APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1884
July 16.

GULAB NAROTAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

Bhágdári (Bombay) Act V of 1862, *Sec.* 3 *—Meaning of the term bhág—Alienation of less than a whole of a bhág—Power of Collector to declare such alienation void —Suit to have the declaration set aside.*

In 1860, prior to the coming into force of the Bombay Bhágdári Act V of 1862, W., a recognized holder of a *bhág* in the Broach District, divided it equally among his four sons A. B. C. and D., who immediately entered into possession of their respective shares. In 1876 A. and C. sold their shares to the plaintiff. B. and D. protested against the sale as being a dismemberment of a *bhág;* and the plaintiff was called upon by the Collector, under section 3 of the Act, to deliver the deed to be cancelled, but declined to do so, and applied that the sale should be recognized. By an order the Collector refused to grant his prayer. The plaintiff, therefore, brought a suit to set aside the order. Both the lower Courts rejected his claim. On appeal to the High Court

Held, confirming the decree of the lower Appellate Court, that the sale to the plaintiff having been effected after the Bombay Bhágdári Act (V of 1862) had come into force, was void.

A *bhág* as contemplated by the Act would seem to mean an aliquot share of a village subject to an aliquot portion of the total land-tax imposed on it, and not any subdivision by partition or otherwise.

Bhái Shankar v. The Collector of Kaira(1) distinguished.

THIS was a second appeal from the decision of E. Hosking, Acting District Judge of Surat, confirming the decision of the lower Court at the same place.

One Wali Mahomed was a representative *bhágdár* in the village of Karmád, in the district of Broach, and also the recognized holder of a subdivision of the same *bhág*. This recognized subdivision consisted of forty-four *bighás* of land, nine houses and *gabháns* (building-sites). He had four sons, *viz.*, Isa, Abraham, Hasan and Ahmanji.

About the year 1860, Wali divided this subdivision of the *bhág* among his four sons, giving each 11 *bighás* and two houses, except one house more to Ahmanji, and each one of the sons entered into

* Appeal, No. 355 of 1883.

(1) I. L. R., 5 Bom., 77.

possession of his respective share during the lifetime of their father. Shortly after the death of Wali, which took place in 1860, the name of his eldest son Isa was entered in the Government register of lands as *khatedár*, but the brothers continued to enjoy their shares respectively, and paid proportionate parts of the assessment.

In 1876 two of the brothers Isa and Hasan sold their shares of the *bhág*, with houses and *gabháns*, to the plaintiffs, describing the property sold as *akár* (whole) *bhág*. The vendors' other brother and his nephew Ahmad protested against this sale on the ground that the *bhág* was being dismembered, and petitioned the Collector of Broach in that behalf, who sent for the plaintiffs and asked them to surrender the deed of sale that it might be cancelled. This the plaintiffs refused to do, and presented an application on 25th July, 1879, to the Collector to recognize the sale. The Collector by an order dated the 7th August, 1879, refused to recognize the sale.

The plaintiffs thereupon brought a suit in the Court of the Assistant Judge at Surat to have the order of the Collector annulled.

The defendant answered that the *bhág*, of which there were no recognized subdivisions, was entered in the name of the vendor Isa Wali; that Isa's three brothers were co-sharers with him, and each was in possession of a separate portion of the *bhág*; that Isa and one of the brothers sold the whole *bhág* to the plaintiffs, but the other two brothers did not join in the sale, and, therefore, their shares could not be held as sold, and that the sale was really of a part of a *bhág* only, and was, therefore, illegal.

The Assistant Judge rejected the claim of the plaintiffs.

From his decision the present appellant appealed to the District Judge at the same place, who confirmed the decree of the lower Court.

The appellant appealed to the High Court.

Pándurang Balibhadra for the appellant.—Ever since the division of the land each part of it constituted a separate *bhág*, and might be looked upon as a whole. Besides this, the division of

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the land in question was effected long before Bombay Act V of 1862 came into force. As to the Bhágdári Act, Melvill, J., in the case of *Veribhái* v. *Raghabhái*(1) says: "There is nothing in Bombay Act V of 1862 which debars a Civil Court from making a decree for the partition of *narvádári* land among the *narvádárs*."

The case of *Bhái Shankar* v. *The Collector of Kaira*(2) is still stronger. There also Melvill, J., says "that the principal object of Bombay Act V of 1862 is to prevent the further dismemberment of *bhágs* or shares in the *bhágdári* or *narvádári* villages. It renders null and void any future alienation of any portion of a *bhág* other than a recognized subdivision, but it does not invalidate previous alienations." The Bhágdári Act, therefore, would not affect the division.

Hon. Ráv Sáheb *V. N. Mandlik* for the respondent.

WEST, J.—The case of *Bhái Shankar* v. *The Collector of Kaira*(3), relied on by Mr. Pándurang, rests really on the principle that rights fully acquired before an Act comes into operation are not to be held as disturbed by the Act, unless it is distinctly so provided. His contention is that as the alienation of a field before 1862 constituted a dismemberment of the *bhág*, so also did a partition amongst the co-sharers, though unrecognized. Each share, therefore, he argues, constituted from the time of partition a separate *bhág*, and could be dealt with as a whole though not in fractions of the share. A *bhág* in Bombay Act V of 1862 seems really to mean, not any subdivision whatever, but one of the aliquot shares of a village subject to an aliquot portion of the total land-tax imposed on the village; but, however that may be, the parallel drawn between a dismemberment by alienation and a dismemberment by partition, and the consequent effects, cannot be sustained. In the former case a general presumption in the construction of statutes prevents the destruction of an existing estate; in the latter, the holders of a particular kind of estates are subjected to disabilities in dealing with them which the Legislature thought would be for their good and for the public good. But when the very purpose of an Act is to

(1) I. L. R., 1 Bom., at p. 227. (2) I. L. R., 5 Bom., at p. 78.
(3) I. L. R., 5 Bom., 77.

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impose restrictions on a particular class of owners, it is no argument against the application of it that such a restriction will in a particular case be effectual, and defeat the wishes of some of the owners. What the Act says is that the alienation of less than a whole *bhág*, or recognized share, shall be unlawful, and there is no qualifying principle to prevent this from taking full effect on any alienation by a *bhágdár* after the Act had come into force. We, therefore, confirm the decree of the District Court, with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

GURUPADA'VA' (ORIGINAL OPPONENT), APPELLANT, *v.* PUTA'PA' (ORIGINAL PETITIONER), RESPONDENT*

July 28.

Minor, certificate of administration to the estate of—Act XX of 1864—Effect of such certificate—Adoption.

By a deed of adoption a Hindu widow adopted a minor son, the deed stipulating that until such minor attained majority the widow was to manage the property. It subsequently appeared that she was incompetent to manage the property; and the natural father of the minor having applied for a certificate of administration, the lower Court granted one to him. On appeal by the widow to the High Court against the decision of the lower Court

Held that the order of the District Judge granting the certificate should be confirmed. The certificate did not alter the rights and interests of the minor or of the widow in the property. Any right of property or possession that could properly be asserted against the minor before the certificate was granted, could be asserted equally after it was granted.

THIS was an appeal against the order of A. C. Watt, Acting District Judge of Dhárwár, granting a certificate of administration to the estate of a minor.

In 1879 one Tipána died, leaving him surviving his two widows, one of whom was the appellant. On 9th August, 1879, the widows by a deed of adoption duly executed adopted the minor son of the respondent Putápá. The deed stipulated that the widows were to manage and enjoy the property of their husband till the

*Appeal, No. 29 of 1883.