1885.

UGARCHAND MÁNACKCHAND v. MÁDAPÁ SOMÁNÁ.

question between the parties being, who has the better title to the land. It will, however, be open to the defendants to raise an issue as to the plaintiffs' claim being barred by the Statute of Limitation.

We must therefore reverse the decree of the Assistant Judge and remand the case for trial with reference to the above remarks. Costs to abide the result.

Decree reversed and case remanded.

APPELLATE CIVIL

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1884.

December 16.

GOPA'L HANMANT DESHKA (ORIGINAL PLAINTIFF), APPELLANT, *v.* KONDO KA'SHINA'TH (ORIGINAL DEFENDANT), RESPONDENT.*

Decree—Execution of decree—Construction—Res judicata—Civil Procedure Code Act (XIV. of 1882), Section 230—Limitation—Vatandárs (Bom.) Act III of 1874, Section 10—Collector's certificate.

A decree of a District Court dated 5th October 1863 declared the plaintiff to be a hereditary deputy vatandár of a certain Deshpande vatan vested in the ancestors of the defendant as hereditary vatandárs, and that the plaintiff, as such deputy, was entitled to receive a certain sum annually out of the income of the vatan. The decree did not explicitly deal with the claim to future payments then set up by the plaintiff as hereditary deputy vatandár. The plaintiff received moneys from time to time under the decree until 1875, but he neglected to have himself registered as a representative vatandár under Bombay Act III of 1874, section 56. In 1875 he made a claim for certain arrears of the allowance which he alleged to be due under the decree and he attached certain moneys out of the income of the defendant's vatan. The Collector issued a certificate under section 10 of the Vatandárs' Act (III. of 1874) for the removal of the attachment, and the attachment was accordingly removed by the Subordinate Judge. The plaintiff appealed from the order of removal, but the appellate Court confirmed that order. On second appeal to the High Court, it was held on 23rd June 1879 that the lower courts were right in raising the attachment; that the civil courts had no jurisdiction to register the plaintiff as a representative vatandár and that the Collector was the proper authority to be referred to. Thereupon the plaintiff applied to the Collector to cancel the certificate which had removed the attachment and to register him as a representative vatandár. The Collector rejected the plaintiff's application on 31st March 1881.

* Second Appeal No. 367 of 1883.

1884.

GOPÁL HANMÁNT DESHKA v. KONDO KÁSHINÁTH.

In 1881 the plaintiff presented a fresh *darkhást* to attach the same vatan property in virtue of the said decree of 1863, but the application was rejected as *re judicata* by both the lower courts. They held that the certificate of the Collector which remained uncancelled operated as a bar. On second appeal to the High Court,

Held, reversing the order of the lower courts, that the decree was one capable of execution.

Held, as regards the Collector's certificate that under section 10 of the Vatandárs Act (Bombay) III of 1874, the certificate was exhausted in operating on the execution which it stopped and that the lower Court ought to have dealt with the case apart from that certificate.

THIS was a second appeal from the decision of J. L. Johnston, Senior Assistant Judge of Poona, at Sholápur.

In 1855 the father of the plaintiff, since deceased, brought a suit against the predecessors of the defendant in the Court of the Sadar Amín at Sholápur, claiming to be a hereditary deputy vatandár of a certain Deshpánde vatan vested in the predecessors of the defendant as hereditary vatandárs. In that suit the plaintiff's father prayed for a declaration of his right as such hereditary deputy vatandár and for the payment thenceforward of a certain sum annually out of the income of the said vatan with arrears for certain previous years. The Sadar Amín dismissed the claim, but on appeal the District Judge on the 5th October 1863 reversed the decree of the Sadar Amín and declared the plaintiff (his father having died) to be a hereditary deputy vatandár of the Deshpánde vatan vested in the predecessors of the defendant as hereditary vatandárs, and as such deputy entitled to a certain sum annually out of the income of the vatan. The decree of the District Judge did not, however, deal explicitly with the claim to future payments. The plaintiff subsequently received moneys from time to time under the decree, but he neglected to have himself registered and treated as a "representative vatandár" under Bombay Act III of 1874, section 56.

In 1875 plaintiff presented a darkhást for the attachment of certain money belonging to the vatan for arrears due under his decree. The money was accordingly attached. Subsequently the Collector issued a certificate to the Subordinate Judge who had attached the money, for the removal of the attachment, under

1884.

GOPÁL HANMANT DESHKA v. KONDO KÁSHINÁTH.

Bombay Act III of 1874, section 10. On receipt of the certificate the Subordinate Judge ordered the attachment to be removed and his order was affirmed by the Assistant Judge on appeal.

The plaintiff thereupon specially appealed to the High Court, which, on 23rd June 1879, held, *inter alia*, that as the plaintiff was not registered and treated as "a representative vatandár" under Bombay Act III of 1874, although the decree of 1863 entitled him to be so registered, a civil court had no jurisdiction to register him as such representative vatandár, or to direct that he should be so registered by the Collector, and that any application for such registration should be made to the Collector. It further held that the attachment upon the money was rightly removed on receipt of the Collector's certificate.

In consequence of this judgment of the High Court the plaintiff's darkhást was struck off the Court's file, whereupon the plaintiff applied to the Collector of Sholápur for the cancellation of his certificate which had raised the attachment placed on the vatan. The plaintiff also applied to the Collector to be registered as a vatandár, but the Collector declined to grant either of the plaintiff's application.

In 1881 the plaintiff sought to attach the same vatan property by virtue of his decree, but the Subordinate Judge of Sholápur rejected his application. The plaintiff appealed, but the lower appellate Court confirmed the decision of the Subordinate Judge with the following remarks:—"The High Court directed the appellant as to the proper procedure to be adopted by him. He accordingly made application to the Collector to be registered and treated as a representative vatandár. His application was refused. The decision of the Collector was open to appeal and to revision by Government, but appellant, instead of appealing to the proper Revenue courts, has come to the Civil courts, though he was told that the jurisdiction in that respect does not lie in the Civil court. I confirm the order with costs on the appellant."

From this order the plaintiff appealed to the High Court.

Gokuldáss Káhándáss for the appellant:—The point of limitation was not raised in the Courts below and cannot be

allowed here. On the decree several executions were issued and submitted to, and it cannot be now impeached. The order passed on the application granting execution was an order in a judicial proceeding and the respondent had notice of it as seems to be evident from his conduct. The order has a conclusive effect and is binding between parties. See *Mungul Pershad Dichit's case.* (1) As to the Collector's certificate. The certificate operated only in removing the first attachment and was exhausted as soon as it raised the attachment. It had reference only to that particular payment of the allowance.

Ghanashám Nilkanth Nádkarni for respondent:—The decree in question is a declaratory decree and the question arises whether it is capable of execution. Under section 230 of the Civil Procedure Code, XIV of 1882, the decree-holder of a decree of more than twelve years old has only one opportunity of applying for execution and should he fail the decree is barred. See *Afrannessa Chowdharani* v. *Sharufulullah.*(2) To take the benefit of the section again the previous applications should have been under that Code. *Sreenath Gooho* v. *Yusoof Khán,*(3) *Dewan Ali* v. *Soroshbala Dabee.*(4) This decree being a declaratory decree is not capable of execution. The decree does not command but declares. For the purposes of limitation the rule in regard to suits should be held to apply to applications in execution proceedings. *Pirjade* v. *Pirjáde.*(5) Limitation should be counted from the date of the first application, which having been disposed of which is as good as granted, the present application is barred. The property having been a vatan property the Collector's certificate removed the attachment and that certificate is still in force.

WEST, J.—The judgment of the District Court of the 5th October 1863 does not deal explicitly with the claim to future payments set up by the plaintiff as hereditary gumásta. It does, however, deal with his hereditary right, and pronounces in favour of it, while it rejects the claim for arrears of salary. If

(1) L. R. 8 Ind. Ap. 126.
(2) 9 Cal. Rep. 321.
(3) I. L. R. 7 Cal. 556.
(4) I. L. R. 8 Cal. 297.
(5) I. L. R. 6 Bom. 681.

1884.

GOPÁL HANMANT DESHKA v. KONDO KÁSHINTÁH.

the judgment and decree did not constitute between the parties a relation in which the one was commanded by the Court to do or permit something in favour of the other, the mere circumstance that the thing was in fact done in part from time to time would not and could not create the supposed relation or give by a mere repetition of errors a right which had not been given by the adjudication. This would be equally so when the execution had been ordered by the Court on an *ex parte* application, though when the opposite party had been called on to appear, an adjudicative character would thus be acquired by the order then passed. The cases cited by Mr. Ghanashám, compared with *Mangal Pershad's Case*(1) and that of *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*(2) show this and the dicta in *Jenkins* v. *Robertson*,(3) and *Langmead* v. *Maple*(4) show that a mere order of a Court without contest is not necessarily *res judicata*. This is especially so in the case of execution-proceedings which are primarily executive, though questions may arise in them for judicial decision. But in the present case though the District Judge did not deal explicitly with the question of future payments, it may well be that he thought this sufficiently provided for by his order as to the hereditary right. This judgment has already been construed by this Court as ordering future payments, and by the District Court of course in the same way when it ordered execution on the decree. This being so, we think it safest, though the matter is not *res judicata*, not to give effect to our doubts as to the proper construction of the judgment and decree by declaring it incapable of execution after execution has so long been submitted to, but to accept the view taken before and heretofore acquiesced in. We accordingly pronounce the decree one capable of execution.

The Collector's certificate under section 10 of the Vatandars' Act III of 1874 (Bombay) was exhausted in operating on the execution which it stopped.

The Court below should have dealt with the present case apart from that certificate. The Collector can effectually protect the

(1) L. R. 8 I. A. 123. L. R. 11 I. A. 37.

(3) L. R. 1 Sc. Ap. 122, 123.

(4) 18 C. B. (N. S.) 255.

1884.

GOPÁL HANMANT DESHKA v. KONDO KÁSHINÁTH.

vatan against any injurious claim and he can register the plaintiff as a vatandárs. He has not, it seems, done either. In these circumstances, the Court below must consider whether execution can proceed on the present application, and the Collector whether he can prevent it, and, if he can, whether he ought to do so. We therefore reverse the decree, and remand the case for re-trial and new decree, awarding costs.

Decree reversed and case remanded.

REVISIONAL CRIMINAL.

Before Sir Charles Sargent, Knight, Chief Justice, Mr. Justice Bayley, and Mr. Justice Scott.

1885. *June* 20.

QUEEN EMPRESS *v.* W. D. EDWARDS AND F. C. VERNER.*

Jurisdiction of High Court—European British subjects in Native States—Law applicable to British subjects in Native States—Cantonment Magistrate's Court at Secunderabad—Power of High Court to transfer for trial a case pending in Cantonment Magistrate's Court—The Code of Criminal Procedure, Act X of 1882, *Sec.* 526—*Act III of* 1884, *Sec.* 11.

Act XXI of 1879, section 8 (which corresponds with section 8 of Act XI of 1872 now repealed), extends to all British subjects, European or Native, in Native States in alliance with Her Majesty the law relating to offences and criminal procedure for the time being in British India. The Code of Criminal Procedure (Act X of 1882), with the amendments introduced by Act III of 1884, is thus, by virtue of that section, applicable to such British subjects, Native or European.

The High Court of Bombay having been vested by notification of the Governor General of India in Council, No. 178 of 23rd September, 1874, with original and appellate criminal jurisdiction over European British subjects, being Christians resident, amongst other places, at Secunderabad, outside the Presidency of Bombay and within the territories of His Highness the Nizám of Hyderabad, the Cantonment Magistrate of Secunderabad in his character of a District Magistrate is subordinate to the High Court in criminal matters relating to Christian European British subjects in Hyderabad within the contemplation of section 526 of the Code of Criminal Procedure, Act X of 1882, as amended by Act III of 1884, sec. 11: and the High Court possesses, by virtue of the appellate jurisdiction so vested in it, the power of transferring a criminal case pending in the Cantonment Magistrate's Court either to itself or to any criminal Court of equal or superior jurisdiction.

The High Court by an order under section 526 of the Criminal Procedure Code (Act X of 1882) transferred the present case of defamation from the Court of the Cantonment Magistrate at Secunderabad to the High Court for trial, on the ground that no machinery for a trial by jury existed at Secunderabad,

* Criminal Application, No. 167 of 1885.