

JUDGMENT.

PER CURIAM:—The sentence of the Sessions Judge is illegal, as he had no power to enhance, by altering a sentence of fine into one of imprisonment. We, therefore, reverse the sentence of the Sessions Judge and restore that of the First Class Magistrate.

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[752] APPELLATE CIVIL.

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

APPA (*Plaintiff*) v. SADU (*Defendant*).^{*} [30th November, 1893.]

Watandar and deputy—Agreement for payment by deputy to the watandar out of the cash allowance for procuring the deputy's nomination—Watandar's Act (Bombay Act III of 1874), ss. 7† and 23‡.

An agreement between the watandar and a deputy nominated by him for the payment by the latter to the former, in consideration of procuring such nomination, of a sum of money out of the cash allowance received by the deputy as remuneration assigned to his office is not legal, being contrary to the spirit of s. 7 read with s. 23 of the *Watandars' Act* (Bombay Act III of 1874).

REFERENCE from Rav Saheb Bhau Yeshwant Gupte, Subordinate Judge of Kada, under s. 617 of the Code of Civil Procedure (XIV of 1882).

The Subordinate Judge referred the following question for the decision of the High Court:—

Whether an agreement between a watandar and the deputy nominated by him for the payment by the latter to the former of a sum of money out of the cash allowance, received by the deputy as remuneration assigned under s. 23 of the *Bombay Watandars' Act* (III of 1874), as consideration for procuring such nomination, is opposed to law?

With respect to the question referred, the Subordinate Judge made the following remarks:—

[753] “The language of s. 7 of *Bombay Act III of 1874*, which forbids alienation or assignment of the watan property assigned under s. 23 of the Act as remuneration to an officiator, is also sufficiently wide to include every species of alienation or assignment within the prohibition, and, unless there is any reason to place a restricted construction on these

^{*} Civil Reference No. 9 of 1893.

† Section 7 of the *Watandars' Act* (Bombay Act III of 1874):—7. Watan property assigned under s. 23 of this Act as remuneration of an officiator, and the profits of watan property so assigned, shall not be alienated or assigned to any person whatever without the sanction of Government.

‡ 23. Subject to the provisions of this Act and of any other law for the time being in force regarding service-inams, cash allowances and pensions, it shall be the duty of the Collector to fix the annual emoluments of officiators, appointed under the provisions of this Act, and to direct the payment thereof to the officiators for the time being.

It shall be lawful for the Collector for this purpose to assign the watan property, or the profits thereof, towards the emoluments of officiators. The existing assignments shall, until altered by competent authority, be taken to have been made under this section. With the sanction of Government the Collector may, as occasion arises, alter the assignment and may increase or diminish it in value, such increase or diminution being made rateably among the holders in proportion to the profits derived by such holders respectively from the watan.

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words, an agreement of the nature under notice must also be admitted to be opposed to the spirit of that section.

“ However, the evident object which the Legislature must have had immediately in view in enacting the last mentioned section was probably this, *viz.*, that the allowance in the hands of Government should not be liable to be attached by a Civil Court or claimed by a stranger, and this view derives confirmation when we find that the Legislature have advisedly legalized the appointment of deputies by watandars under certain restrictions. All that is wanted in the case of a deputy appointed by a watandar is that the man proposed to be appointed should not be of known bad character, that he should be a fit and proper person capable of discharging the duties of the office to which it is proposed to appoint him, and that he should also be a watandar himself; and, if a candidate fulfils all these conditions, there does not seem to be any special reason why a watandar who has to nominate a deputy should not be at perfect liberty to engage the services of that deputy on the best terms on which he can manage to secure them. It is inconceivable why a watandar should be given the empty honour of nominating a deputy and invited to exercise that right if he is not allowed to secure any gain for himself. The possibility of the watandar and his deputy making some such arrangement for securing some advantage or fee to the principal must of course have been foreseen, and the absence, therefore, of any express provision in the Watan Act forbidding all such arrangements leads me to doubt if it was intended to make them altogether unlawful. If an agreement on the part of a deputy to pay a sum of money to his principal as consideration for his nomination to the deputyship would not be invalid, it is a question whether the mere addition of the words ‘out of the amount of the cash allowance received by the deputy’ ought to invalidate such an agreement when it is obvious that the parties could not have [754] intended that the sum agreed to be paid should come out of the identical money drawn from the treasury. Such an agreement is, when fairly analysed, nothing more than an agreement to pay a certain sum of money, and it is immaterial, as far as the legality of that agreement is concerned, to see if the promisor has pointed out the source from which he expects to procure the needful funds to discharge his obligation. But the prohibition is enacted in very general terms both in the Transfer of Property Act and also in s. 7 of the Watandars’ Act, and I, therefore, doubt if it can be ignored when the terms of an agreement expressly contravene it.

“ The case of *Naro v. Mahadav* reported at I.L.R., 12 Bom., 614, may be distinguished on the ground that the agreement set aside in that case was open to the objection that it did not leave the watandars free agents in their selection of a deputy, but the case is nevertheless important as showing that a previous concert among watandars for the appointment of a particular member of their own body to an office is not allowed by law.”

The opinion of the subordinate Judge on the point was in the affirmative.

Vishnu K. Bhatavdekar (*amicus curiæ*), appeared for the plaintiff. This was a suit brought by the watandar against his deputy to recover a certain sum which was due to the watandar under an oral agreement which was to the effect that if the watandar plaintiff appointed the defendant as his deputy, the defendant would pay to the plaintiff half the money out of the cash allowance which the deputy would recover from the

Government treasury. We submit that such an agreement would not be against public policy—*Sitaram Vinayak v. Ramchandra Babaji* (1).

Mahadev B. Chaubal (amicus curiae), for the defendant was not called upon.

JUDGMENT.

SARGENT, C. J.—We think that the agreement must be held to be contrary to the spirit of s. 7 read with s. 23 of Bombay Act III of 1874 and to be, therefore, not legal.

Order accordingly.

18 B. 755.

[755] APPELLATE CIVIL.

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

SUNDAR MALHAR PATEL (*Original Defendant*), Appellant v. BAPUJI SHRIDHAR AND ANOTHER (*Original Plaintiffs*), Respondents.*
[4th December, 1893.]

Mortgage—Redemption—Right to redeem made conditional on payment by mortgagor of another debt as well as mortgage debt—Effect of that other debt becoming barred by limitation—Right to redeem mortgage still subject to condition.

A mortgage bond contained a clause stipulating that the mortgagors were not to redeem the mortgaged property without paying not merely the amount of the mortgage-debt and interest, but also the amount due on a certain bond executed at the same time as the mortgage in respect of money due under a decree, and that "unless the whole was paid off, neither the mortgagor nor any one else should have a claim."

The mortgagee subsequently obtained a decree on the instalment bond and made several attempts to execute it, but failed, his *darkhast* being eventually rejected as time-barred.

Held that the right of redemption was made conditional on the payment of what was due on the instalment bond—a condition which was unsatisfied as long as such sum remained unpaid, although in contemplation of law there might be no longer a bond debt still in existence owing to a decree having been passed on the bond, and that decree having become barred by limitation.

[R., 22 B. 520 (524); 28 B. 349 (353) = 6 Bom. L. R. 313; 11 Bom. L. R. 318 (327); 8 O. C. 132 (135).]

THIS was a second appeal from the decision of S. Tagore, District Judge of Sholapur-Bijapur.

In January, 1868, the defendant was the holder of a decree against the plaintiff for Rs. 566. The plaintiff being desirous of buying certain land from the defendant, and being unable to pay the purchase-money, the defendant agreed to sell him the land in the following terms:—1st, that the plaintiff should execute to the defendant a mortgage of the land for the 700; 2nd, that the plaintiff should execute to the defendant an instalment bond for Rs. 500 in respect of the amount due under the decree. These terms were accepted by the plaintiff, who on 11th January, 1868, executed both documents, *viz.*, the mortgage-deed and the instalment bond. The mortgage-deed contained a stipulation to the effect that the mortgagor

* Second Appeal No. 898 of 1891.

(1) P. J. (1885) p. 24.