. XXXVII of 1793, s. 15. It is the law also in Bombay and other parts of India.

Property already under attachment at the suit of the creditor to enforce part of a debt accrued due in a mortgage transaction at an earlier period, was sold in satisfaction of his decree for instalments subsequently due by the same debtor. A second attachment would have been a mere formality, and was not material to the validity of the sale.

[D., 7 C.L.J. 202 (213).]

APPEAL from two orders (9th May, 1884 and 7th July, 1885 (1)), whereby an order (5th November, 1883) issued in execution of a decree by the Subordinate Judge of Surat was affirmed.

This appeal questioned the legality of the orders of the Courts below for the sale of property in execution of a decree against the appellant, as the representative of Ardasir Dhanjishab Bahadur. The appellant was the widow of Jehangirshah, deceased, in 1859, the son of Ardasir, deceased, in 1856; and the respondents were the successors in title of creditors of Ardasir [223] upon mortgage bonds, and they were holders of decrees charging his estate.

Two questions of law were raised: whether a grant by the Government of villages "as *jaghir*," had conferred on Ardasir an interest saleable in execution of decrees enforcing liabilities against his estate after his death; and whether the sale was, or was not, invalid in consequence of not having been proceeded by attachment under the decree, it having been already at the time of the sale under attachment at the instance of the decree-holders in proceedings taken by them to recover prior instalments due at an earlier stage of the same transaction. The property consisted of four villages; and the *sanad* of 24th November, 1830, granting them, is set forth at pp. 563 and 566 of the report of the appeal to the High Court in I. L. R., 9 Bom., as well as in their Lordships' judgment.

On the 18th July, 1833, Ardasir mortgaged the *jaghir* villages to Shah Dulabhai Hargovandas, the ancestor of the present respondents, as security for a loan of Rs. 85,001, and executed another mortgage in 1847,

(1) 9 B. 561.

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his debt having increased to Rs 2,85,001, agreeing to pay it off by annual instalments of Rs. 15,551. On the death of Ardasir in 1856, suits commenced. In 1863 the successors in title of the original mortgagee obtained a decree against Awabai and Dosibai, as representatives of Ardasir for Rs. 1,99,578, being the principal and interest of seven instalments due under the documents of 1833 and 1847, to be recovered from the *jaghir* and the other properties of the deceased Ardasir. In execution of this decree the property was attached on the 2nd March, 1865.

In 1866 the parties referred to arbitration questions as to the instalments in arrear and those to become due. The award ordered on 3rd December, 1866, that the plaintiffs should recover the sum of Rs. 72,142, for instalments in arrear, and for instalments about to become due, Rs. 1,15,271 by sale of the villages, and all the properties of the deceased. In 1880 the defendants objected to execution, on the ground that the Court had passed no decree upon the award. The plaintiffs then applied to the Subordinate Judge to enter up a decree. On his refusal, the [224] High Court, on 3rd May, 1883, reversed his order (1); and on 11th July, 1883, a decree was made in terms of the award. It is set forth at p. 562 of I. L. R., 9 Bom.

On 21st July, 1883, the decree-holders applied for execution, and that the villages might be sold subject to their right under the decree of 1863. On the 2nd August attachment was ordered. On the 24th of the same month an order for sale was applied for without further proceedings in attachment. The Subordinate Judge agreed in the view that they were unnecessary, and directed that the property should be sold.

Upon this, on the 11th September, 1883, Dosibai applied that the order for sale without attachment should be set aside; and she renewed an objection, before then made, that Ardasir had only a life-interest, which had become extinct. This application was rejected, whereupon Dosibai appealed to the High Court.

On the 9th May, 1884, the High Court made an interlocutory order, holding that the Judge was right in ordering the sale of the villages, so far as the form of executing the decree was concerned. This was one of the orders against which this appeal was preferred; and the judgment is reported at p. 562 of I. L. R., 9 Bom. The High Court, however, sent down an issue to the Subordinate Judge to determine whether Ardasir had, or had not, only a life-interest in the *jaghir* villages.

On the 9th September, 1884, the Subordinate Judge returned his finding that Ardasir had an absolute interest: and the confirmation of the order by the High Court (2) also formed the subject of the present appeal.

Mr. *H. Cowell* appeared for the appellant.

Mr. *J. D. Mayne* and Mr. *T. H. A. Branson*, for the respondents.

For the appellant, it was argued that inasmuch as the correspondence of 1830, between the principal Collector of Surat and the Bombay Government, as well as a minute of Sir John Malcolm, showed that the grant of that year was made subject to the payment of *nazarana* by the successors of Ardasir, although this did [225] not appear on the *sanad*, this requirement went far to show that Ardasir had only a life-interest. The amount of the *nazarana* was not fixed, and the heir could only obtain

(1) *Ishvardas Jagjivandas* v. *Dosibai*, 7 B. 316. (2) 9 B. 561 (568).

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a renewal of the grant on the terms that might be fixed when the succession took place. Reference was made to *Gulabdas Jagjivandas* v. *The Collector of Surat* (1), *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh* (2). Ardasir appeared to have understood the grant to him to be for no more than his life, for in the mortgages there were no words purporting to charge the absolute interest as security, but only his own estate. That the Government so understood the *sanad*, at one time, might be inferred without attributing more to its acts than they might be construed to mean. The proceedings on the succession of Jehangir were referred to; the circular order of 21st July, 1848, and the Resolution of 1861, which, though cancelled in 1877, indicated an opinion adverse to the power of alienating, on the part of the grantee, the absolute interest.

That a *jaghir* must be taken, *prima facie*, to be an estate only for life, although it might possibly be granted upon such terms as to make it hereditary, had been decided; and this agreed with the proposition that the grant being originally of the Government revenue, was resumable on the death of the grantee; although, as intimated in the judgment in I. L.R., 3 Bom., at p. 191, there was often the custom to continue the grant to heirs or successors, on the payment of a fine. The *onus* was on the respondents to show that the grant was intended to be of an hereditary and alienable estate, depriving the Government for ever of the revenue upon the villages.

The right to issue a warrant to sell in execution of a decree, without the previous issue of attachment under that decree, was also questioned. The practical result of the omission of the attachment was that the decree-holder sold, not the property out and out, as he was entitled to do under the present Code, but he sold only the interest in the property subject to a prior decree. The sale was really only of a right to the property on payment of the unsatisfied balance of a former decree. Such a sale was [226] not authorized by the Code, nor by the law of mortgage. If the requirements of the Code had been complied with, the result would have been better prices for the property. If it had been duly attached, the property could have been sold so as to pass an absolute title to the purchaser.

Counsel for the respondents were not called upon.

JUDGMENT.

Their Lordships' judgment, afterwards, on February 7th was delivered by

LORD HOBHOUSE.— There have been a great many proceedings in this suit, and the record is very bulky, but the facts material to the present appeal are few, and the questions short and simple.

On the 24th of November, 1830, the Government of Bombay made a grant to one Ardasir in the following terms:—

"In consideration of the active and zealous performance of the duties entrusted to him by Government, the Honourable the Governor in Council hereby gives and bestows upon Ardasir Bahadur, son of Dhanjishah, and his heirs for ever as *jaghir* the following four villages,— Bhestan and Sonari in the Chorasi Pargana, Kumuara and Boriach in

(1) 6 I.A. 54=3 B. 186. (2) 2 B. 346.

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the Chikhli Pargana, in the zilla of Surat, with the *jama* and *moglai** of the same, now yielding an average net sum of rupees two thousand nine hundred and ninety-two, one quarter and ninety-six reas (2,992,1-96). The revenue of the said villages hereafter, whether more or less, to be collected by the said Ardasir Bahadur and his heirs, from the 5th June, 1830, and such *lavazims* or *haks* as are at present settled on those villages are to be disbursed by the said Ardasir Bahadur in the same manner as heretofore."

Ardasir contracted a large debt, and in the year 1833 he executed a deed giving to his creditor a charge on the four villages. In the year 1847 the debt had increased, and he executed a further charge, coupled with a covenant to pay off the debt by annual instalments. In 1856 he died. The respondents represent his creditor and mortgagee. The appellant represents his heir.

In the year 1861 the mortgagee sued the then heirs of Ardasir, and obtained a decree, dated the 14th November, 1863, to recover the debt then due, nearly two *lakh* of rupees, from the four *jaghiri* villages, and from their income, and from the other properties [227] of Ardasir. In pursuance of this decree an attachment was obtained, and the four villages have ever since remained under attachment.

In the year 1866 fresh instalments and fresh arrears of interest had accrued due, and the parties, having some dispute as to the correct amount, referred the question to a *panch*, who on the 3rd December, 1866, made an award ascertaining the amount due. This award was filed in Court on an application made under s. 526 of the Code, and appears to have been taken as supplemental to the suit of 1861, but no decree was made upon it till the 11th July, 1883, when a decree was passed to the effect that the respondents (representing the creditor and mortgagee) should recover the amounts then mentioned from the four villages and their revenues, and from all other properties of the deceased Ardasir.

In the month of July, 1883, the respondents applied for a sale under the last decree, without any previous attachment; and they claimed to have the property sold, with a reservation of their right under the first decree of 1863, on which they alleged that there was still due Rs. 82,468. It appeared that the four villages were still under attachment in execution of the first decree, and the appellant stated that she was taking steps to have it removed. The Court granted the application, but directed that a previous notice of thirty days should be given and duly proclaimed. That is the order of which the appellant complains. On her appeal the High Court supported the Court below; and she now contends that both Courts are wrong, resting her case on three grounds.

The first ground goes to the substance of the respondents' demand. The appellant contends that the grant of 1830 did not confer an absolute interest on Ardasir, but, being a grant of a *jaghir*, operated as giving a succession of life-interests to him and his heirs for the time being. There is no principle or authority which gives any warrant for such a contention. It is true that when a *jaghir* is granted in indefinite terms, it is taken to be for the life only of the *jaghirdar*. But where there is a grant to a man and his heirs, and nothing to control the ordinary [228] meaning of the words, the grantee takes an absolute interest. The principle that *jaghirs* are to

* "The *moglai* of Bhestan is granted in *jaghir* to Mulna Kutbudin Hussin, and is consequently not included in this grant. Rupees (525) five hundred and twenty-five."

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be considered life tenures only "unless otherwise expressed in the grant" is expressly laid down in the Bengal Regulations. See Reg. XXXVII of 1793, s. 15. It is the law also in Bombay and other parts of India.

The second objection taken by the appellant is that the order for sale should have been preceded by an attachment. The two Courts below held that, in the case of a decree to enforce a mortgage, such as the present one, an attachment is not required, and that the practice is to make an order for sale without one. Their Lordships do not feel called on to go into that. In this case the four villages were under attachment at the suit of the same creditor, and to enforce a portion of the same debt, which had accrued at an earlier period under the same instruments of mortgage. A second order for attachment would be an empty formality and there is no rule which requires it.

The third objection of the appellant is that as the sale has been ordered, not of the whole property free from charge, but with a reservation of the respondents' claim under the first decree, she is damnified, because nobody but the respondents themselves would bid for a property so situated. This objection was not taken in either of the Courts below.

The reason for the reservation is not apparent, nor indeed is the meaning or the effect of the order quite clear. If the objection had been taken in the first Court on the petition which the appellant presented to get the order discharged, very possibly it might have been complied with, and certainly its intention would have been placed beyond doubt. Their Lordships would be very reluctant to give effect to an objection of this kind, taken for the first time when the appellant's case is lodged here, even if it appeared to be of some importance. But it cannot be of any importance. The sale is ordered to realize more than $3\frac{1}{2}$ *lakhs* of rupees, which would exhaust the value of the four villages several times over. The debt is not the debt of the appellant, nor is she interested in its reduction except for the purpose of getting some surplus out of the villages. As it is practically impossible that there should be any such surplus, [229] the question is wholly unsubstantial, and that may be the reason why it was never raised until the present stage of the proceedings.

Their Lordships hold that the appeal should be dismissed with costs, and they will humbly advise Her Majesty accordingly.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow and Rogers.*
Solicitors for the respondents: Messrs. *Payne and Lattey.*