PRIVY COUNCIL.

P. C.*
J. C.
1900.
February 16;
March 24.

PADAPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* SWAMIRAO SHRINIVAS AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.

On appeal from the High Court at Bombay.

Vatan—Restriction upon alienation by a vatandár—Mortgage invalid to what extent—Regulation XVI of 1827*—Act III (Bombay) of* 1874.

An alienation by way of mortgage of vatan property, or any part of it, executed when Regulation XVI of 1827 was yet in force, had no operation beyond the life of the vatandár who mortgaged. The mortgage was in its inception void against the heir of the vatandár, and had not become validated against the heir by reason of the repeal of the sections in Regulation XVI of 1827, relating to this subject, by Bombay Act III of 1874.

Kalu Narayan Kulkarni v. *Hanmappa bin Bhimappa* (1) referred to and approved.

The childless widow of a vatandár, deceased in 1847, was the recognised vatandár in possession in 1865. She mortgaged two villages of the vatan to the father of the respondents. The latter two, after litigation, retained possession in 1886, by order of the Commissioner in the Revenue Department, until there should be a decree of Court to the contrary. The widow, according to the judgment below, had held the vatan adversely to her late husband's son, the plaintiff, who was born in 1848 of her co-widow, and he was the true heir, entitled from his birth. But the High Court gave effect to the adverse possession of the widow for the period of limitation supporting the mortgage. The plaintiff was the sole heir of the widow, his step-mother, who died in 1877.

The appellant contended that the vatan as inherited by him was free from the mortgage encumbrance, and that he was entitled to possession.

Held, reversing the decree of the High Court, that the mortgage was void against the heir, and had no force beyond the life of the vatandár who had executed it. The decree of the Subordinate Judge to that effect, and for possession, was maintained.

APPEAL from a decree (18th November, 1892) of the High Court reversing a decree (27th July, 1889) of the Subordinate Judge of Sholápur.

The suit was brought on the 16th August, 1887, by Padapa, now appellant, the son of Bhujangapa (named also Bhujangrao) a vatandár, deceased, on the 27th September, 1847, against the two sons of Shrinivas Swamirao, who died in 1880. Bhu-

Present :—LORDS HOBHOUSE, DAVEY, and ROBERTSON, and SIR RICHARD COUCH.

(1) (1879) 5 Bom., 435.

jangapa left two widows, the junior of whom, Ramova, was the mother of the plaintiff. The senior widow Kalova obtained possession of the vatan in 1865, and on the 15th September in the same year executed a mortgage deed of two villages, part of the vatan property, in favour of Shrinivas, to whom as mortgagee possession was given. The object of Padapa's suit was to have that mortgage declared void against himself, and to have possession of the property free of the encumbrance.

Whether the mortgaged property as part of the vatan was free or not, was the question on this appeal. The circumstances of the transaction appear in their Lordships' judgment: see also *Swamirao* v. *Padapa bin Bhujangrao*[1], the report of the appeal to the High Court.

The plaintiff, born on the 15th September, 1848, was a minor at the date of the mortgage. On the 9th May, 1864, Kalova's right to the vatan estate was confirmed, and afterwards the vatan was made over to her upon the terms of what is called the "Gordon Settlement." This expression is explained in a judgment of the High Court in a case in 1888, *Appaji Bapuji* v. *Keshav* reported in I. L. R., 15 Bom., 13, to which a note in I. L. R., 18 Bom., the report of the present suit, refers.

The Subordinate Judge decreed the plaintiff's claim on the ground that the property which Kalova had dealt with in 1865 was vatan, and could not be alienated by her for more than her lifetime. Other grounds were given which appear in the report in I. L. R., 18 Bom., p. 26.

The High Court (Bayley, officiating C. J., and Candy, J.) reversed the decision of the Subordinate Judge. They were of opinion that Padapa, if the successor of Kalova to the vatan, was entitled to recover the lands free from any mortgage executed by his predecessor. But they decided that Kalova was not the rightful incumbent of the vatan, and that the plaintiff was not her successor as vatandár. They considered that Padapa from the date of his birth in 1848 was himself the vatandár, and Kalova was without title; that she was, unless she was the

(1) (1892) 18 Bom., 22 at p. 28

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manager acting on his behalf, a mere trespasser. Thence they inferred that Padapa, if she was to be so regarded, though Bhujangapa's son and heir, had lost by lapse of time and Kalova's adverse possession his right to recover the lands as vatan, free from the mortgage encumbrance. They added that there was good reason to suppose that in 1865 Padapa was cognizant of the mortgage and, after it, acquiesced in the transaction. They allowed the plaintiff to redeem the villages mortgaged, that being a right which he inherited, on payment to be made within six months, of Rs. 9,000, with 12 per cent. simple interest thereon from April, 1881, to January, 1887, with, in default, foreclosure.

The judgment appears in full at page 28 of the report of *Swamirao* v. *Padapa bin Bhujangrav*, in I. L. R., 18 Bom.

Mr. *C. W. Arathoon*, for the appellant, argued, as the principal reason against the validity of the mortgage of the 15th September, 1865 that, as a consequence of the enactment in section 19 of Regulation XVI of 1827, and the decisions thereupon, no mortgage could have operated to charge the vatan when the heir had become entitled to the possession of it on the death of the widow who, as vatandár, had mortgaged the vatan villages. The appellant as the sole surviving member of the vatandár family was entitled to succeed to the vatan either as heir to Bhujangapa or as heir to Kalova. As heir to either one of these he was entitled to possession on the death of his step-mother, and the property was freed by law from any encumbrance created by his predecessor. It was an untenable view of the High Court that Padapa had so acted, by acquiescing in the transaction, that he must be taken to have consented to the charge upon the property having been valid against himself. It had not been proved that Kalova had had an adverse possession for more than twelve years; but even if that were assumed, the inalienable character of the property affixed to it as vatan would have remained unchanged. Kalova could not have charged the vatan, or any part if it, for a period beyond her own life. The Courts below had both referred to the inalienable character of the vatan property, and it was submitted that here there had been nothing to constitute this case an exception.

The respondents did not appear.

On the 24th March their Lordships' judgment was delivered by

LORD DAVEY:—This is an appeal from a decree of the High Court of Bombay dated the 18th November, 1892, which reversed the decree of the Subordinate Judge of Sholápur dated the 27th July, 1889. The sole question is whether the appellant is entitled to possession of two villages free from any incumbrance by the respondents, or whether they have a mortgage on the property which is valid and effectual against him. The High Court decided in favour of the respondents.

The facts of the case are complicated, but so far as material for the present purpose are as follows :—

The villages in question form part of certain vatan lands formerly belonging to Bhujangapa, the vatandár. He died on the 27th September, 1847, leaving two widows, Kalova and Ramova. The senior widow Kalova was childless. The appellant is the son of Ramova born on the 15th September, 1848. The legitimacy of the appellant's birth was at one time disputed and is denied by the respondents in their statement of defence in this suit. Both Courts below agree in holding that the appellant has in previous litigation and in this suit established his status as legitimate son and heir of Bhujangapa.

Before the appellant's birth the revenue authorities placed the vatan under sequestration, and it so remained until an order was made by Mr. Gordon, President of the Special Commission, on the petition of Kalova recognising her title to the vatan. This order bears date the 10th August, 1863, but she does not appear to have been put in actual possession until some time in 1865. No sanad from the Government to Kalova is produced, but possession was given on the terms of what is called the Gordon Settlement which were ratified by the Bombay Act III of 1874. By this settlement the services were commuted for one-fourth of the income, but the tenure continued to be vatan.

On the 15th September, 1865, Kalova made the mortgage in question of the vatan to Shrinivas, the father of the respondents, and she subsequently made further charges on the property in his favour. Litigation ensued between Kalova and Shrinivas

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with the result that on the 31st August, 1875, Shrinivas was placed in possession of the property and he was in possession at Kalova's death, which took place in November, 1877.

By an order of the Collector of Bijápur dated the 4th April, 1881, the appellant was placed in possession of the revenues of the villages. But that order was reversed by an order of the Commissioner of the 20th March, 1886, on the erroneous ground that the prohibition against alienation of vatan property did not preclude the making of a mortgage, and the respondents were by the Commissioner's order restored to possession until the appellant should bring a decree of a competent Court to the contrary.

The appellant thereupon obtained from the Government a sanad dated the 2nd December, 1886, whereby the villages were conferred upon him subject to a fixed annual payment in lieu of services, and it was provided that the said lands and cash allowances should be continued without demand of services and without increase of land tax over the above fixed amounts and without objection or question on the part of Government as to the rights of any holders thereof so long as any male heir to the vatan —lineal, collateral or adopted within the limits of the vatandár family—should be in existence.

The present suit was commenced by the appellant on the 16th August, 1887, against the respondents, who are the two sons of Shrinivas now deceased. The prayer of the plaint, so far as material, was for an order that the villages in suit being in the nature of vatan property the mortgage was not binding after the death of Kalova and for possession.

The material defences were (1) that the villages were not vatan property, (2) that Kalova's and their own possession under a title derived from her had been adverse, and so the suit was barred by limitation.

The Subordinate Judge in his judgment dated the 27th July, 1889, found (1) that the cause of action arose in the month of February, 1886, (2) that the property was vatan and consequently not liable for the debt (even if proved) after Kalova's death, and (3) that the appellant was entitled to possession. Accordingly the

Subordinate Judge made a decree that the appellant should recover possession and that the investigation of mesne profits be reserved—all costs on the respondents.

The respondents appealed to the High Court. By their judgment the learned Judges held that the property was vatan and there was nothing in the sanad granted to the appellant to take the property out of the well-established rule (which was in force in 1865 when the mortgage to Shrinivas was executed) that alienation by way of mortgage of any portion of vatan property had no force beyond the life of the vatandár mortgagor. They referred to the case of *Kalu Narayan Kulkarni* v. *Hanmapa bin Bhimapa*[1]. It was there held that a mortgage by a vatandár of vatan property executed in 1871, when Regulation XVI of 1827 was yet in force, was in its inception void against the heir of the vatandár, and did not become validated against the heir by reason of the repeal of that Regulation by Act III (Bombay) of 1874. Their Lordships agree with that decision and think it is directly applicable to the present case.

The learned Judges, therefore, held that *primâ facie* the appellant (if the successor to Kalova) was entitled to recover the lands free from any mortgage executed by his predecessor. But they considered that Kalova was not the incumbent of the vatan, and the appellant was not her successor. Having established his legitimacy he was the vatandár from the date of his birth and Kalova was a trespasser. It followed that his title to recover the lands free from any incumbrance on the ground that he is the vatandár has been lost by limitation. True he is also the heir of Kalova, but in that character his only right was to redeem Kalova's mortgage.

It may be useful to recapitulate the material dates in the case. The appellant was born on the 15th September, 1848, and, therefore, attained his majority on the 15th September, 1866. Kalova died in November, 1877. At her death, therefore, the appellant was not barred from asserting his original title as heir of Bhujangapa. But on the 15th September, 1878, it would seem that he became barred and his title as son and heir of Bhujangapa was extinguished. Thereupon Kalova's heir would *primâ facie* be

(1) (1879) 5 Bom., 485.

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entitled to the vatan and if he found other persons in possession also claiming under Kalova he could maintain an action against them in which their title as against him would be determined. The question would then come to be who has the best title through Kalova, she being assumed to have been the rightful owner of the land. If the persons in possession did not claim under Kalova, but were independent trespassers, other considerations would arise.

Unfortunately their Lordships had not the advantage of hearing counsel for the respondents in support of the ingenious argument which found favour in the High Court. But giving it their best consideration they think it errs in leaving out of sight the incidents of the tenure and Kalova's true position.

Assuming that the appellant was barred by limitation from recovering the lands as heir of his father from those claiming under Kalova, and consequently his title as vatandár from his own birth was extinguished, that circumstance did not alter the tenure. The lands remained vatan and Kalova was vatandár *de facto* with all the rights and subject to all the restrictions incident to that tenure. In the order of Mr. Gordon, under which Kalova obtained possession, it was conferred on her as vatan and in the mortgage made by her the lands are described as vatan. And in all the proceedings in the Collector's office she is recognised as vatandár. It is clear, therefore, that she held possession as vatandár and in no other character. Consequently she could not make any alienation which would be valid against her own heir whether that heir were the appellant or another. And on the assumption that the appellant's earlier title is extinguished by limitation there is nothing to preclude him from asserting his title as Kalova's heir. The argument seems to give greater right to possession as vatandár by wrong or usurpation than would be enjoyed by a rightful vatandár.

The learned Judges seem also to have thought that the appellant had in some way adopted the mortgage.

Their Lordships think the evidence insufficient to support this finding. But it is unnecessary to discuss this topic further, because if the mortgage was void against the appellant, and not

merely voidable, no amount of acquiescence short of the period of limitation would give it validity as against the appellant.

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Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court should be reversed, and instead thereof the appeal to that Court should be dismissed with costs. The respondents must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant :—Messrs. *T. L. Wilson and Co.*

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Russell.

MULJI PURSHOTUM AND ANOTHER, PLAINTIFFS, *v.* CURSANDAS NATHA AND OTHERS, DEFENDANTS.*

1900. *July* 27, 27.

Hindu law—Inheritance—Deceased brother's son—Sister—Daughter of a predeceased son.

A brother's son succeeds as heir in preference to a sister or a granddaughter (daughter of a predeceased son).

In the island of Bombay the sister's place as heir is to be determined by the text of Mayukha.

Both under the Mayukha and the Mitákshara, the sister comes in as a *gotraja sapinda* and, as such, must be postponed to the brother's son, who is a *sapinda*.

ORIGINATING summons taken out by executors to determine who was entitled to the undisposed of residue of the property of Kessowji Jadhavji, who died on the 9th February, 1886, leaving a large amount of self-acquired moveable and immoveable property.

By his will which was dated the 8th February, 1886, and of which probate was obtained on the 7th May, 1886, he directed that his daughter-in-law (widow of his predeceased son Liladhar) should adopt one Karamsi Madhavji, and he bequeathed the residue of his property to the said Karamsi Madhavji.

The executors filed a suit (No. 185 of 1887) to have the will construed, and it was finally determined by the Privy Council in 1898(1) that Karamsi Madhavji took no interest in the estate.

* Suits Nos. 66 and 503 of 1900.

(1) (1898) 23 Bom., 271.