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share in 1869. There is no evidence to show that she took any part in those transactions, which were apparently managed exclusively by the plaintiff, the eldest son, with the tacit consent of Chhaganlal.

It remains to consider the question as to the custody of the *rajseva*. We think that question has been rightly decided by the Subordinate Judge. We think that the findings on issue 8 should be varied by declaring that the plaintiff Uttamram is entitled to take the *rajseva* and keep it, with the property appertaining thereto, as the family idol and the property thereof, which, we agree with the Subordinate Judge, is rightly stated in the inventory attached to the plaint, with liberty to such members of the family as are or shall become *marjadas* to have access to the same for the purposes of worshipping them.

This disposes of all the questions raised by the appeal except as to the costs of the suit, which the Court below has thrown on the estate. As the Court below has found, and we think correctly, that the defendants have failed in establishing any fraudulent or dishonest conduct on the part of the plaintiff in the management of the estate, the rule in ordinary partition suits, that the costs of the suit should be borne by the estate, was properly followed. The decree must therefore be varied in accordance with the remarks made in this judgment and also as to the costs of Bai Krishna, Bai Manchha, and Bai Nandkore, each of which must be calculated on the claims as allowed by this judgment, but subject thereto the decree is confirmed; and we think that parties should pay their own costs of this appeal, except costs of Bai Krishna, which should be paid by the plaintiff.

Decree varied.

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[289] APPELLATE CIVIL.

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

KALIAN MOTI (*Original Plaintiff*), Appellant *v.* PATHUBHAI
FALJUBHAI (*Original Defendant*), Respondent.* [10th March, 1892.]

Talukdars Act (Bombay Act VI of 1888), s. 31, cl. 2—Construction—Retrospective operation—Alienation of estate—Sanction.

A decree upon a mortgage bond passed against part of a *talukdar's* estate on the 15th August, 1887, was transferred under s. 320 of the Civil Procedure Code (Act XIV of 1882) to the Collector for execution. The property was sold on the 5th August, 1889, but the Collector refused to confirm the sale, as the sanction of the Governor in Council under cl. 2, s. 31 of the Talukdars' Act (Bombay Act VI of 1888), which came into force on the 25th March, 1889, had not been obtained.

Held, that the section was not retrospective in its operation, and that the sale should be confirmed, although no sanction had been obtained. When the Act passed, the plaintiff had already acquired a vested right by the decree to have the property sold, and the presumption was that the Legislature did not intend to interfere with that vested right. That presumption was not rebutted by any intention to interfere appearing in the Act itself.

[F., 1 Bom.L.R. 849; R., 19 B. 80 (82); 22 B. 884 (887, 888, 889); 1 Bom.L.R. 154 (155); 11 Ind. Cas. 912 (913)=7 N.L.R. 125.]

THIS was a second appeal from an order passed by E. M. H. Fulton, District Judge of Ahmedabad, in execution of a decree.

* Second Appeal No. 586 of 1891.

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The plaintiff, Kalian Moti, obtained a decree on the 5th August, 1887, in the Court of the Subordinate Judge of Dhandhuka on a *san* mortgage relating to certain land which formed part of a *talukdar's* estate. The decree directed that the amount due upon the mortgage should be recovered by the sale of the land, and it was, therefore, transferred to the Collector for execution under s. 320 of the Civil Procedure Code (Act XIV of 1882). The property was sold on the 5th August, 1889, but the Collector refused to confirm it, as it was not sanctioned by the Governor in Council under cl. 2, s. 31 of Bombay Act VI of 1888 * which came into force on the 25th March, 1889. He sent back the papers to the Court, stating that no sale could be [290] made. Subsequently the plaintiff, who himself was the purchaser at the auction sale, presented an application that the Collector should be ordered to give a certificate of sale. The Subordinate Judge held that the order of the Collector was right, and rejected the application.

The plaintiff appealed to the District Court, which confirmed the order of the Court below.

After referring to cl. 2, s. 31 of Bombay Act VI of 1888, the District Judge made the following observations in his judgment:—

"The Act came into force on the 25th March 1889. By s. 2 the word alienation is defined as meaning 'transfer of ownership.' Section 316 of the Civil Procedure Code provides that after a sale of immoveable property has become absolute (by confirmation), a certificate shall be granted to the purchaser, and declares that such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before.

"It follows, then, from the wording of these two sections combined with that of cl. 2 of s. 31, Bombay Act VI of 1888, that no sale of *talukdari* estate has any validity unless it was confirmed prior to the 25th March 1889, or has been sanctioned by the Governor in Council.

"But it is urged that the Gujarat Talukdars Act, 1888, cannot be given retrospective effect so as to affect the rights of the plaintiff in respect of his prior mortgage and decree. There is, no doubt, a general presumption against the intention of the Legislature to interfere with vested rights, unless such intention is unmistakably expressed, and the effect of s. 6 of Act I of 1868 has to be considered. By this section it is enacted as follows:—'The repeal of any Statute, Act, or Regulation shall not affect anything due * * * or any proceeding commenced before the repealing Act shall have come into operation.' Now it appears to me that this provision does not apply to the present case, because though the result of the Gujarat Talukdars [291] Act is to supersede, in certain cases, s. 312 of the Civil Procedure Code, which directs the Court to pass an order confirming the sale when no objection to it has been established, still it does not repeal it. The section seems applicable only to cases where a law has been expressly repealed. If, then, such be the case, it is manifest that the objection to the sale founded on s. 31 of Bombay Act VI

* Clause 2, s. 31 of Bombay Act VI of 1888.—No alienation of a talukdar's estate, or of any portion thereof, or of any share or interest therein made after this Act comes into force shall be valid unless such alienation is made with the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the *jama* and of the village expenses and police charges due in respect of the alienated area shall thenceforward vest in the alienee and not in the talukdar.

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The plaintiff appealed to the High Court.

Nagindas Tulsidas Murphatia, for the appellant.—Both the lower Courts were wrong in refusing to order the Collector to give us a certificate of sale. Clause 2, s. 31 of the Talukdars Act (Bombay Act VI of 1888) applies to a private sale effected by a *talukdar* himself, and not to a judicial sale. It could not have been the intention of the Legislature to make a decree, which gives a vested right to parties beneficially affected by it, inoperative by giving retrospective effect to a subsequent enactment. The decree under which we seek to recover our money, having been passed before the Act came into force and having directed a sale of mortgaged property, must end in execution; otherwise it would be merely a dead letter. To hold that the decrees passed prior to the passing of the Talukdars Act, but not executed, cannot afford relief to the decree-holders would be to deprive money-lenders of their money without having any source open to them for its recovery. In such a case the creditor cannot fall back upon the mortgage, because it has become merged in the decree, and he cannot take advantage of the decree, because owing to the absence of the Government's sanction the Act would not allow it to be executed. It cannot be said that the Legislature intended to pass an Act which, according to the construction put upon it by the lower Courts, sets aside a mortgage effected before the Act came into force.

There was no appearance for the respondent.

JUDGMENT.

SARGENT, C. J.—In this case the appellant had obtained a decree on 5th August, 1887, on a mortgage bond on the lands in [292] question, part of a *talukdar's* estate, and which decree had been transferred, under s. 320 of the Code of Civil Procedure, to the Collector for execution. The sale of the property took place on 5th August 1889, but the Collector refused to confirm it, as there was no sanction of the Governor in Council to it. Both the Courts below have held the Collector's refusal well founded.

By cl. 2, s. 31 of the Bombay Act VI of 1888, "no alienation of *talukdar's* estate or of any portion thereof, or any share or interest therein made after this Act comes into force shall be valid, unless such alienation is made with the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the *jama* and of the village expenses and police charges due in respect of the alienated area shall thenceforward vest in the alienee and not in the *talukdar*." We agree with the lower appeal Court that s. 6. Act I of 1868, does not apply to the present case. In any view of that Act, here the proceeding in execution of the decree had not commenced before the Talukdars Act. We also agree with the lower appeal Court that the sale by the Court followed by confirmation of such sale and grant of certificate, effecting, as they do, the transfer of ownership to the auction-purchaser, is an alienation within the definition of that term; but when the Act passed, the plaintiff had already acquired a vested right by the decree to have the property sold, and the important question for decision is whether the presumption against the Legislature having

intended to interfere with that vested right is rebutted by a clear intention to do so appearing on the face of the Act itself.

The District Judge held that the words of the section were plain as having a retrospective effect. No doubt, the language of the section is distinct in prohibiting alienations after the passing of the Act, but none the less clear was the language of the Mercantile Law Amending Act, by s. 9 of which the effect of all writs of *feri facias* as against the goods of a debtor to the prejudice of *bona fide* purchaser for value was taken away, but which in *Williams v. Smith* (1) was held not to apply to a [293] *feri facias* taken out before the Act. The object of the Act, as stated in the preamble, is to remove doubts as to the applicability of certain portions of the Bombay Land Revenue Code to *talukdars'* estates and to make provision for the revenue administration of the same, and if the sanction of Government had been required by the Act only to insure that object, it might be said that the necessity for the sanction would equally arise where the alienation was in execution of a decree; but the language of the Legislature clearly leaves it absolutely in the hands of Government to refuse such sanction, and thus to prevent the alienation being carried out without assigning any reason whatever; and we think that, without clearer proof than is afforded by the language of the Act, we ought not to conclude that it was intended to be exercised when a decree of the Civil Court had already before the Act directed that the property should be sold. The case of *Pryor v. Pryor* (2) is important as showing how unwilling the Court is to construe an Act in such a manner as to take away an existing right under an unexecuted decree. In that case the Act only affected the particular course of procedure after decree in a partition suit, yet the Court refused to give it a retrospective effect.

We must, therefore, reverse the order of the Court below, and direct the Court to give the necessary instructions to the Collector in accordance with the above remarks.

Order reversed.

17 B. 293.

APPELLATE CIVIL.

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

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (Original Defendant), Appellant v. JETHABHAI KALIDAS (Original Plaintiff), Respondent.* [7th April, 1892.]

Declaratory decree—Declaration of title to land—Specific Relief Act (I of 1877), s. 42—Criminal Procedure Code (X of 1882), s. 133—Order for removal of an obstruction standing upon certain land—Ownership of such land—Effect of Magistrate's order under s. 133—Jurisdiction of Civil Court after order made.

A Magistrate made an order against the plaintiff, under s. 133 of the [294] Criminal Procedure Code (Act X of 1882), for the removal of a certain *otta* standing in front of the plaintiff's shop as an obstruction to the public way. The plaintiff thereupon brought this suit against the Secretary of State for India in Council for a declaration that the land on which the *otta* stood was his property, and not that of the Government.

Held, that the public roads being vested by s. 37 of the Land Revenue Code (Bombay Act V of 1879) in the Government of Bombay, they were "interested

* Second Appeal No. 806 of 1890.

(1) 4 H. & N. 559.

(2) L.R. 10 Ch. 469.