

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Nánábhái Haridós.

SHANKAR GOPA'L AND OTHERS, (PLAINTIFFS), v. BĀ'BA'JĪ
LAKSHMAN AND ANOTHER, (DEFENDANT).*

1888.
April 5.

Vatandárs' (Bombay) Act III of 1874, Sec. 10—Decree—Eaccution—Transfer of vatan property from one not vatandár—Construction—Collector's certificate prohibiting delivery of decreed property—Practice—Procedure.

The plaintiff Shankar and his brother, who were *vatandár deshpadés*, sued to redeem a certain property alleged to have been mortgaged by their undivided paternal aunt to the defendant Bábáji. Bábáji objected, on the ground that the plaintiffs were not the heirs of the widow, who had left a daughter. The daughter was joined as co-plaintiff, and a decree passed in her favour, and that decree was confirmed by the Special Judge. The plaintiffs being dissatisfied with this decision, applied to the Collector for the issue of a certificate, under section 10 of (Bombay) Act III of 1874, prohibiting the property from passing out of the family. The daughter in the meanwhile obtained possession of the property under the decree. Subsequently the certificate applied for by the plaintiffs was filed by them. The lower Court, feeling doubt as to whether the Collector could legally issue the certificate and how far it would operate, referred the case to the High Court.

Held, that the Court should not act upon the certificate of the Collector. The effect of the decree being to transfer the property from the mortgagee, who was not a *vatandár*, to the daughter, who, according to the Collector's certificate, was also not one, section 10 of (Bombay) Act III of 1874 had no application. The Collector, if he thought proper, should take proceedings under section 6, clause (1), of the Act.

THIS was a reference by Ráv Sáheb Rámchandra Báikrishna Chitale, Subordinate Judge of SÁngola and Málsiras, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs Nos. 1 and 2 sued in the Subordinate Judge's Court at SÁngola to redeem certain land from defendant No. 1, to whom they alleged it was mortgaged by their deceased paternal aunt one degree removed, who lived united with them and died leaving no heirs nearer than themselves. Defendant No. 1 pleaded that plaintiffs Nos. 1 and 2 were not the heirs of the deceased mortgagor, as she left a daughter surviving her. The daughter was accordingly made plaintiff No. 3 with her own consent, and the case was proceeded with to judgment, which was delivered on the 12th August, 1886, in favour of plaintiff No. 3.

* Civil Reference, No. 53 of 1887.

Not satisfied with this decision, plaintiffs Nos. 1 and 2 applied for revision to the Special Judge, who confirmed the decree on the 21st April, 1887.

Before the decree was confirmed by the Special Judge, plaintiff No. 1 applied to the Collector of Sholapur praying for the issue of the certificate under section 10 of the Vatan Act, (Bombay) No. III of 1874, on the ground that the property was *deshpānde inām*, and could not pass, as such, out of the family of the *vatanđárs*. The certificate was granted accordingly and sent to the Subordinate Court at Sāngola, in order that the decree might be cancelled. It was dated the 22nd March, 1887, and was received in the Subordinate Judge's Court on the 27th. Before the issue of this certificate, plaintiff No. 3 applied for possession of the property decreed to her, and it was given her on the 1st February, 1887.

The Subordinate Judge referred the following questions to the High Court for its decision :—

1. "Whether plaintiff No. 3 is a *vatanđār* within the provisions of the Vatan Act, (Bombay) No. III of 1874 ?
2. "If so, whether the Collector can legally issue his certificate under section 10 of the Act when the service in respect of the *vatan* has become commuted ?
3. "If so, whether the certificate can operate in favour of plaintiffs Nos. 1 and 2 beyond the cancellation of the decree ?
4. "If so, whether plaintiff No. 3 can be ousted of her possession given to her before the issue of the certificate and properly made over to plaintiffs Nos. 1 and 2, because of it instead of the mortgagee ?
5. "Whether the Amending Act (Bombay) V of 1886 can operate retrospectively against plaintiff No. 3, to deprive her of her rights vested in her before the passing of it, by postponing her succession to all the male heirs of the *vatanđárs* ?"

The Subordinate Judge's opinion on the first point was in the affirmative, and on the second, third, fourth and fifth in the negative.

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Mahádev Bháshkar Chaubal for plaintiffs Nos. 1 and 2 :—The plaintiffs are the rightful heirs of the original mortgagor, their aunt, who was united with them. The Collector rightly issued to them the certificate, and the Civil Court ought to have stopped execution of the decree under section 10 of the *Vatandárs'* (Bombay) Act III of 1874. Under this Act a female cannot succeed to the *vatan*, and the plaintiff being the daughter of our aunt could not succeed. The *vatan* property is inalienable, whether services are dispensed with or not, and the circumstance that services have been commuted, does not change its nature—*Jagjivandás v. Imdad Ali* ⁽¹⁾.

Báláji Abáji Bhágvat for plaintiff No. 3 :—Where services are dispensed with, the *vatan* property is alienable. A daughter is an heir : see section 4 of (Bombay) Act III of 1874. The father of the plaintiff was a *vatandár* and was succeeded by his widow. Section 4 of the Act, as also the amending Act V of 1886, sec. 2, include her in the definition of *vatandár*, though her succession is postponed. My client was a *vatandár*, and the Collector could not issue the certificate under section 10 of the Act, which applies in cases where the property alienated is in the possession of a *vatandár*. Here the mortgagee was not a *vatandár*, and the section has no application.

Vásudev Gopál Bhandárkar, for the mortgagee, contended that should the certificate of the Collector be held valid, his client would be entitled to possession.

SARGENT, C. J. :—The effect of the decree of the 21st April, 1887, was to transfer the *vatan* property from the mortgagee to the third plaintiff, who, according to the Collector's certificate, is not a *vatandár*. But the mortgagee himself was not a *vatandár*, and under such circumstances we do not think that the decree was within the contemplation of section 10 of (Bombay) Act III of 1874, the object of which was to give practical effect to the prohibition against alienations by *vatandárs* as provided by sections 5 and 7. The Court should, therefore, not act upon the certificate of the Collector, but leave him to take proceedings, if he thinks proper, under section 6, clause 1. Under these circumstances it is not necessary to answer the other questions.

(1) I. L. R., 6 Bom., 211.