

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

1938.
October 15.

ADAM UMAR SALE (ORIGINAL DEFENDANT NO. 1), APPELLANT, v.
BAPU BAWAJI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS
Nos. 2-8), RESPONDENTS.*

*Bhagdari Act (Bombay Act V of 1862), sec. 3—Bhag—Unrecognised sub-
division of a bhag—Alienation—Suit to set aside the alienation—Limita-
tion.*

Possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act (Bombay Act V of 1862) can become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest.

The Bhagdari Act (Bombay Act V of 1862) contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person.

Dalā v. Parag(1) and *Jethabhai v. Nathabhai*(2), distinguished.

SECOND appeal from the decision of G. D. Madgaonkar, District Judge of Broach, confirming the decree passed by K. V. Desai, Subordinate Judge of Broach.:

Suit to recover possession of land.

The piece of land in dispute formed an unrecognised sub-division of a *bhag*. The ancestors of the plaintiff sold it to the ancestors of defendants Nos. 1, 2 and 3 in the year 1863, that is, after the introduction of the Bombay Bhagdari Act in 1862. The sale was opposed to the spirit of section 3 of the Act.

The plaintiff filed this suit in 1905, to recover the possession of the land from the defendants, alleging that the sale having been void under section 3 of the Act could confer no right or title on the defendants.

The Subordinate Judge decreed the plaintiff's claim. It was upheld on appeal by the District Judge on grounds which he stated as follows:—

As to the plea of adverse possession, it is to be observed that the defendants raised no such issue in the lower Court. The plaint itself no doubt states that

* Second Appeal No. 112 of 1908.

(1) (1902) 4 Bom. L. R. 797.

(2) (1904) 28 Bom. 399; 6 Bom. L. R. 428.

defendant No. 1 has been in the possession since the sale, that is considerably over twelve years prior to the suit. But there is no clear issue nor evidence as to how far this possession was adverse to plaintiff, apart from any presumption that may be made from plaintiff's ancestor being one of the vendors.

Further, it is now settled law that adverse possession for however long a period is no bar to ejectment by the Collector under section 3 of the Bhagdari Act: *Collector of Broach v. Rajaram*, I. L. R. 7 Bom. 542, 546; *Bai Dala v. Parag*, 4 Bom. L. R. 797; *Jethabhai v. Nathabhai*, I. L. R. 28 Bom. 399.

But the English rule 'Prescription runneth not against the Crown' does not hold good in India; in point of limitation, except where specially protected by law, the Crown and its officers stand on the same footing as any other parties.

There is no such special exemption in the Bhagdari Act: the words 'whenever he shall, upon due inquiry' &c., can hardly be said to extend the period of limitation. In the cases cited above, the *ratio decidendi* was really the fact that the legislature for special reasons of policy, had absolutely made illegal and invalid *ab initio* all alienations of unrecognised sub-divisions; so that possession under such alienations by a stranger non-bhagdar could never by mere lapse of time be recognised by the Courts as legal possession. If so, there seems no clear reason why the plaintiff instead of moving the Collector to take action and, if action were taken in his favour, of leaving the appellant to apply to the Court to set aside the Collector's order should not himself directly apply to the Court to reinstate him in possession; or, when he so applies, why possession of itself should bar his remedy direct any more than it does so indirectly through the Collector. The point of adverse possession cannot thus really arise in the case. To use the words of Chandavarkar, J., in *Jethabhai v. Nathabhai*, I. L. R. 28 Bom. 407: 'It is of the essence of adverse possession that it must relate to some property which is recognised by law. But here there is no such property, since the legislature has proscribed the kind of property on which the plaintiffs seek to found their title by adverse possession.' In respect of the resulting hardship, if any, to defendants, one can but quote the words of Jenkins, C. J., in *Dala v. Parag* (4 Bom. L. R. 799): 'Great hardship may possibly arise from time to time by the exercise of those powers, but this is not an unfrequent result of legislation of this class and we cannot on this ground help the plaintiff, for "Courts must look at hardships in the face rather than break down rules of law".'

L. A. Shah, for the appellant (defendant No. 1):—It has been found as a fact that the sale took place in the year 1863 A. D., and ever since the possession has been with the defendant. The present suit, which is brought more than forty years after that date, is therefore time-barred (see section 28 and Article 144 of the Limitation Act), unless there is something in the Bhagdari Act (Bombay Act V of 1862) to exclude the operation of the provisions of the Limitation Act, 1877.

1908.

ADAM
UMAR
v.
BAPU
BAWAJI.

1908.

ADAM
UMAR
v.
BAPU
BAWAJI.

We submit there is nothing in the Bhagdari Act, 1862, to exclude the operation. The cases of *Dala v. Parag*⁽¹⁾ and *Jethabhai v. Nathabhai*⁽²⁾ are distinguishable from the present case inasmuch as there the Collector had initiated the proceedings and the question was whether his action was subject to any provisions of the Limitation Act, 1877. In the case of *The Collector of Broach v. Desai Raghunath*⁽³⁾, the proceedings were under section 2 of the Bhagdari Act (Bombay Act V of 1862). In *Dala v. Parag*⁽¹⁾ the learned Chief Justice relied upon the expression "whenever it shall appear" in section 3 of the Bhagdari Act, and held that the plea of adverse possession could not prevail against the Collector's order. In the case of *Jethabhai v. Nathabhai*⁽²⁾ also the Collector had passed the order and the plaintiff was seeking to get rid of the effect of that order. The general remarks of Chandavarkar, J., must be taken with reference to the facts of the case, the point arising in this appeal not having been argued in that case.

G. N. Thakore (for *M. N. Mehta*), for the respondent:—The Limitation Act does not control the transactions in question in contravention of the Bhagdari Act: see *The Collector of Broach v. Desai Raghunath*⁽³⁾, where the Collector's action fell under section 2 of the Bhagdari Act. In *Dala v. Parag*⁽¹⁾ and *Jethabhai v. Nathabhai*⁽²⁾ the Collector's action fell under section 3 of the Act. These cases are not distinguishable from the present case on the ground that the Collector's action intervened in each of them, while in the present case there is no order of the Collector. Besides, the remarks of Chandavarkar, J., which form part of the decision of the case, are clearly in favour of the view that the policy of the Act is to make the transaction contravening its provisions unlawful, and null and void in law. I strongly rely on the said remarks.

BACHELOR, J.:—This appeal raises a question as to the construction of the Bhagdari Act (Bombay Act V of 1862). The plaintiff sued to recover possession of a parcel of land alleging that it formed part of a *bhag* which was his ancestral property,

(1) (1902) 4 Bom. L. R. 797.

(2) (1904) 28 Bom. 899; 6 Bom. L. R. 423.

(3) (1883) 7 Bom. 546.

and that in 1863 it and some other land were sold, in contravention of the Bhagdari Act, by his ancestors and those of defendants 4 and 5 to the ancestors of others of the defendants. It is admitted that the land in suit is an unrecognised sub-division of a *bhag*, and it is found as a fact by the Court below that the sale to the defendants' predecessors took place in 1863, that is, after the coming into force of the Bhagdari Act.

The learned District Judge has allowed the plaintiff's claim on the grounds that the sale of 1863 was void under section 3 of the Bhagdari Act, and that no adverse possession of the land could be acquired by the first defendant so as to bar the suit under the law of limitation. Though other questions have been slightly discussed before us on behalf of the first defendant, who is the appellant here, it appears to me that the only point of substance is that which has reference to the Limitation Act. It is common ground that the sale of 1863 was void under section 3 of the Bhagdari Act, and upon a consideration of the pleadings and the general conduct of the suit I am satisfied that the suit must be held to be barred by limitation unless it can be saved by virtue of the special provisions of the Bhagdari Act. Though no issue as to limitation was raised in the trying Court, the point was taken in the first defendant's written statement, and has been discussed by the Judge below; having regard to these circumstances and to section 4 of the Limitation Act, I think that Mr. Shah is entitled to argue the question of limitation in this appeal.

Now the argument which found favour with the lower appeal Court, and which accordingly the appellant has now to displace, is that possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act can never become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest. This argument is grounded upon the general scheme and policy of the Act, and upon certain judicial decisions.

As to the scheme of the Act, it is apparent from the title, the preamble and the sections that the Act is a special or exceptional piece of legislation designed with the view to prevent the dismemberment of Bhagdari tenures. To give effect to this policy

1893.

ADAM
UMAR
v.
BAPT
BAYAT.

1908.

ADAM
UMAR
v.
BAFU
PAWAJI.

the legislature directs in section 1 of the Act that no portion of a *bhag*, other than a recognised sub-division of such *bhag*, shall be liable to seizure under the process of any Civil Court. Then by section 2 it is provided that on the issue of any such process for the seizure of any unrecognised portion of a *bhag*, the Collector may move the Court to set aside the process, and if the Court finds that the case falls within the Act, "it shall set aside or quash such process, and cause the provisions of this Act to be put in force." Then follows section 3, with which we are more immediately concerned in this appeal. It begins by reciting that "it shall not be lawful" to alienate or incumber any portion of a *bhag* other than a recognised sub-division of such *bhag*; and the second paragraph enacts that any alienation contrary to the provisions of the section "shall be null and void; and it shall be lawful for the Collector whenever he shall, upon due inquiry, find that any person is in possession of any portion of any *bhag* other than a recognised sub-division of such *bhag* in violation of any of the provisions of this section, summarily to remove him from such possession, and to restore the possession to the person whom the Collector shall deem to be entitled thereto." Then by the third paragraph it is laid down that any suit brought to try the validity of any order made by the Collector in the exercise of the above powers must be brought within three months after the execution of such order.

It has been held by this Court in decisions which are binding upon us that under section 3 of the Act the Collector may take action at any time; that his action is not subject to the law of limitation; and that the plea of adverse possession cannot prevail against any order which he may make: see *Dala v. Parag*⁽¹⁾ and *Jethabhai v. Nathabhai*⁽²⁾. A reference to the former case will show how this principle is deduced from the general scheme of the Act and from the particular words authorising the Collector to take action whenever he shall find any person in apparently unlawful possession. But in this case no action has been taken by the Collector. It is the plaintiff himself who now seeks to disturb a possession extending over 40 years; and the question

(1) (1902) 4 Bom. I. R. 757. (2) (1904) 28 Bom. 399; 6 Bom. L. R. 423.

is whether the immunity from limitation, afforded to the Collector under the Act, should be extended also to a private party. I can find no warrant in the Act for that opinion; on the contrary, the policy of the Act, as I read the sections which I have endeavoured to summarise, is to vest in the Collector alone the special powers of interference conferred, leaving private parties to the operation of the ordinary law. And this view derives support from the consideration that the Collector is in a better position than the Civil Court to carry out the special objects of this particular Act with due regard to the aims of the Government as well as to any equities which may exist between the parties. But there is, I think, nothing to indicate that the exceptional position conferred on the Collector can be acquired by a party who after standing by for 40 years comes direct to the Court instead of availing himself of the special remedy provided by the Act. Reliance was placed by Mr. Thakore upon a passage in Chandavarkar, J.'s judgment in *Jethabhai's* case⁽¹⁾ where it was said that, on principle, such a title as the plaintiff's in that suit claimed to have acquired, could not be acquired by adverse possession. But this passage, as the following sentences clearly show, had reference to the particular claim advanced by the then plaintiffs who professed to hold the land as forming part of a *narva* holding and as subject to all the incidents of the tenure. No such claim is put forward here and the passage is therefore inapplicable to the present facts.

Then it was said that the possession obtained by the first defendant's predecessor was possession obtained through a transaction which the law both prohibits and declares to be null and void. That is undoubtedly so, but it supplies no reason for supposing that such possession would not be adverse to the rightful owner. On the contrary, it is just such possession as this, that is, possession originating without colour of title, which is contemplated by the law of limitation: so, in the *President and Governors of Magdalen Hospital v. Knotts*⁽²⁾ possession obtained under void leases was held to be adverse. It is important to distinguish between the sale and the possession. The sale, no

1908.

 ADAM
 UMAR
 v.
 BAPU
 BAWAJI.

(1) (1904) 28 Bom. 399; 6 Bom. L. R. 428. (2) (1879) 4 App. Cas. 324.

1908.

ADAM
UMAR
v.
BAPU
BAWAZI.

doubt, was void, and the law allowed the vendors ample time in which to have it set aside. But the appellant does not rest upon the sale; he takes his stand on the long possession following the sale, and the effect of that possession is not displaced by reference to its origin. So far as I can discover, the Act contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person.

For these reasons I am of opinion that the appeal should be allowed and that the suit should be dismissed with costs throughout.

Appeal allowed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

JAMSHEDJI CURSETJEE TARACHAND, PLAINTIFF, v. SOONABAI
AND OTHERS, DEFENDANTS.*

1907.

December 2.

Trusts to perform Muktd. ceremonies, validity of—Tenets of Zoroastrian faith—Nature and meaning of Muktd ceremonies—Ceremonies tending towards the advancement of religion—Practice—How far decision by single Judge binding on his successors.

* Trusts and bequests of lands or money for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktd, Baj, Yejushni, and other like ceremonies, are valid "charitable" bequests, and as such exempt from the application of the rule of law forbidding perpetuities.

The Farvardigan days are the most holy days during the Zoroastrian year and the performance of Muktd ceremonies during the Farvardigan days is enjoined by the Scriptures of the Zoroastrian religion.

* The performance of the Muktd ceremonies is a *religious duty* imposed on the Zoroastrians by the proved tenets of the religion they profess.

The ceremonies themselves are acts of religious worship. They include worship, praise, and adoration for the Supreme Deity, and a thanksgiving for all his mercies. They contain petitions for benefits, both temporal and spiritual, for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well-being and long reign of the sovereign, for

* O. C. J., Suit No. 341 of 1907.