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actually employed, but that is only allowable when it is sought to avoid an illegality, inconsistency, or manifest absurdity. No such reason exists here. I must, therefore, decide that the votes in respect of the 100 and the 5 shares were properly allowed. The suit will be dismissed with costs, including costs of the rule.

Attorneys for the plaintiffs :—Messrs. *Conroy and Brown*.

Attorneys for the defendants :—Messrs. *Payne, Gilbert and Sayáni*.

FULL BENCH.

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

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May 1.

PARSHOTAM BHATSHANKAR, (ORIGINAL PLAINTIFF), APPELLANT,
v. HIRA' PARAG, (ORIGINAL DEFENDANT), RESPONDENT.*

*Bhāgdāri (Bom.) Act V of 1862, Sec. 3—Undivided share of a bhāg,
alienation of—Construction.*

The alienation of an undivided portion of a *bhāg*, or share in the *bhāg*, to a person who is not a *bhāgdār*, is void under section 3 of Act V (Bom.) of 1862.

BIRDWOOD, J., dissented.

THE plaintiff obtained a decree against one Lakhmidás, and in execution he attached a certain *bhāgdāri* property as belonging to Lakhmidás. The present defendant objected to the attachment, alleging that the property was his, he having purchased it at a previous execution-sale. He pleaded adverse possession. The attachment was removed, and the plaintiff was referred to a suit to establish his right. He now sued to establish his right to attach and sell the said property in execution.

The Court of first instance found the previous purchase of the defendant proved, as also the plea of adverse possession, and rejected the plaintiff's suit.

The plaintiff appealed to the District Judge, who confirmed the lower Court's decree.

On appeal by the plaintiff to the High Court, among other grounds, the plaintiff contended that the property being an un-

* Appeal No. 378 of 1888.

divided portion of a *bhág*, the sale of it to the defendant was void under the *Bhágdári* (Bombay) Act V of 1862.

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The following reference was made by the Division Bench, consisting of the Chief Justice and Mr. Justice Telang, to a Full Bench :—

“Having regard to the decisions in *Ardesir Nasarvánji v. Muse Nátha Amiji*,⁽¹⁾ *Bái Kuvarbái v. Bhagván Ichhárám*⁽²⁾ and in Second Appeals Nos. 519 of 1882 and 474 and 475 of 1885, we think it expedient to refer the following question for the decision of a Full Bench :—

“Whether the alienation of an undivided share in a *bhág* is void under section 3 of Bombay Act V of 1862.”

Gokuldás Kahándás for the appellant :—Having regard to the preamble and sections 1 and 3 of the *Bhágdári* (Bombay) Act V of 1862, it is clear that the alienation of an undivided share of a *bhág* is void. The circumstance that it remains undivided for a time does not prevent it from dismemberment by partition. The intention of the Legislature is to prevent dismemberment of the *bhág*, and it would frustrate that intention if a sale of an undivided share be held legal—*Ardesir Nasarvánji v. Muse Nátha Amiji*.⁽³⁾ The case of *Bái Kuvarbái v. Bhagván Ichhárám*,⁽⁴⁾ which is against me, seems to have left the second part of the preamble of Bombay Act V of 1862 unconsidered. The object of the Act is to prevent mischief by alienation and to preserve the *bhágdári* estate—Second Appeals Nos. 474 and 475 of 1885, in which such alienations were held void.

Goverdhanráam Mádhavrám, for the respondent, relied on *Bái Kuvarbái v. Bhagván Ichhárám*.⁽⁵⁾ To amount to dismemberment there must be a physical dismemberment. Mere declaration of a right to a portion of the *bhág* is no such dismemberment.

SARGENT, C. J. :—The question whether the alienation of an undivided share in a *bhág* to a person outside the *bhág* is void under section 3 of the *Bhágdári* (Bombay) Act, V of 1862, is refer-

(1) I. L. R., 1 Bom., 601.

(3) I. L. R., 1 Bom., 601.

(2) I. L. R., 13 Bom., 203.

(4) I. L. R., 13 Bom., 203.

(5) I. L. R., 13 Bom., 203.

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red to by Melvill and Kemball, JJ., in the judgment in *Ardesir Nusarvánji v. Muse Nátha Amíji*,⁽¹⁾ but without deciding it. They say: "We do not feel bound to determine the question whether the attachment and sale of an undivided share in a *bhág* would be contrary to the letter or spirit of Bombay Act V of 1862. Even if Ardesir were the purchaser of an undivided share, all that he could do would be to sue for a partition, which admittedly he has never done, and which he is not now doing; and the question would then arise, whether consistently with the provisions of Bombay Act V of 1862, such a partition could be made." In Second Appeal No. 519 of 1882 the purchaser of an undivided share sought to enforce a division of the *bhág*, and the Assistant Judge held that the purchase was not illegal, because the *bhág* still remained entire, but that the result of the partition, which the plaintiff was attempting to enforce, was rendered illegal by the Act. On second appeal the decree of the Court below was confirmed by West and Nánábhái Haridás, JJ., but there was no written judgment to show the precise ground on which the Court proceeded. In Second Appeals Nos. 474 and 475 of 1885, in which there was no written judgment, the Court would appear by confirming the decree of the Court below to have proceeded on the assumption that the sale of an undivided portion of a *bhág* was void. However, in *Bái Kuvarbái v. Bhagván Ichhárám*,⁽²⁾ Birdwood and Parsons, JJ., held that such a sale was not void on the ground that the mischief at which the Act aims is the physical dismemberment of *bhágs*. They say: "No doubt, the language of the section seems comprehensive enough to include such shares of *bhágs* within the prescribed prohibition; for the section provides that no "portion" of a *bhág* shall be liable to sale by the process of any Civil Court; and an undivided share is as strictly a portion of a *bhág* as a share actually divided off by metes and bounds; but any interference with the sale of undivided shares does not appear to be within the intended scope of the Act. The mischief at which the Act aims is the dismemberment of *bhágs*,—that is, their physical dismemberment." The preamble to the Act shows that the motive of passing the Act was to secure the permanence of *bhágdári* and *narvadári*

(1) I. L. R., 1 Bom., at p. 606.

(2) I. L. R., 13 Bom., 203, at p. 208.

tenures, of which the leading feature, as stated by Westropp, C. J., in *Dolsang v. The Collector of Kaira* ⁽¹⁾ after referring to the reports of the revenue authorities on the subject, is that the shareholders in the village lands settle hereditarily and in the gross for the payment of the assessment on the lands to Government-- and section 5 declares that it is the dismemberment of the *bhág* or share or recognized sub-division that the Act is intended to prohibit. The question is, therefore, whether the alienation of an undivided portion of a *bhág* or share in the *bhág* to a person, who is not a *bhágdár*, is not a dismemberment of it, which will cause a discontinuance of the tenure. Now, although this may not perhaps result at once from the alienation of an undivided portion of a *bhág* or share, such alienation places the alienee in a position in which he can assert his right to partition (unless prevented from doing so by some provision of the Act) and so become the owner of a portion physically dismembered from the *bhág*. There is no section in the Act, which, without straining its language, could be construed to have the effect of prohibiting such an alienee from suing for partition; and the lands allotted to him on such partition would not be subject to the *bhágdári* tenure, which is not a quality of the lands—or else there would have been no necessity for the Act. The possibility that the alienee might associate himself with the hereditary sharers in the *bhág* ought not, we think, to weigh against the mischief with which the tenure is threatened by such an alienation, and which the Act was intended to prevent. As such an alienation certainly comes within the language of the section and practically falls within the mischief of the Act, we think the prohibition against alienation should be held to apply equally well to an undivided “portion” as to one divided by metes and bounds. We must, therefore, answer the question referred to us in the affirmative.

BIRDWOOD, J.:—I adhere to the decision arrived at by Mr. Justice Parsons and myself in *Bái Kuvarbái v. Bhagván*.⁽²⁾ The mischief at which the Act aims is the physical dismemberment of *bhágs*. Though the expression “any portion of a *bhág*” is

(1) I. L. R., 4 Bom., at p. 374.

(2) I. L. R., 13 Bom., 203.

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used in section 3, yet the context, as pointed out in our judgments in *Bái Kuvarbái's* case, shows that it was not apparently the intention of the Legislature to prohibit the sale of an undivided share in a *bhág*. If the purchaser of such a share were to obtain a decree for partition, I doubt whether any plot of land divided off by metes and bounds, but not constituting a recognized sub-division of a *bhág*, could be assigned to him; for such an assignment would be within the mischief of the Act. But every sale of an undivided share does not necessarily result in an attempt on the part of the vendee to secure possession of a specific portion of the *bhág* lands. In many cases the purchasers of undivided shares must have been admitted to joint possession with the other sharers, as in *Bái Kuvarbái's* case. They may be quite satisfied with such possession; and so long as they are, the integrity of the *bhág* will not be threatened any more than it ordinarily is by the possibility of any one of the original sharers seeking at any time to sue out a partition. The purchaser has no better right to ask for a partition than was possessed by the sharer whose share or part of whose share he purchased. The sale does not, therefore, introduce any new element of danger into the administration of the village. Nor, again, do I think that the Act contemplates the future retention of *bhágs* in the hands only of persons settling hereditarily for the payment of the assessment, for there is nothing in the Act to prevent the sale of a whole *bhág* or a recognized sub-division of a *bhág*,—which I take to be a parcel of land divided off by metes and bounds,—to persons who are in no way connected with the families of the original *bhágdárs*. For these reasons, I am unable to concur in the judgment of the learned Chief Justice and Mr. Justice Telang.
