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with the case of *Kattusheri Pishareth Kanna Pisharody* v. *Vallotil Manakel Narayanan Somayajipad*[1], which follows the principle laid down in section 30 of the Code of Civil Procedure (Act XIV of 1882.)

SARGENT, C. J.—The general rule is, as stated in *Kattusheri Pishareth Kanna Pisharody* v. *Vallotil Manakel Narayanan Somayajipad* [2], that, "unless there is a special provision of law, co-owners are not permitted to sue through some or one of their members, but that all must join in a suit to recover their property"; nor can the defendant be deprived of his right to insist on the other co-owners being joined on the record by reason of there being evidence to show that they approve of the suit being brought by the plaintiff alone. This was ruled in the analogous case of joint contracts in *Kalidás Kevaldás* v. *Nathu Bhagván*[3]. We must, therefore, confirm the decree, with costs.

(1) (2) I. L. R., 3 Mad., 234. (2) (2) I. L. R., 3 Mad., 234.
(3) (3) I. L. R., 7 Bom., 217.

APPELLATE CIVIL.

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

1885. *May* 4.

JAMA'L SA'HEB (ORIGINAL DEFENDANT), APPELLANT, *v.* MURGA'YA SWA'MI (ORIGINAL PLAINTIFF), RESPONDENT.*

Math—Mortgage of lands attached to a math—Act II (Bombay) of 1863, *Sec.* 8, *Cl.* 3, *effect of declaration by Government under—Power of a jangam guru to alienate land given to math—How far such alienation is binding on his successor in the office—Limitation—Cause of action.*

The defendant was in possession of three fields (survey Nos. 222, 360 and 372) as mortgagee under mortgages executed by one Guláya, who was the plaintiff's *guru* and his predecessor in office as *jangam*, or presiding Lingáyat priest of the *math*. Two of the fields (Nos. 360 and 372) had been mortgaged in 1863. Guláya died in 1874, and in 1882 the plaintiff brought this suit to recover possession of the fields, on the ground that it was not competent to Guláya to mortgage them beyond the period of his own life, and also on the ground that under clause 3 of section 8 of Bombay Act II. of 1863 they were not alienable from the *math*.

It appeared that in 1862 a *sanad* was issued by Government to Guláya, declaring the land in dispute to be his personal *inám*, and continuable for ever as

* Second Appeal, No. 446.

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transferable private property, subject only to *chaothái* and *nazrána*. This *sanad* was withdrawn in 1868, and another *sanad* was issued, declaring the land to be service emolument appertaining to the office of *jangam*, on condition that the holders thereof should perform the usual services to the community, and should continue faithful subjects of the British Government. The *sanad* stated as follows:—"As this *vatan* is held for the performance of service it cannot be transferred, and in consequence no *nazrána* will be levied." The *nazrána*, which had been levied under the *sanad* of 1862 for the years from 1861-62 to 1865-66, was refunded.

Held, that the plaintiff was entitled to recover the land in question. The circumstance of the repayment of *nazrána* and *chaothái* for the years 1861-66 clearly showed that, in the opinion of the Government, a personal *inám* had been wrongly granted to Guláya by the *sanad* of 1862, and there was nothing to show that Guláya objected to the decision ultimately arrived at by Government. After the passing of Bombay Act II of 1863 it would not have been open to him—as it was not open to his mortgagee now—to contest that decision in any way, for by section 16, clause (*d*) of that Act it is competent to Government to determine any question as to whether or not any lands are held for service, and the decision of Government, when once made, is final. Since 1868 there could be no question that the lands comprised in the *sanad* had not been alienable by the *jangam* of the *math* beyond his life-time, and as they belonged to a service *vatan* they were held on a tenure of successive life estates. After the death of Guláya, therefore, the plaintiff, as Guláya's successor in office, was entitled to the whole of the *inám* land claimed by him.

Two of the fields in question (Nos. 360 and 372) had been orginally mortgaged by Guláya to one Shivlingápá in 1863. In July, 1866, a fresh loan on the security of the same land was obtained from Dhanápá, the son of Shivlingápá, and the first mortgage deed was then superseded by one executed in favour of Dhanápá. In 1871 Dhanápá assigned his mortgage to the defendant. Guláya died in January, 1874, and this suit was instituted in February, 1882. It was contended that the plaintiff's claim to fields Nos. 360 and 372 was barred, as the mortgage to Dhanápá was more than twelve years anterior to the suit.

Held, that the suit was not barred, as the cause of action accrued to the plaintiff on Guláya's death, and the suit was brought only eight years after that event.

THIS was a second appeal from the decision of A. C. Watt, Acting District Judge of Dhárwár.

The plaintiff sued to recover possession from the defendant of certain land comprising three fields, survey Nos. 222, 360 and 372, alleging that the same had been long attached to the service of the *Virakta Math* at Karajgi in the Dhárwár District; that the land was a charitable endowment *inám* to his *guru* Guláya; that it was not competant to Guláya to mortgage or otherwise alienate it beyond his life-time; and that under section 8, clause 3, of

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the Bombay Act II of 1863 it was not transferable from the *math*. He further prayed for mesne profits, on the ground that Guláya having died in 1874, the defendant had been since then in wrongful possession.

The defendant *(inter alia)* contended that the lands were not of the nature of charitable service tenure; that the Summary Settlement Act, section 8, was not applicable to them; that he held survey No. 222 as a mortgagee from Guláya, and survey Nos. 360 and 372 as assignee of Guláya's mortgagee.

It appeared that in 1862 a *sanad* was issued by Government to Guláya, declaring the land in dispute to be his personal *inám*, and continuable for ever as transferable private property, on payment of *chautháí* and *nazrána*. This *sanad* was subsequently withdrawn in 1868, and replaced by another to the effect that the land "shall be continued so long as the village community may require the services, as the service emolument appertaining to the office of *jangam* * * * * ", and further added that "as this *vatan* is held for the performance of service, it cannot be transferred, and in consequence no *nazrána* will be levied." The *nazrána* which had been levied under the *sanad* of 1862, for the years from 1861-62 to 1865-66, was accordingly refunded.

The Subordinate Judge at Háveri awarded to the plaintiff field No. 222, and rejected his claim as to the others.

The plaintiff and the defendant preferred cross appeals from this decree, and the District Judge amended the Subordinate Judge's decree by awarding him Nos. 360 and 372 and costs in proportion to the claim awarded.

The defendant preferred a second appeal to the High Court.

Inverarity (*Ganesh Rámchandra Kirloskar* with him) for the appellant.—A *math* being a religious house no service could be attached to it. The land in dispute was given to the *math* as alienable private property, and the plaintiff's *guru* had every right to alienate it. Bombay Act II, section 8, has no application to the present case. The plaintiff's *guru* may be looked upon as a trustee, and his acts are binding upon the plaintiff, who as a subsequent trustee for the *devasthán* property here cannot

impeach them—*Mánikdál Atmárám* v. *Manchershi*.[1] As regards the cause of action, it was given to the plaintiff when the property was first alienated, and as this suit has been instituted more than twelve years after, it is barred by limitation.

Branson (*Máneksha Jehángirsha* with him) for the respondent.—The defendant is an assignee of a mortgagee only, and the assignment to him was after the *sanad* of 1868, which *sanad* cancelled that of 1862, and declared the land in dispute as inalienable charitable property under section 8, clause 3 of the Bombay Act II of 1863. Religious endowments are inalienable—*Naráyán* v. *Chintáman*[2]. The plaintiff's *guru* had only a life-interest in the property, and the cause of action arose after the death of plaintiff's *guru*: see *Kuria* v. *Gururái*[3]; and as the suit was instituted within twelve years after it, the suit is not barred.

BIRDWOOD, C. J.—The plaintiff, the respondent in this Court, sued to recover possession of three fields, survey Nos. 222, 360, and 372, attached to the *Virakta Math* at Karajgi, from the defendant, the appellant in this Court, who was in possession of field No. 222 as mortgagee of Guláya, the plaintiff's *guru* and predecessor in office as *janyam* or presiding Lingáyat priest of the *math* and of fields Nos. 360 and 372, as assignee of a mortgagee.

Fields Nos. 360 and 372 were mortgaged as field No. 224, (according to the old survey), on the 12th August, 1863, to Shivlingápá, who was to remain in possession till the year 1874-75, and to receive the crops till that year in discharge of his debt. A fresh loan was raised on the security of the same land from Dhanápá, the son of Shivlingápá, on the 5th July, 1866. The first mortgage deed was then superseded by one executed in favour of Dhanápá, which extended the period of his occupation to the year 1895.

In 1871, Dhanápá assigned his mortgage to the defendant, to whom Guláya executed a mortgage deed on the 13th July, 1872, which refers to the assignment and to an existing *ilavati*, or usufructuary mortgage, held by the defendant on survey No. 222,

(1) I. L. R., 1 Bom. at p. 277. (2) I. L. R., 5 Bom., 393.
(3) 9 Bom. H. C. Rep., 282.

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then known as survey No. 195, and extends the period of defendant's occupation of the three fields till the year 1935.

Guláya died about January, 1874; and this suit was instituted in February, 1882. The plaintiff says that since Guláya's death the defendant has been in wrongful possession of the fields in suit, of which he claims possession, therefore, on the ground that it was not competent to Guláya to mortgage them beyond the period of his own life; and also on the ground that, under clause 3 of section 8 of Bombay Act II of 1863, they were not transferable from the *math*.

The land was held by Guláya in *inám* long before he mortgaged any part of it to Shivlingápá; and the District Judge remarks that the grant was made, probably, by the Delhi Government or the Peshwa. It appears that, in 1862, a *sanad* was issued by Government to Guláya, in which the land was declared to be his personal *inám*, and continuable for ever as transferable private property, on payment of *chauthái* and *nazrána*. This *sanad* is not forthcoming, as it was withdrawn in 1868 and replaced by the *sanad*, exhibit No. 3, which declares that the land "shall be continued, so long as the village community may require the services, as the service emolument appertaining to the office of *jangam*, on the following conditions:—that is to say, that the holders thereof shall perform the usual service to the community, and shall continue faithful subjects of the British Government." It is further added that "as this *vatan* is held for the performance of service, it cannot be transferred, and, in consequence, no *nazrána* will be levied." The *nazrána*, which had been levied under the *sanad* of 1862 for the years from 1861-62 to 1865-66, was accordingly refunded. This circumstance shows that, in the opinion of Government, a personal *inám* had been wrongly granted to Guláya in 1862, and there is nothing apparently to show that Guláya objected to the decision ultimately arrived at by Government; and, indeed, after the passing of Bombay Act II of 1863 it would not apparently have been open to him, and it is not open to his mortgagee now, to contest that decision in any way, inasmuch as, by clause (*d*) of section 16 of the Act, it is competent to Government to determine any ques-

tion that may arise, in giving effect to the Act, "as to whether or not any lands are held for service;" and the decision of Government, when once made, is final. In giving effect to the Act, it would clearly have been necessary for the Government to consider and decide whether the *inám* lands held by Guláya fell under clause 1 of section 1 of the Act or not. Their decision, that the lands fell under the third class of excepted cases set forth in clause 2 of section 1, was final; and the question in the present case is, therefore, whether any alienation made before the issue of the *sanad* of 1868 was valid beyond the life-time of Guláya. Since 1868 there can be no question that the lands comprised in the second *sanad* have not been alienable by the *jangam* of the *math* beyond his own life-time. As they belong to a service *vatan*, they are held "on a tenure of successive life-estates"—*Kuria bin Hanmia* v. *Gururáv*[1]. And both the Courts below have, therefore, awarded plaintiff possession of field No. 222 (old survey No. 195), as the mortgage deed confirming and extending defendant's possession of that field was executed in 1872.

The Subordinate Judge refused the plaintiff's claim to recover possession of fields Nos. 360 and 372, because the mortgage to Dhanápá, in 1866, was effected while the *sanad* of 1862 was in force. The Subordinate Judge also found that, up to 1861, the lands in suit were not shown in the revenue accounts (exhibits 60 to 71 and 42 and 43) as service lands. The District Judge observes, however, that these accounts were made "solely for the collection of the land revenue, and not after any judicial enquiry."

We think that the District Judge has rightly decided the case on a consideration of the terms of the *sanad* of 1868 and of the circumstances under which it was issued. The law gives an effect to the declaration contained in that *sanad* which is not apparently given by Act XI of 1852 or any other law to any declaration contained in the *sanad* of 1862. If that be so, then, even while the *sanad* of 1862 was in force, its terms would not be conclusive as to the rights of the *jangam*. Any question as to the extent of the deceased Guláya's interest in the *inám* lands up to

(1) 9 Bom. H. C. Rep., 282.

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the year 1868 would still be a question of evidence. The *inám* was not created by the *sanad* of 1862, which merely continued an existing *inám*; and, unless the Government was, at the time, legally empowered to declare the nature of the *jangam's* private interest in the land and to convert a life-estate, if such was the extent of his previous interest, into absolute property, then no existing private rights enjoyed by him would be affected. The *sanad* would be operative only in so far as it regulated his relations with Government with reference to the payment of a quit-rent and *nazrāna* on transfers, if transfers were already permissible. But after Bombay Act II of 1863 became law, the Government was empowered to deal finally with evidence bearing on the private rights of *inámdárs*. It could, for instance, in the case of the *inám* lands attached to the *Virakta Math* at Karajgi, determine, on a consideration of such evidence as was available, whether the lands were held for service or as personal *inám*; and, after its determination had once been announced, it would not be competent to a Civil Court to deal in any way with evidence which might have been so available, for the purpose of arriving at any decision of its own as to the tenure of the lands since the passing of the Act. The revenue accounts up to the year 1861, on which the Subordinate Judge relied, were clearly available to Government. They must be assumed to be a part of the material on which the Government decision of 1868 was founded, and to be consistent with that decision; which, indeed, is now the only evidence admissible as to the extent of Guláya's rights at the time of the earlier mortgages—the mortgage to Shivlingápá, which merged in that to Dhanápá, having been effected after Bombay Act II of 1863 became law. That being so, the declaration as to Guláya's tenure made in 1868 holds good, if not from the date of the cancelled *sanad*, at all events from the 9th April, 1863, when the Act came into force. There is no evidence to show that Government intended in 1868 to curtail Guláya's rights. The second *sanad* was evidently issued, because it was ascertained that the first *sanad* did not, in the estimation of Government, correctly declare the nature of his rights as they existed in 1862.

It follows that, after the death of Gulaya in 1874, the plaint-

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iff, as Guláya's successor in office, was entitled to the whole of the *inám* land claimed by him.

It was contended that the plaintiff's claim to fields Nos. 360 and 372 was barred by time, as the mortgage to Dhanápá was more than twelve years anterior to the suit. The possession, however, of the mortgagee during Guláya's life was not adverse to him, and as the suit was brought only eight years after his death, it consequently was not barred.

We vary the District Judge's decree, awarding the plaintiff the lands in suit, by awarding also mesne profits in respect of the said lands from the institution of the suit until the delivery of possession to the plaintiff. We confirm the District Judge's order as to costs; but as there can be no doubt that Shivlingápá and Dhanápá advanced money to Guláya, on the security of the *inám* lands, in good faith, believing the security to be perfectly good, we make no order as to the costs of Appeal No. 446 of 1883. The plaintiff to pay the costs of Appeal No. 627 of 1883.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Birdwood.

1885. *June 26.*

UMARKHA'N, AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANT, *v.* MAHOMEDKHA'N AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.

Court Fees Act VII of 1870, Sec. 7, Cl. 9—Redemption suit—Separate memorandum of appeal presented by each of two appellants, proper fees chargeable on.

A decree having been given by the lower Courts in a redemption suit, directing that the mortgaged property should be redeemable on payment of the amount expressed to be secured by the mortgage deed, *viz.* Rs. 1,152-15-4, to the defend ants,—*viz.* Rs. 568-9-8 to the defendant Umarkhán and Rs. 584-5-8 to the defend- ant Moro and two others,—appeals were preferred to the High Court by Umarkhán and Moro, each of them presenting a separate memorandum of appeal. A question arose as to what Court fees should be levied on them. On reference by the Taxing Officer of the Court,

* Reference under section 5 of the Court Fees' Act.