

APPELLATE CIVIL.

Before Sir Narayan Chandavarkar, Kl., Acting Chief Justice, and
Mr. Justice Batchelor.

LAKSHMANRAO KRISHNAJI LIMAYE (ORIGINAL PLAINTIFF), APPELLANT, v.
BALKRISHNA RANGNATH AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1912.

June 17.

Transfer of Property Act (IV of 1882), section 59—Mortgage bond—Attestation by only one witness—Bond judicially found to be invalid and unenforceable—Government Notification—Retrospective effect—Exemption of certain Districts from the operation of section 59 of the Transfer of Property Act (IV of 1882)—Subsequent suit to enforce the mortgage—Res judicata—Rights vested under decrees not affected.

In execution under a money-decree certain property mortgaged to the plaintiff on the 8th September 1893 was attached and was about to be brought to sale. The plaintiff, thereupon, applied that the property should be sold subject to his mortgage lien. The Court rejected the plaintiff's application on the ground that the mortgage bond was invalid and not enforceable because it was attested by only one witness and not by two as required by section 59 of the Transfer of Property Act (IV of 1882). The plaintiff, thereupon, brought a suit in the year 1905 for a declaration that his mortgage bond was valid and operative according to law and, therefore, enforceable. The suit came up in second appeal to the High Court which, on the 14th August 1908, finally decided that the plaintiff's mortgage was void and, therefore, inoperative under section 59 of the Transfer of Property Act (IV of 1882). In the meanwhile, on the 24th June 1908, the Government of Bombay issued a notification exempting certain Districts including the Poona District in which the mortgaged property was situate, from the operation of section 59 of the Transfer of Property Act (IV of 1882). The notification was given a retrospective effect from the 1st January 1893. On the strength of the said notification the plaintiff applied to the High Court for review of judgment and his application being rejected, he, in the year 1910, instituted the present suit to enforce his mortgage and both the lower Courts having rejected the claim on the ground of *res judicata*, the plaintiff preferred a second appeal.

Held, confirming the decree, that the decree passed by the High Court in 1908 still subsisted and was not affected by the Government Notification although the notification had retrospective effect. The notification could not abrogate rights which had been judicially declared and had been merged in decree.

Kay v. Goodwin(1) and *Lenm v. Mitchell*(2); followed.

SECOND appeal against the decision of C. Roper, District Judge of Poona, confirming the decree of V. G. Kaduskar, Subordinate Judge of Haveli, at Poona.

* Second Appeal No. 527 of 1911.

(1) (1830) 6 Bing. 576.

(2) [1912] A. C. 400.

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Suit to recover mortgage money by sale of mortgaged property.

The facts were as follows :—

The property in suit belonged to Govind and Waman Rangnath Bhople (defendants 2 and 3). They mortgaged it to Lakshmanrav Krishnaji Limaye (plaintiff) for Rs. 1,400. The mortgage-deed was registered and attested by one witness only.

One Shankar Thakar, a creditor of Govind and Waman Bhople, obtained a money-decree against them and in execution attached the property mortgaged to Lakshmanrav Limaye. Thereupon the mortgagee applied to the Court that the property should be sold subject to his mortgage lien. The Court found that the mortgage bond gave no right to the mortgagee over the property as it was attested only by one witness and not by two as required by section 59 of the Transfer of Property Act (IV of 1882). His application was, therefore, rejected. Thereupon he, in the year 1905, brought a regular suit for a declaration that his mortgage-deed was valid and enforceable. The proceedings in the suit came up in second appeal to the High Court which, on the 14th August 1908, finally dismissed the suit holding that the deed was void under section 59 of the Transfer of Property Act (IV of 1882).

While the second appeal was pending in the High Court, the Government of Bombay, on the 24th June 1908, issued a notification exempting the Districts of Poona, Sátára, Sholápur and Ahmadnagar from the operation of section 59 of the Transfer of Property Act, 1882. The notification was given a retrospective effect from the 1st January 1893. It ran as follows :—

In exercise of the power conferred by section 1, paragraph 5 of the Transfer of Property Act, the Governor in Council with the previous sanction of the Governor-General in Council is pleased to exempt from the provisions of sections 59 and 123 of the said Act with effect from 1st January 1893 to the 1st July 1910, the following territories administered by the Government of Bombay :—

The Districts of Poona, Sátára, Sholápur and Ahmadnagar—Notification No. 4659, dated the 24th May 1910, published at page 765 of the *Bombay Government Gazette*, Part I, dated the 26th May 1910.

On the strength of the said Notification the plaintiff applied to the High Court for review of judgment and his application being rejected, he, on the 29th July 1910, instituted the present suit to recover the mortgage debt, namely, Rs. 1,400 principal and Rs. 1,400 interest, in all Rs. 2,800 by sale of the mortgaged property. The Subordinate Judge dismissed the suit holding that the claim was barred as *res judicata*. His reasons were as follows:—

It is nowhere urged that the decision of the High Court would not be a *res judicata*, it being a finding on a point of law, and that the cause of action is not the same in the present suit as it was in the previous suit. If the cause of action be different, a finding on a point of law cannot operate as *res judicata* which is obvious. But if it be the same, *i. e.*, if the dispute is identical, then it would operate as *res judicata*, *vide* I. L. R. 10, Cal. 1037, 15 All. 327, 26 Mad. 104 and 31 Bom. 128. There cannot be any manner of doubt that the cause of action is the same in the previous suit as well as in the present suit. The dispute is the same and an additional prayer in the plaint to recover the money would not alter the character or the sameness of the dispute. This prayer of the plaintiff is not allowable unless the lien of the plaintiff's debt on the land is upheld. But it has been negatived by the decision of the High Court which is a final adjudication of the claim of the plaintiff to proceed against the property in dispute. The point is so clear that I need not elaborate it.

On appeal by the plaintiff, the District Judge confirmed the decree.

The plaintiff preferred a second appeal.

Jayakar with *M. V. Bhat* for the appellant (plaintiff):—The former suit was forced upon us owing to the Court's order in the miscellaneous proceeding disallowing our mortgage lien. The object of the suit was to obtain a declaration of our lien and to set aside the order passed against us in that proceeding. The causes of action in the two suits are quite distinct.

According to the decision of the High Court, the bond being not attested by two witnesses was, on the date of that decision, void and not enforceable according to law. In other words, we had no cause of action based on the mortgage bond when the previous suit was brought. But when the Government issued the notification exempting the Poona District from the operation of section 59 of the Transfer of Property Act and gave to it retrospective effect, we got a cause of action

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for the first time by reason of the notification having rendered the bond valid and enforceable at law. Therefore, the plea of *res judicata* cannot arise.

* *D. A. Khare* for respondent 5 (defendant 5) was not called upon.

CHANDAVARKAR, ACTING C. J. :—This second appeal raises the question of *res judicata* under the following circumstances. On the 8th of September 1893 defendants Nos. 2 and 3 mortgaged the property in dispute to the plaintiff. Some time after that, a creditor of the said defendants, who had obtained a money-decree against them, attached the property in execution and was about to bring it to sale in 1893, when the plaintiff applied to the Court for an order that the property should be sold in execution of the decree, subject to his, that is, the plaintiff's mortgage of the 8th of September 1893. In that miscellaneous proceeding the Subordinate Judge raised this issue: Had the plaintiff the mortgage lien claimed by him? And as the result of his investigation the Subordinate Judge found that the plaintiff's bond was invalid and unenforceable, because it was not attested by two witnesses, as required by section 59 of the Transfer of Property Act. The plaintiff then brought a regular suit to get rid of the effect of the order passed by the Subordinate Judge in the miscellaneous proceeding. That was a suit for a declaration that the plaintiff's bond was valid according to law, and, therefore, enforceable. The suit was dismissed by the Subordinate Judge, but in appeal the District Judge held that the bond was valid and operative according to law, and, therefore, enforceable. There was a second appeal to this Court on the 14th of August 1908 and this Court reversed the District Court's decree and restored that of the Subordinate Judge, holding that the plaintiff's bond was void and therefore inoperative for want of attestations as required by section 59 of the Transfer of Property Act. The result of that litigation, therefore, was that the defendants acquired as against the plaintiff a vested right under the decree of this Court in Second Appeal, by which the plaintiff was held not entitled to set up his

mortgage and bring the property to sale. The plaintiff, however, applied for a review of the decree of this Court on the ground that on the 24th of June 1908 Government had by a notification exempted certain districts, including the district of Poona, from the operation of section 59 of the Transfer of Property Act and given that notification a retrospective effect from the 1st of January 1893. The Court having rejected the review application, the plaintiff brought the suit, which has led to the present second appeal, to enforce his mortgage.

Both the Courts below have held that the plaintiff's claim is *res judicata* by reason of the decree of this Court, of the 14th of August 1908.

But it is contended for the plaintiff that the Government Notification takes his suit out of the principle of *res judicata*. That, however, is not a sound contention. It is true that the Government Notification exempted certain districts from the operation of section 59 of the Transfer of Property Act with effect from the 1st of January 1893, and the present case comes from one of those districts. But the Government Notification cannot have a higher operation than a legislative enactment, and in the case of a legislative enactment, which repeals a previous law either partially or wholly, the principle is that it cannot affect vested rights acquired under decrees. That principle, enunciated by Tindal, C. J. in *Kay v. Goodwin*⁽¹⁾, has been followed recently by the Privy Council in *Lemm v. Mitchell*⁽²⁾. Tindal C. J. said:—"I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law". Citing Tindal C. J. with approval, their Lordships of the Judicial Committee of the Privy Council say in *Lemm v. Mitchell*⁽²⁾ that explicit language on the part of the Legislature is necessary to warrant

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a Court "in holding that a legislative body intended not merely to alter the law, but to alter it so as to deprive a litigant of a judgment rightly given and still subsisting."

Here the decree of this Court, of the 14th of August 1908, still subsists. It is not affected by the Government Notification although that notification had a retrospective effect. The notification could not abrogate rights which had been judicially declared and had become merged in decrees. On this ground the decree of the Court below must be confirmed with costs.

Decree confirmed.

G. B. B.

APPELLATE CIVIL.

*Before Sir Narayan Chandavarkar, Kt., Acting Chief Justice, and
Mr. Justice Batchelor.*

BAI GULAB (ORIGINAL PETITIONER), APPELLANT, v. THAKORELAL
PRANJIVANDAS (ORIGINAL OPPONENT), RESPONDENT.*

*Hindu Law—Minor—Capacity to make will—Indian Majority Act
(IX of 1875), section 3.*

A Hindu minor, who has not attained majority as provided in the Indian Majority Act, 1875, is not competent to make a will of his or her property.

APPLICATION for probate.

The testatrix was a Hindu and was above 16 years in age though she was under eighteen. By her will she disposed of property belonging to her.

The petitioner applied for probate of the will.

It was contended by the opponent that as the testatrix had not attained majority, as provided in section 3 of the Indian Majority Act, 1875, she was not competent to dispose of her property by making a will.

The District Judge agreed with this contention and rejected the application on the following grounds :—

* First Appeal No. 196 of 1911.