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given full force and effect to. I am fortified in this opinion by the fact that, although it has been settled law since the year 1873 that coins are not "instruments of gaming used in playing any game," no alteration of the law in this respect was made by the Legislature even when it passed Bombay Act IV of 1887. Had there been any after intention to include coins among instruments of gaming so as to make gaming with them punishable, the obvious way to have carried out that intention would have been to insert the word "coin" in section 12 of the Act. The same result might have been attained if on the insertion of the new definition of the expression "instruments of gaming" the restricting words "used in playing any game not being a game of mere skill" had been repealed in section 12 and the other sections in which these words occur. Bombay Act I of 1890, however, does neither of these things. The sole professed object with which it was passed was to include "wagering" within the prohibitions of the Prevention of Gambling Act in consequence of the decision of this Court in the case of *Queen-Empress* v. *Narottamdás Motirám*[1]. The Act was not intended to make any change in the law as to the nature of the instruments of gaming referred to in section 12 of Bombay Act IV of 1887, and I am of opinion that it has made none.

Appeal dismissed.

[1] I. L. R., 13 Bom., 681.

APPELLATE CIVIL.

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

1891. *July* 9.

CHINTA'MAN DA'MODAR AGA SHE, (ORIGINAL DEFENDANT), APPELLANT, *v.* BA'LSHA'STRI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Execution—Decree—Partition decree—Obstruction—Limitation—Darkhást presented in 1890, *in legal continuance of a darkhást of* 1882.

A *darkhást* is not necessarily cancelled by being taken off the file. Its effect must be determined by the special circumstances of each case.

A. obtained a decree for partition in 1881, and on the 11th March, 1882 presented a *darkhást* for complete execution of the decree. Having attempted to take possession of a moiety of a house to which he was entitled under the decree,

* Second Appeal, No. 89 of 1891.

he was obstructed by S., and it became necessary for him to file an ejectment suit against S. before proceeding further with the execution of his partition decree. In August, 1885, a second appeal in this ejectment suit was pending in the High Court, and A., on the 1st August, 1885, obtained an order in the execution matter, which recited the fact of the second appeal, and that A. desired that the *darkhást* should "for the present be cancelled," and ordered that "further execution be stopped." Other litigation between A. and S. took place, which was finally closed on the 31st October, 1889. On the 3rd January, 1890, A. presented a *darkhást* for the execution of the decree of 1881. It was contended that execution was barred, and that the order of 1st August, 1885, had cancelled the *darkhást* of 11th March, 1882.

Held, that the present application was not barred, the *darkhást* being in legal continuance of the *darkhást* of 1882.

THIS was a second appeal from the decision of R. S. Tipnis, Acting Assistant Judge of Ratnágiri.

The facts of the case were as follows :—

On the 28th September, 1881, the plaintiff obtained a decree against the defendant and others for partition of a house, fields and moveable property. The decree held that the plaintiff was entitled to a half share of the property in dispute, and directed partition. Under the decree some property was actually divided, and the plaintiff and the defendants were directed to be given portions allotted to each of them, and with respect to the rest of the property, such as fields which yielded revenue to Government, the parties were directed to effect partition in execution through the Collector.

On the 11th March, 1882, the plaintiff presented his first *darkhást* for complete execution of the decree.

In the year 1883 the plaintiff was given possession of the portions of the property already divided under the decree, and the Collector was directed to partition the rest of the property.

While the partition proceedings were pending before the Collector, the plaintiff having attempted to take possession of the house and other property which had been already divided by the decree, Satyabhámábái, a widow belonging to the family of the parties, obstructed him. The plaintiff thereupon in 1882 brought a suit to eject her. She defended the suit, alleging that she was entitled to a moiety of the property, and that not being a party to the partition decree she was not bound by it.

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The plaintiff obtained a decree against Satyabhámábái in the Court of first instance, but, on appeal, that decree was reversed on 21st March, 1884, and his claim rejected on the ground that she was entitled to hold the property for her maintenance, and that the plaintiff was not entitled to recover the property until he had made provision for her maintenance. The plaintiff then filed a second appeal in the High Court.

Meantime while the suit in ejectment was going on, Satyabhámábái on the 1st November, 1883, presented an application to the Collector, objecting to the partition of the remaining property being proceeded with by him on the ground of her lien for maintenance. The Collector filed the application, but went on with the partition proceedings and settled a certain partition scheme. But as both the parties objected that the scheme was not in accordance with the decree, the Subordinate Judge set it aside in 1884 and directed the Collector to make a fresh partition.

While the partition proceedings were pending before the Collector the appellate decree in the ejectment suit instituted by the plaintiff against Satyabhámábái having rejected the plaintiff's claim, he on the 10th July, 1885, stated to the Court that proceedings in execution should be stopped, as he had preferred a second appeal to the High Court against the appellate decree, and that there was no use in proceeding further until the second appeal was decided. The Court thereupon communicated with the Collector, who, on the 15th July, 1885, returned to the Court the warrant issued to him for partition. Below the warrant the Court took down the statement of the plaintiff's pleader, namely, that he had preferred a second appeal from the decree of the appellate Court (in the ejectment suit), that the first partition having been upset, no fresh partition need be made, that he would prefer a separate *darkhást*, and that the *darkhást* should, for the present, be cancelled. After having recorded the above statement of the plaintiff's pleader, the Court on the 1st August, 1885, passed the following order upon the *darkhást*:—

"Therefore further execution should be stopped, and the warrant with its accompaniments received from the Collector is

placed with the *darkhást* and this *darkhást* is disposed of. This *darkhást* to be placed on the record along with the papers."

While the proceedings under the above *darkhást* were pending, the plaintiff on the 3rd March, 1885, presented a second *darkhást*, stating that as the period of three years from the date of the first *darkhást* would soon expire, he presented the second *darkhást* merely to prevent the decree being barred by limitation. The order of the Court upon the *darkhást* was that as the execution proceedings were going on under the first *darkhást* there was no necessity to take further steps upon the second *darkhást*, and thus it was disposed of.

On the 29th February, 1888, the plaintiff presented a third *darkhást*, saying that he did so to keep the decree alive and did not seek for any execution upon it. The Court disposed of this *darkhást*, directing that as no execution was sought, no further steps should be taken.

In the meanwhile, on the 12th November, 1886, the High Court, in second appeal, confirmed the decree of the lower appellate Court in the ejectment suit which had been instituted by the plaintiff against Satyabhámábái.

The plaintiff thereupon on the 8th August, 1887, filed a suit against Satyabhámábái and the defendants in the partition suit, praying, among other things, for a scheme for the maintenance of Satyabhámábái. This suit was finally decided, in appeal, on the 31st October, 1889. It was held that the defendant, Chintáman Dámodar Agáshe, should maintain Satyabhámábái, who was a widow of his branch of the family; that the plaintiff's share was not liable for her maintenance; that the plaintiff should be put into possession of all the property which was already awarded to him under the partition decree and of which he had been deprived by Satyabhámábái, and that the plaintiff's remedy to obtain possession of the rest of the property was by proceeding in execution of that decree.

The plaintiff accordingly on the 3rd January, 1890, presented a *darkhást* for the execution of the partition decree.

The defendant, Chintáman Dámodar Agáshe, objected on the ground that the execution of the decree was barred by limitation.

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The First Class Subordinate Judge, Khán Bahádur M. N. Nánávati, held that the *darkhást* was barred, and rejected it.

The plaintiff appealed to the District Court, and the Acting Assistant District Judge reversed the order of the Subordinate Judge, and directed that the *darkhást* be proceeded with in the usual manner.

In his judgment the Assistant Judge remarked: "In the case before me it clearly appears that execution proceedings under the *darkhást* of 1882 were temporarily suspended and not finally brought to an end. This is evident from the statement of the plaintiff's pleader and the order of the Court dated the 1st August, 1885" * * * * "Under these circumstances it must be held that the execution proceedings were practically suspended by an obstacle which had been held as temporarily valid, unless set aside by a separate suit."

The following cases were relied on by the Assistant Judge in his judgment:—*Booboo Pyaroo Tuhobildarinee* v. *Syud Nazir Hossein*[1]; *Issurree Dassee* v. *Abdool Khalak*[2]; *Chandra Prodhan* v. *Gopi Mohan Shaha*[3]; *Raghunandun Pershad* v. *Bhugoo Lall*[4]; *Paras Rám* v. *Gardner*[5]; *Basant Lal* v. *Batul Bibi*[6]; *Kalyánbhai Dipchand* v. *Ghanashamlál Jádunáthji*[7]; *Krishnáji Raghunáth* v. *Anandráv Ballál*[8]; *Venkatráv Bápu* v. *Bijesing Vithalsing*[9]; *Virasami* v. *Athi*[10]; *Náráyan Nambi* v. *Pappi Brahmani*[11]; *Rajrathnam* v. *Shevalayammal*[12].

Against the decree of the District Court the defendant appealed to the High Court.

Gazdar with *Ganesh Krishna Deshamukha* for the appellant:—The *darkhást* of 1882 was actually put an end to by the order of the 1st August, 1885, and not merely suspended. That is clear from the fact, that an intermediate *darkhást* was presented on the 29th February, 1888, with the avowed object of keeping the decree alive. The cases cited do not apply to the present case.

(1) 23 W. R., 183, Civ. Rul.
(2) I. L. R., 4 Calc., 415.
(3) I. L. R., 14 Calc., 385.
(4) I. L. R., 17 Calc., 268.
(5) I. L. R., 1 All., 355.
(6) I. L. R., 6 All., 23.
(7) I. L. R., 5 Bom., 29.
(8) I. L. R., 7 Bom., 293.
(9) I. L. R., 10 Bom., 108.
(10) I. L. R., 7 Mad., 595.
(11) I. L. R., 10 Mad., 22.
(12) I. L. R., 11 Mad., 103.

Satyabhámábái did not obstruct the partition of the revenue-paying property, which alone is the subject-matter of the present *darkhást*. There was really no obstruction to the execution. But even assuming that there was, it was not such as made it necessary to stop the execution proceedings. Notwithstanding Satyabhámábái's obstruction, the execution could have been proceeded with as between the parties. Further, the execution proceedings were stopped, not by the Court's bidding, but at the voluntary request of the respondent himself. Further, if the order of the 1st August, 1885, only amount to suspension, this suspension was to last until the disposal of second appeal, that is, until the 12th November, 1886, and from that time more than three years elapsed before the present *darkhást* was filed on the 3rd January, 1890. Satyabhámábái's obstruction eventually succeeded, and the respondent's opposition to it failed. The cases cited, therefore, do not apply.

Branson with *Mahádeo Chimnáji Apte* for the respondent :—The present *darkhást* was for the execution of the whole decree. On the 1st August, 1885, the order was for a suspension 'for the present,' not for total cancellation of the execution proceedings. Taking off the file does not necessarily mean cancellation, but may, having regard to all the circumstances, as in the present case, be taken only to mean a temporary suspension—*Hurronáth Bhunjo* v. *Chunni Lall Ghose*[1].

Satyabhámábái obstructed the partition of the reveuue-paying property by serving a notice on the Collector on the 1st November, 1883. Moreover, in causing the obstruction she did not merely urge her right of maintenance, but also claimed a share, which ultimately was not granted to her. Thus the question raised by her involved the possible necessity of re-adjusting the whole partition, raised a practically inevitable obstruction, and so rendered the temporary suspension absolutely necessary. The decision in *Kalyánbhái Dipchand* v. *Ghanashamlál Jádunáthji*[2] covers the present case.

The obstruction caused by Satyabhámábái was finally removed on the 31st October, 1889, and the present *darkhást* was presented within three years from that date.

(1) I. L. R., 4 Calc., 877. (2) I. L. R., 5 Bom., 29.

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CHINTÁMAN DÁMODAR AGÁSHE v. BÁLSHÁSTRI.

SARGENT, C. J.:—In this case the plaintiff had obtained a decree on the 28th September, 1881, for partition against several defendants; and on the 11th March, 1882, he presented his *darkhást* for complete execution of the decree. By the decree a certain house was directed to be divided in equal shares between the plaintiff and the first defendant, and a warrant was accordingly issued to put plaintiff in possession of his moiety. At the same time it was referred to the Collector to effect a partition of the family lands.

When plaintiff proceeded to take possession of the moiety of the house he was obstructed by Satyabhámábái, a widow of the family, whereupon he filed a suit in 1883 to eject her, to which Satyabhámábái pleaded that she was not bound by the decree of 1881 and was entitled to half the entire property. She herself also objected on the 1st November, 1883, to the Collector proceeding with the partition. The Court of first instance awarded the plaintiff's claim, but, on appeal, it was thrown out on the 21st March, 1884, on the ground that Satyabhámábái was entitled to hold the property at present for her maintenance, and that plaintiff could not have possession until he had made provision for her maintenance.

On 10th July, 1885, the plaintiff made a statement to the Court that, having failed in his suit to remove the obstruction offered by Satyabhámábái, he had appealed to the High Court, pending which it was objectionable that the remaining division of the property should take place and possession given, and prayed that delivery of possession should be stayed. On the 1st August, 1885, the Court made an order, which, after reciting the statement of the plaintiff that the Collector had on 15th July, 1885, returned the warrant issued to him for partition, that plaintiff's vakil had stated below the warrant that he had preferred a second appeal from the order of the appellate Court, that the first partition having been upset, no fresh partition need be made, that he would prefer a separate *darkhást*, and that the *darkhást* should for the present be cancelled, proceeded thus:—"Therefore, further execution should be stopped and the warrant with its accompaniments received from the Collector is placed with the *darkhást*

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and this *darkhást* is disposed of. This *darkhást* to be placed on the record along with the papers mentioned below."

The plain meaning of this order is that the *darkhást* is for the present disposed of by ordering that further execution of the decree be stopped. On the 12th November, 1886, the second appeal preferred by the plaintiff was decided against him, and on 8th August, 1887, he filed a suit against Satyabhámábái and the other parties to the partition decree for various reliefs, and among others for a scheme for the maintenance of Satyabhámábái. This suit was decided, in appeal, on 31st October, 1889, the decree directing that Satyabhámábái should be maintained by defendant No. 1, as she was a widow of his branch of the family, and plaintiff's share was held not liable for it; and plaintiff was directed to be put into possession of the property in respect of which he had been obstructed by Satyabhámábái; it was also pointed out that plaintiff's remedy to obtain partition of the rest of the property (*i. e.*, the land which had been referred to the Collector to partition) was by proceeding in execution of the original partition decree.

The plaintiff then presented the present *darkhást* on 3rd January, 1890, for the execution of the partition decree of 1881. The First Class Subordinate Judge of Ratnágiri held the *darkhást* was time-barred, but on appeal the decree was reversed and the Court below was ordered to proceed with the *darkhást*. The ground of the decision of the lower appeal Court is that "the execution proceedings were practically suspended in 1885 by an obstacle over which plaintiff had no control," and that the present *darkhást* is not an execution, but an application to revive the *darkhást* of 1882 in accordance with the decisions in *Booboo Pyaroo Tuhobildarinee* v. *Sayud Nazir Hossein* (1); *Hurronáth Bhunjo* v. *Chunni Lall Ghose* (2); *Kalyánbhái Dipchand* v. *Ghanashamlál Jádunáthji* (3); and *Paras Rám* v. *Gardner* (4). The result of those cases is stated by Mr. Justice Melvill in *Kalyánbhái Dipchand* v. *Ghanashamlál Jádunáthji* (5) to be "that the application made by a decree-holder after the removal of the

(1) 23 W. R., 183.
(2) I. L. R., 4 Calc., 877.
(3) I. L. R., 5 Bom., 29.
(4) *Ibid.*, 1 All., 355.
(5) I. L. R., 5 Bom., at p. 34.

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obstacle, which has for a time rendered execution impossible, is not an application to execute the decree, but one for the revival and *continuation of the former proceedings.*"

Two objections, however, have been taken to the application of that ruling to the present case. It was first urged that the *darkhást* must be deemed to have been cancelled by the order of 1st August, 1885, and not suspended. As to this the decisions in *Hurronáth Bhunjo* v. *Chunni Lall Ghose* (1) and *Venkatr v Bápu* v. *Bijesing Vithalsing* (2) show that a *darkhást* is not necessarily cancelled by being taken off the file, and that its effect must be determined by the special circumstances of each case. Here it is plain from the plaintiff's statement that the object he had in view was not to put an end to the execution proceedings, but to suspend them for the time until the disposal of the plaintiff's second appeal; and the recital in the order of the Court to the effect that the plaintiff's vakil asked that the *darkhást* "should for the present be cancelled" clearly shows that it was with that limited object that the *darkhást* was disposed of by the Court when it ordered that it should "be placed along with the papers mentioned below on the record." We think, therefore, that the lower appeal Court was right in its view of the order of 1885.

It was contended, however, that in all the cases above cited, the order was made on the successful objection of a third party which interrupted the execution proceedings and made them impossible, whereas here the order suspending the *darkhást* proceedings was made on the application of the judgment-creditor himself, and the suspension of those proceedings was not absolutely necessary. It may be that the partition might, strictly speaking, have been proceeded with between the parties to the suit notwithstanding Satyabhámábái's objection, leaving the question as to the provision for Satyabhámábái's maintenance to be determined in another suit between the parties; but it is plain that her obstruction constituted a practical objection to a complete partition being effected between the members of the family. It was for the Subordinate Judge to consider whether that

(1) I. L. R., 4 Calc., 877.

(2) I. L. R., 10 Bom., 108.

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circumstance was sufficient to justify his disposing of the *darkhást* in the manner he did; and it may be that the decree being one in a partition suit the defendant himself could have applied at any time to the Court, by showing sufficient cause to have the order cancelled and partition proceeded with, but the order not having been made owing to any default on the part of the respondent and being still in force when the present *darkhást* was presented, there is the same reason for treating it as being, to use Stuart, C. J.'s language in *Paras Rám* v. *Gardner*(1), "in legal continuance" of the *darkhást* of 1882, as was done in those cases which have been referred to by the respondent.

We think, therefore, that the lower Court of appeal was right in its view of the present *darkhást*, and that its order should be confirmed with costs.

Decree confirmed.

(1) I. L. R., 1 All., 355.

APPELLATE CIVIL.

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

SHAIK IDRUS, (ORIGINAL PLAINTIFF), APPELLANT, *v.* ABDUL RAHIMAN AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1891. *July 20.*

Mortgage—Construction—Intention of parties—Mortgagee to have possession for ten years and to receive profits in lieu of interest—Mortgagor to recover possession in the year he paid the money after the expiration of the period—Mortgagee's right of sale—Clause 3, Section 15 of Regulation V of 1827—Mortgagee's personal remedy against the mortgagor—Limitation.

Where a mortgage-bond contained a stipulation that the mortgagee should enter into possession of the mortgaged property and enjoy the rents and profits in lieu of interest for ten years, and that after the expiration of that period the mortgagor should enter into possession in the year in which he paid the debt,

Held that it was the intention of the parties that the mortgaged property should not be sold in satisfaction of the mortgage-debt, that the mortgagee was to remain in possession for ten years, and that under clause 3 of section 15 of Regulation V of 1827 he had no power of sale.

The mortgagee having brought his suit within three years from the expiration of the stipulated period of ten years,

Held, that the mortgagee's personal remedy against the mortgagor was not time-barred.

* Second Appeal, No. 447 of 1890.