

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

JETHABHAI PARBHUDAS AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS, v. NATHABHAI BAVAJI AND OTHERS (ORIGINAL DEFEND-
ANTS), RESPONDENTS.*

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March 8.

Bhagdari and Narwadari Act (Bombay Act V of 1862), sections 3, 5†—Bhag—Narwa—Recognized sub-divisions of a Narwa compromise effecting a sub-division not recognized—Vid compromise—Collector's action—Appeal to Commissioner—Civil Court—Adverse possession—Evidence Act (I of 1872), section 115—Estoppel.

At the death of K, a sub-sharer holding a recognized sub-division in a narwa, disputes arose between plaintiffs and defendants as to the heirship. The disputes

* Record Appal No. 484 of 1903.

† Sections 3 and 5 of the Bhagdari and Narwadari Act run as follows:—

3. It shall not be lawful to alienate, assign, mortgage, or otherwise charge or incumber any portion of any bhag or share in any bhagdari or narwadari village other than a recognized sub-division of such bhag or share, or to alienate, assign, mortgage or otherwise charge or incumber any homestead, building-site (gabhan) or premises appurtenant or appendant to any such bhag or share or recognized sub-division appurtenant or appendant thereto, apart or separately from any such bhag or share, or recognized sub-division thereof.

Any alienation, assignment, mortgage, charge or incumbrance, contrary to the provisions of this section, shall be null and void; and it shall be lawful for the Collector or other chief revenue-officer of the district, whenever he shall, upon due inquiry, find that any person or persons is or are in possession of any portion of any bhag or share of any homestead, building site (gabhan) or premises appurtenant or appendant to such bhag or share in any bhagdari or narwadari village other than a recognized sub-division of such bhag or share, in violation of any of the provisions of this section, summarily to remove him or them from such possession, and to restore the possession to the person or persons whom the Collector shall deem to be entitled thereto;

and any suit brought to try the validity of any order or orders which the Collector may make in such matter must be brought within three months after the execution of such order or orders.

* * * * *

5. Nothing in this Act contained shall be construed as prohibiting the alienation, assignment, mortgaging, charging or incumbering any bhag or share, or recognized sub-division of any bhag or share, in any such village as aforesaid, conjointly and in the gross with its homestead, building-site (gabhan) and other proper appurtenances, if such alienation, assignment, mortgage, charge or incumbrance be in other respects warranted by law, the object and intention of this Act being to prevent the dismemberment of bhags or shares, or recognized sub-divisions thereof, in bhagdari or narwadari villages, and also to prevent the severance of homesteads, building-sites (gabhan) or other premises, appurtenant or appendant to bhags or shares, or recognized sub-divisions of bhags or shares, from the same or any of them.

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led to a suit by the plaintiffs, wherein they failed. Before, however, the period for appeal expired, the parties effected an amicable settlement, by which the defendants gave up their rights in favour of the plaintiffs over half of a survey number, which was a part of a *narwa* holding governed by the Bhagdari and Narwadari Act (Bombay Act V of 1862). Later on the plaintiffs leased their portion of the land in perpetuity to a third party. The defendants thereupon applied to the Collector, complaining that the plaintiffs had alienated the property contrary to the provisions of the Bhagdari and Narwadari Act (Bombay Act V of 1862), and praying that the alienation being void, they (the defendants) should be placed in possession of the land. The Collector declined to interfere; but, on appeal, the Commissioner held otherwise and directed the defendants to be put in possession of the land. The plaintiffs then filed a suit to recover the possession of the land.

Held, that as the effect of the compromise arrived at between the parties was to alienate a portion of a *bhag* or share in a *narwa* other than a recognized sub-division of such *bhag* or share it was void within the meaning of section 5 of the Bhagdari and Narwadari Act (Bombay Act V of 1862); that the plaintiffs acquired no rights under the compromise, and that therefore they were not entitled to any relief.

An appeal from an order passed by the Collector under section 3 of the Bhagdari and Narwadari Act (Bombay Act V of 1862) lies to the Commissioner.

The Collector can take action at any time under section 3 of the Bhagdari and Narwadari Act (Bombay Act V of 1862); and the plea of adverse possession cannot prevail against any order that he may make.

Dala v. Parag Khushal (1) followed.

It is of the essence of the title by adverse possession that it must relate to some property which is recognized by law.

SECOND APPEAL from the decision of S. L. Batchelor, District Judge of Ahmedabad, confirming the decree passed by J. M. Shukla, Subordinate Judge of Borsad.

Suit to recover possession of land.

The property in dispute belonged originally to one Kashibhai, who was a sub-sharer holding a recognized sub-division in a *narwa* under the Bhagdari and Narwadari Act (Bombay Act V of 1862). Kashibhai died leaving a widow; and on her death, the plaintiffs inherited the property as heirs of Kashibhai. Disputes then arose between the plaintiffs and the defendants' father as to the heirship; and they resulted in Suit No. 1783 of 1882 being filed by the plaintiffs. On the 20th December, 1882, this suit was decided against the plaintiffs. Before the period of

(1) (1902) 4 Bom. L. R. 797.

appeal had expired, the plaintiffs and defendants' father entered into a compromise on the 21st January, 1884, the effect of which was that the defendants waived their right over the properties described in the compromise including one half of survey No. 275 and passed a release for it to the plaintiffs, who were since then in possession of the properties mentioned in the compromise. The plaintiffs on the 14th June, 1895, leased the property in perpetuity to Ambaidas and Govindbhai. This action of the plaintiffs led the defendants to apply on the 31st January, 1896, to the Collector under the Bhagdari and Narwadari Act (Bombay Act V of 1862), complaining that the lease by the plaintiffs would dismember the *narwa* and praying that the property should be given up to them. In June, 1896, the Collector decided that the permanent lease would not cause a dismemberment of the *narwa* and that the defendants had no cause or right to complain. This decision was, on appeal, reversed by the Commissioner; and the defendants were put in possession of the property in July, 1898. In 1901, the plaintiffs filed this suit to recover the possession of the property from the defendants.

The defendants contended (*inter alia*) that the claim was barred by the provisions of Bhagdari and Narwadari Act (Bombay Act V of 1862), and that the compromise dated the 21st January, 1884, was inoperative.

The Subordinate Judge threw out the plaintiffs' claim holding that the jurisdiction of the Civil Court was barred by the Bhagdari and Narwadari Act (Bombay Act V of 1862). On appeal this decree was confirmed by the District Judge.

The plaintiffs appealed to the High Court.

J. A. Shah, for the appellants (plaintiffs):—We submit that the release (Exhibit 44) is not an alienation or an assignment within the meaning of section 3 of the Bombay Act V of 1862. It is only a compromise between the rival claimants of Kashibhai's property and the rights of inheritance are in no way included within the scope of section 3 of the Act: see *Veribhai v. Raghobhai*.⁽¹⁾ Further the land in dispute is one of the many properties mentioned in Exhibit 44; and there is nothing to show that all the said properties including the land in dispute do not form a recognized

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(1) (1876) 1 Bom. 225.

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sub-division of a *narwa*. The lower Courts have not approached the question from that point of view. Before the release could be declared to be inoperative under section 3 of the Bhagdari and Narwadari Act (Bombay Act V of 1862) the Court has to see whether or not all the properties including the disputed land and not only the land in dispute mentioned in Exhibit 44 formed part of a *narwa* or of a recognized sub-division thereof. The lower Appellate Court is wrong in holding the claim barred by the concluding portion of section 3 of the Act.

The Collector has made no order in this case and the Commissioner is not the officer within the meaning of the section. The Act does not provide for any appeal to the Commissioner. And for the purposes of the section the Commissioner has no *locus standi* whatever. The suit is not therefore barred.

We have also made out a claim by adverse possession.

[ASTON, J.:—Could the provisions of the Bhagdari and Narwadari Act (Bombay Act V of 1862) be controlled by the plea of adverse possession under the Limitation Act (XV of 1877): see *Dala v. Parag Khushal* (1)?]

We submit that though the Collector is at liberty to take action at any time under section 3 of the Act, the Courts have to give effect to the legal rights as much under the Limitation Act (XV of 1877) as under the Bhagdari and Narwadari Act (Bombay Act V of 1862). The case of *Dala v. Parag Khushal* (1) relates only to the Collector's order.

We further submit that the defendants are estopped from going behind the compromise (section 115 of the Indian Evidence Act, I of 1872).

At any rate, the land in dispute should be joined up with Kashibhai's land and therefore given over to the plaintiffs; but the defendants are in no way entitled to it: see *Mahamad Dasu v. Amanji*. (2)

M. N. Mehta, for the respondents (defendants):—The land in dispute is a portion of a survey number, which stands in the name of defendant No. 1; and being portion of a *narwa* has been rightly joined up with the remaining portion of the survey num-

(1) (1902) 4 Bom. L. R., 797.

(2) (1869) 23 Bom. 710.

ber. Exhibit 44 is an alienation within the meaning of section 3 of the Bhagdari and Narwadari Act (Bombay Act V of 1862), since it conveys the property absolutely to the plaintiffs. The land in dispute being a portion of a *narwa* the compromise does constitute dismemberment of it and is therefore void.

The plea of adverse possession cannot affect the application of the Act: see *Dala v. Parag Khushal*.⁽¹⁾ The Courts can do what the Collector can do under the section at any time.

Section 115 of the Indian Evidence Act (I of 1872) does not apply and the facts in this case do not create any estoppel.

L. A. Shah was heard in reply.

CHANDAVARKAR, J.:—The undisputed facts of this case, which have given rise to several questions of law, are shortly these. Kasibhai was a sub-sharer, holding a recognised sub-division in a *narwa*. He died leaving a widow, and the plaintiffs allege that on her death they inherited the property as heirs of Kasibhai. There were disputes between the plaintiffs and the defendants' father as to heirship and that led to Suit No. 1783 of 1882. In that suit the plaintiffs failed and before the period for appeal expired, the parties effected an amicable settlement, which resulted in the execution of a deed dated the 21st of January, 1884, (Exhibit 44) by which the defendants' father gave up all his rights in favour of the plaintiffs in certain properties which comprised the land in dispute. That land is a portion of Survey No. 275 and is 2 acres and 4 gunthas in extent, the whole of the survey number being 4 acres and 8 gunthas. This survey number is a *Narwa* holding and Bombay Act V of 1862 applies to it.

The plaintiffs leased the land in dispute in perpetuity to third parties and that led the defendants to make an application to the Collector, complaining that the plaintiffs had alienated the property contrary to the provisions of the Act just mentioned. They alleged that the permanent tenancy was an alienation of an unrecognized portion of the *narwa*, and requested the Collector to declare it void and place them in possession of the land. The Collector, however, declined to interfere on the ground that the permanent lease did not amount to any dismemberment or the

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creation of an unrecognized sub-division of the *narwa* holding and that there had been a recognized sub-division by virtue of Exhibit 44 before the permanent lease. The defendant appealed from the Collector's order to the Revenue Commissioner who reversed that order and directed the defendants to be put in possession of the land in dispute.

The present suit was brought by the plaintiffs to recover possession. Both the Courts below have rejected the plaintiffs' claim and in this second appeal their pleader has urged their title to recover the land on three grounds: (1) that their title being derived from Exhibit 44, which is a deed of compromise, there was no alienation within the meaning of section 5 of Bombay Act V of 1862; (2) that they have become owners by adverse possession; and (3) that the defendants are estopped from denying the validity of Exhibit 44 and contesting the plaintiffs' title to the land.

At the outset it is to be remarked that the question of the validity or otherwise of the permanent lease and of the Commissioner's order thereon is not before us. Neither party contests the legal propriety of that order. The first question is—whether Exhibit 44 had the effect of alienating a portion of a *bhag* or share in the *narwa* other than a recognized sub-division of such *bhag* or share and was on that account void within the meaning of section 5 of Bombay Act V of 1862?

It is argued for the plaintiffs that Exhibit 44 is not affected by that section, because it is urged, it was a compromise entered into for the settlement of a *bonâ fide* dispute between the parties. The answer to that, however, is that the result of the compromise was to dismember Survey No. 275, which comprised 4 acres and 8 gunthas, and to give to the plaintiffs 2 acres and 4 gunthas out of it. In other words, by Exhibit 44 was carved out of the *narwa* a sub-division which did not exist at the date of the transaction as "a recognized sub-division." Whether we call it a compromise or a partition or by any other name, the effect of the transaction was the same. The substance and effect of the transaction is what must be looked to for the purpose of determining whether it is within the mischief which the Legislature had in view in passing the Act in question. If the

transaction clearly amounts to an alienation of an unrecognised sub-division of a share in a *narwa*, its real nature cannot be disguised by calling it a compromise. The relinquishment, then, by the defendants' father of the land in dispute in favour of the plaintiffs was not lawful but void under the provisions of sections 3 and 5 of Bombay Act V of 1862. But it was argued that although the transaction was void under Bombay Act V of 1862, yet in the absence of interference on the part of the Collector, there was nothing to prevent Civil Courts from recognising the rights of the plaintiffs. We cannot give effect to this argument, because section 3 declares that such an alienation as we have here "shall not be lawful," which means that it shall be absolutely void. The plaintiffs sue in ejectment and must make out their title to recover the land. Their title rests on Exhibit 44, but that being a void deed there is nothing on which the plaintiffs' title can rest. Whether the Collector interferes or not under the second clause of section 3, the first clause making such alienations "not lawful," a Court of law is bound to give effect to it. Further, the action of the Commissioner in putting the defendants in possession was under the power given to the Collector by the second clause of section 3. It is true that the action was taken on the defendants' complaint as to the permanent lease. But the defendants asked to be put in possession and the Collector had relied in his order on the fact that in his opinion Exhibit 44 represented a valid transaction. With these facts before him the Commissioner reversed the Collector's order and restored the possession to the defendants. Even assuming that the Commissioner had not the question of the validity of Exhibit 44 before him, we are bound to uphold his action if we can ascribe it to something which he had the legal power to do, the question being not whether the Commissioner intended to restore possession to the defendants because he thought Exhibit 44 to be void, but rather whether the defendants can defend the possession so obtained on legal grounds. Next it is contended that the Commissioner had no jurisdiction to interfere under the Act, because the authority designated in section 3 is the Collector, and the Act gives no appeal from the Collector's order to the Commissioner. The answer to that is that Bombay Act V of 1862 must be read with the Land Revenue Code. Section

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203 of the Land Revenue Code lays down: "In the absence of any express provision of this Act, or of any law for the time being in force to the contrary, an appeal shall lie from any decision or order passed by a Revenue-officer under this Act, or any other law for the time being in force, to that officer's immediate superior, whether such decision or order may itself have been passed on appeal from a subordinate officer's decision or order or not." The Collector is 'a Revenue-officer' according to the definition of the term in the Code, and it is conceded by the learned pleaders for both parties that for the purpose of assessment a *narwa* tenure falls within the provisions of the Land Revenue Code. The Commissioner, therefore, had jurisdiction to interfere with the order of the Collector passed under Bombay Act V of 1862.

Now, we come to the question of the title said to have been acquired by the plaintiffs by adverse possession. The District Judge has found the plaintiffs' possession for more than twelve years under Exhibit 44 proved, but he has held that it is not adverse, because some of the defendants were minors during the period. We need not consider the legal soundness of that view of the District Judge, because, in our opinion, Bombay Act V of 1862 is not affected by the Limitation Act, as was decided in *Dala v. Parag Khushal*,⁽¹⁾ where it was held that the Collector can, under section 3 of the Bhāgdāri Act, take action at any time, and that the plea of adverse possession cannot prevail against any order that he may make. Then again in *The Collector of Broach v. Desai Raghunath*,⁽²⁾ it was held that no law of limitation applies to proceedings taken by a Collector under Bombay Act V of 1862.

If, as we have already held, the Commissioner's order supplies the place of the Collector's order and is passed with jurisdiction, then this case falls within the principles laid down in the cases cited above. Apart from authority and on principle alone it seems to us that such a title as the plaintiffs claim to have acquired cannot be acquired by adverse possession. It is not the case of the plaintiffs that they have held the land in dispute adversely for more than twelve years as a land not falling within

(1) (1902) 4 Bom. L. R. 707.

(2) (1888) 7 Bom. 546.

the *narwa* tenure or the specific *narwa* holding of which it admittedly forms a part. Their case rather is that they have held it as forming part of the holding and as subject to all the incidents of the tenure. All that is claimed for them is that their possession for more than twelve years of the land in dispute entitles them to hold it as against the defendants as "a recognized sub-division" of a *bhág* or share in the *narwa*. But it is of the essence of a title by adverse possession that it must relate to some property, which is recognized by law. But here there is no such property, since the Legislature has proscribed the kind of property on which the plaintiffs seek to found their title by adverse possession.

Then as to estoppel. Apart from the question whether section 115 of the Indian Evidence Act was intended to apply to transactions expressly declared by the Legislature to be void or unlawful, the undisputed facts of the case are such as to make that section inapplicable. The plaintiffs were about to appeal from the decree passed in the suit which they had brought, and in consideration of their not appealing, the defendants' father relinquished his rights to the land in dispute. In other words, the plaintiffs' promise not to appeal formed the consideration for the relinquishment. It was substantially a contract between the parties. There was no declaration, act or omission by means of which the defendants' father led the plaintiffs to believe a thing to be true and to act upon such belief. Section 115 of the Evidence Act requires that to create an estoppel there must be a representation by means of a declaration, act or omission that *a thing is true, i.e.*, that the representation is "as to some state of facts alleged to be at the time actually in existence." If the representation relates to promises *de futuro*, it can be binding not as an estoppel but as a contract: see per Selborne L. C. in *Maddison v. Alderson*,⁽¹⁾ and per Lord Macnaghten in *George Whitechurch Limited v. Oavanagh*.⁽²⁾ Assuming that there was a representation as to an existing state of facts, what was it that the defendants' father can be said to have represented to be true? That the plaintiffs were the heirs entitled to the land in dispute. The defendants do not dispute that—in fact, they are

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(1) (1858) 8 App. Cas. p. 473.

(2) (1902) A. C. 117 at p. 130.

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not concerned to dispute it for the purposes of the present case. The defendants' father did not represent that the land in dispute was a recognised sub-division of a *bhāg* or share in the *warwa* which could be legally held whether, by the plaintiffs or any one else, and that is the question which is now in dispute. If the plaintiffs agreed to the compromise in Exhibit 44 under the belief that the land was a recognised sub-division, that belief was not caused by the defendants' father. In fact, there is no allegation, much less evidence, to show that the defendants' father caused the plaintiffs to act upon that belief.

For these reasons we confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

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Before Mr. Justice Chandavarkar and Mr. Justice Aston.

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NARAYAN AND OTHERS (ORIGINAL APPLICANTS), APPELLANTS, v. VENKATACHARYA BALKRISHNACHARYA (ORIGINAL OPPONENT), RESPONDENT.*

Hindu Law—Mitākshara—Debts—Surety—Grandson's liability to pay debts contracted by the grandfather as a surety.

Under Hindu Law as laid down in the *Mitākshara* a grandson is not liable to pay a debt which his grandfather contracted as a surety unless the latter in accepting the liability of a surety received some consideration for it.

A party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law amounting to no more than his view that the question is unarguable.

SECOND APPEAL from the decision of J. C. Gloster, District Judge of Belgaum, confirming the decree passed by D. S. Sapre, Subordinate Judge of Athni.

Application for the removal of attachment under a decree.

The opponents obtained a decree against the assets of one Ramchandra, the grandfather of the applicants. The decree was for the recovery of a debt due by Ramchandra as a mere surety for the payment of money. In execution of this decree

* Second Appeal No. 547 of 1903.