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From a review of all these authorities, it is clear that the order in this case expressly avoided deciding the question of Asha's rights and appellant's mortgage, and as such it must be held to have been passed without investigation, and appellant's failure to bring a suit within twelve months did not preclude him from raising his defence in the present suit.

There is an additional reason for coming to the same finding in the present suit. The respondent-plaintiffs have joined the heirs of the deceased Asharam as parties to this suit. They were not parties to the miscellaneous application, and they cannot be shut out from raising the defence that they have permanent rights in the land. The point, that the judgment-debtor cannot be regarded as being necessarily a party in attachment proceedings under sections 278, 283, has been settled by a long course of rulings of the several High Courts—*Shivapa* v. *Dod Nagaya* [1]; *Ajibal Narasinha* v. *Shirekoli Timapa* [2]; *Kedar Nath* v. *Rakhal Das* [3]; *Mannu Lal* v. *Harsukh Das* [4].

For all these reasons, I am of opinion that both the lower Courts were in error in holding that the appellant was precluded in this case from urging his defence in the present suit. He has clearly a right to require the Courts to adjudicate upon the nature and extent of Asha's interest and his own mortgage. We reverse the decrees of both the Courts below.

Decree reversed.

(1) I. L. R., 11 Bom., 114.
(2) I. L. R., 17 Bom., 629.
(3) I. L. R., 15 Cal., 674.
(4) I. L. R., 3 All., 233.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1897.
August 19.

CHUDASAMA NAUDHABHAI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* NARAN TRIBHOVAN AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Tálukdár—Gujarát Talukdars' Act (Bom. Act VI of 1888), *Sec.* 31, *Cl.* 2—*Sale in execution of a decree—Sale of tálukdári estate—Sanction of Government.*

A tálukdár mortgaged his tálukdari estate in 1883, *i. e.*, prior to the passing of the Gujarát Tálukdárs Act (Bombay Act VI of 1888). In 1893 the mort-

* Appeal No. 42 of 1897.

gagee sued on his mortgage and, without having the sanction of the Governor in Council, obtained an order in the District Court for the sale of the mortgaged property, that Court holding that the provisions of section 31, clause 2, of Bombay Act VI of 1888 did not apply to the case of a mortgage effected prior to the passing of the Act. On appeal to the High Court,

Held, reversing the order of the District Court, that clause 2 of section 31 of Bombay Act VI of 1888 applied to the case and that a sale in execution of a decree was such an alienation as came within the terms of the section and required the previous sanction of the Governor in Council. The Court, however, directed the District Judge to give the plaintiffs a reasonable time for the production of the sanction, and ordered that in case they produced it, the order for sale should be affirmed, otherwise the plaintiff's application for sale should be dismissed.

Nagar Pragji v. *Jivabhai*(1) and *Doshi Fulchand* v. *Malek Dajiraj*(2) referred to and explained.

APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad.

On 4th October, 1883, one Pathabhar, a tálukdár of Dhandhuka, mortgaged his tálukdári estate (by *san* mortgage) to the plaintiff for Rs. 7,500.

On the 25th March, 1889, Bombay Act VI of 1888 (the Gujarát Tálukdárs' Act) came into force. That Act contains the following provision :—

"Section 31, clause (2).—No alienation of a tálukdár's estate, or of any portion thereof, or of any share or interest therein, made after this Act comes into force, shall be valid, unless such alienation is made with the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the jama and of the village expenses and police charges due in respect of the alienated area, shall thenceforward vest in the alienee and not in the tálukdár."

In 1893 the plaintiff brought this suit to recover Rs. 5,000, being the amount of instalments due under the mortgage together with interest up to date of suit, by sale of the mortgaged property.

The District Judge of Ahmedabad, who tried the case, held that under the above section he could not pass any decree against the mortgaged property, as it was a tálukdári estate. He, therefore, passed a decree on 3rd February, 1894, directing the amount

(1) I. L. R., 19 Bom., 80. (2) I. L. R., 20 Bom., 565.

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claimed to be recovered from the private property of the tálukdár other than the property mortgaged.

In appeal, the High Court in October, 1895, following the ruling in *Doshi Fulchand* v. *Malek Dajiraj*, amended the decree of the District Judge by directing that if the judgment-debtors failed to pay the decretal amount within six months from the date of the decree, the decree-holder might apply for an order absolute for sale of the mortgaged property(1).

The judgment-debtors having made default, the decree-holder presented a darkhást (No. 48 of 1896) stating that Rs. 11,566-13-1 were due to him under the decree and praying for the sale of the mortgaged property and for payment of that amount out of the proceeds.

The District Judge raised the following issue :—

"Can the estate of a tálukdár, having regard to the provisions of section 31 of Bombay Act VI of 1888, be sold in execution of a decree obtained subsequently to that Act coming into force, in respect of an incumbrance created on the estate prior to the date of that Act coming into force, without the sanction of the Governor in Council?"

The District Judge found this issue in the affirmative, and directed the mortgaged property to be sold in execution of the decree.

Against this decision the judgment-debtors appealed to the High Court.

Lang, Advocate General, (with Ráo Bahádur *Vasudev J. Kirtikar*) for the appellants.

N. V. Gokhale for the respondents.

The following authorities were referred to in argument:—*Kalian* v. *Pathubhai*(2); *Nagar Pragji* v. *Jivabhai*(3); *Doshi Fulchand* v. *Malek Dajiraj*(4); *Shah Kalidas* v. *Chudasama Nadhabhai*(1).

RANADE, J.:—There is no doubt an apparent conflict between the ruling in *Nagar Pragji* v. *Jivabhai*(3) and the remark made in

(1) P. J., 1895, p. 428.
(2) I. L. R., 17 Bom., 289.
(3) I. L. R., 19 Bom., 80.
(4) I. L. R., 20 Bom., 565.

the judgment in *Doshi Fulchand* v. *Malek Dajiraj*[1] in which a doubt is expressed as to the correctness of the extension given in *Nagar* v. *Jivabhai* to the principle laid down in *Kalian* v. *Pathubhai*[2]. In this last case, it was ruled that when the incumbrancer had obtained a decree for the sale of mortgaged property prior to 25th March, 1889, on which day Bombay Act VI of 1888 came into force, the prohibition under clause 2 of section 31 of that Act did not apply, and the decree was capable of execution as before the Act. The facts are not fully reported in *Nagar Pragji* v. *Jivabhai*, but as the decree in that case was passed in August, 1889, within a few months after the Act came into force, the suit was presumably instituted before the prohibition became operative. This circumstance assimilates the case to the class of cases referred to in *Kalian* v. *Pathubhai*.

There is no particular reason to distinguish cases in which a decree has been obtained from those in which proceedings had been presumably instituted before the Act came into force. In *Doolubdass* v. *Ramloll*[3] their Lordships of the Privy Council had to consider how far retrospective effect could be given to the provisions of an Act of 1848, which declared that "all agreements by way of wager shall be null and void," and it was held that this prohibition did not affect the validity of existing contracts, at all events not those contracts on which actions had already been brought before the new Act came into force. The test suggested in *Moon* v. *Durden*[4], which is a ruling on the English Act against wagers, *viz.*, the use of the word 'shall' in that Act, applies equally to section 31 of Act VI of 1888. The principles of the construction of statutes in this connection were very clearly stated in *G. Lee Morris* v. *Sambamurthi*[5], where it was observed that the general principle is that rights already acquired shall not be affected by the retrospection of a new Act, and that the law regulating the acquisition of rights is the law as it stood when the facts out of which the right springs occurred. Of course, this is only a presumption, and if the intention to give retrospective effect can be clearly gathered from the provisions

(1) I. L. R., 20 Bom., 565.
(2) I. L. R., 17 Bom., 289.
(3) 5 Moore I. A., 109.
(4) 2 Exch. R., 22.
(5) 6 Mad. H. C. Rep., 122.

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of the new Act, such intention must prevail for reasons such as those referred to in *Shivram* v. *Kondiba*[1]. These principles appear to me to cover the decision in *Nagar Pragji* v. *Jivabhai*[2], and as one of the Judges who decided that case, I see no reason to think that the extension thereby given to the principle of the ruling in *Kalian* v. *Pathubhai*[3] was not correct. It was on this account that the same Judges who decided *Nagar* v. *Jivabhai*, when they were called upon to decide the case reported in *Shah Kalidas* v. *Chudasama Nadhabhai*[4], followed the more cautious procedure suggested in *Doshi Fulchand* v. *Malek Dajiraj*[5]. In *Shah Kalidas* v. *Chudasama Nadhabhai* as the incumbrance was of a date prior to the Act, but the suit was instituted long after the Act came into force, a decree was passed for the amount due, but its enforcement by sale of the property was made subject to the provisions of section 89 of the Transfer of Property Act, which would, it was observed, make it possible for the creditor to obtain the sanction of Government before the sale actually took place. This direction was in accordance with the course suggested in *Doshi Fulchand* v. *Malek Dajiraj*[5]. It will be thus seen that there is really no conflict between the several rulings of this Court noted above.

I would follow the course laid down in *Shah Kalidas* v. *Chudasama Nadhabhai*[4] in the present case, and vary the order of the District Judge by directing that time may be allowed to the decree-holder to produce the sanction required by section 31, clause 2, and only after he produces such sanction steps should be taken to execute the decree.

PARSONS, J.:—As my learned colleague distinguishes the case of *Nagar Pragji* v. *Jivabhai*[2] from the case of *Doshi Fulchand* v. *Malek Dajiraj*[5] on the ground that in the former the suit had been instituted prior to the coming into force of the Gujarát Tálukdárs' Act, 1888, the necessity to refer this case to a Full Bench pointed out in the latter decision does not exist. In this case, of which a prior stage is reported in *Shah Kalidas* v. *Chuda-*

(1) I. L. R., 8 Bom., 340.
(2) I. L. R., 19 Bom., 80.
(3) I. L. R., 17 Bom., 289.
(4) P. J. for 1895, p. 428.
(5) I. L. R., 20 Bom., 565.

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sama Nadhabhai[1], the Act came into force long before the suit was filed and, therefore, under section 31 (2) there can be no alienation of the estate or any portion thereof without the previous sanction of the Governor in Council. A sale in execution of a decree is such an alienation as comes within the terms of this section (see *Kalian* v. *Pathubhai*[2]).

We must, therefore, reverse the order of the District Judge and direct that he give the plaintiffs such time as shall to him seem reasonable for the production, by them, of the sanction of the Governor in Council; in case they produce the same, he can then affirm his present order, otherwise he must dismiss their darkhást. We leave him to dispose of the costs incurred throughout.

Order reversed.

(1) P. J., 1895, p. 428. (2) I. L. R., 17 Bom., 289.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IN RE MOTIRAM.*

1897.
August 26.

Criminal Procedure Code (Act X of 1882), Sec. 345—Compounding offences—Mischief—Mischief done to the private property of a village Mahár.

The accused was charged with mischief for causing damage to crops which were the private property of a village Mahár. The Magistrate refused to allow the offence to be compounded, on the ground that the damage was done to a village Mahár and, therefore, could not be treated as damage affecting only a private person, as Mahárs had duties to perform in connection with the village.

Held that the offence was compoundable under section 345 of the Code of Criminal Procedure (Act X of 1882), as the damage was caused to a private person and not to the public. The fact that the complainant was a village Mahár would not make his personal property the property of the public, or even of the Mahár community generally.

APPLICATION under section 435 of the Code of Criminal Procedure (Act X of 1882).

The complainant was a vatandár Mahár of the village of Gartad in Khándesh.

* Criminal Application for Revision, No. 194 of 1897.