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matter is one for the consideration of Government and the Legislature.

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In my opinion, the decree of the District Judge should be reversed, and that of the Subordinate Judge restored. All costs throughout on defendant.

FARRAN, C. J. :—I entirely concur in the judgment which my learned colleague has delivered and in the reasons upon which he has based his decision. I wish, however, to be understood as not expressing any opinion upon the applicability of section 85, Land Revenue Code, to Vithalrao's holdings, as the question has not been fully argued and the judgments of the lower Courts do not set out their nature; and I have, therefore, not considered the matter. I am also not sufficiently conversant with the subject to offer an opinion as to the propriety or otherwise of extending the provisions of section 71 of the same Code to alienated holdings or otherwise altering the law upon this subject.

Decree reversed.

FULL BENCH.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, Mr. Justice Parsons and Mr. Justice Ramade.

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July 20.

NILKANTH GANESH NAIK (ORIGINAL APPLICANT), APPELLANT, v.
THE COLLECTOR OF THANA (ORIGINAL OPPONENT), RESPONDENT.*

Land Acquisition Act (X of 1870) and Act I of 1891—Award of compensation—Payment of compensation awarded how enforced—Appeal from an order irregularly made—Practice—Procedure.

The Land Acquisition Act (X of 1870) did not provide for or contemplate an award for compensation being enforced against the Collector by execution proceedings, and there is no general law which enables a Civil Court to enforce such a statutory liability, when imposed upon a Collector or other civil officer, by means of execution proceedings without a suit. The ordinary mode of enforcing such an obligation is by suit, unless the Legislature when it creates the obligation prescribes such other means of enforcing it.

* Appeal, No. 121 of 1896.

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On the 16th February, 1894, under the Land Acquisition Act (X of 1870), an award of compensation to the claimant for land acquired under that Act was made by the Assistant Judge of Thána, and he subsequently made an order directing the Collector to pay the amount with interest and costs, without, however, fixing a date for payment. On the 1st March, 1894, the new Land Acquisition Act (I of 1894) came into force. On the 26th February, 1895, the claimant applied to enforce payment of the amount awarded, and the then Assistant Judge (Mr. Knight) re-affirmed the previous order and directed the Collector to pay it on or before the 20th May, 1896. No payment, however, was made, and the matter came before the new Judge (Mr. FitzMaurice) for final order. He held that neither under Act X of 1870 nor the new Act I of 1894 had he any power to enforce payment against the Collector, and he, therefore, dismissed the claimant's application. On appeal to the High Court the matter was referred to a Full Bench.

Held, that the Act X of 1870 prescribed no mode of compelling payment by the Collector of compensation awarded under its provisions, but left the persons interested to a suit to enforce such payment. The proceedings under that Act were, therefore, at an end when the award was made. That being so, there were no proceedings pending in the case when the new Act I of 1894 came into force. Clause 2 of section 2 of that Act, therefore, did not apply, and no further steps could be taken under that Act.

Per RANADE, J. :—The District Judge's order appealed from was improperly made. The Assistant Judges had jurisdiction to make the previous order, and even if their order was not properly made, it could not be set aside in the way it was done by the District Judge as if an appeal lay to him from such order. That order, however, as now held was wrong, and the irregularity of the District Judge's order thus led to no failure of justice, and fell under section 578 of the Civil Procedure Code (Act XIV of 1882).

Quære—whether an award made under the provisions of Act I of 1894 can be enforced against the Collector by execution proceedings.

APPEAL from the decision of J. FitzMaurice, District Judge of Thána, in darkhást No. 2 of 1895.

On the 16th February, 1894, the Assistant Judge of Thána (Mr. Pratt) under section 15 of the Land Acquisition Act (X of 1870) made an award of compensation to the claimant.

The Collector subsequently desired to withdraw the proceedings in the matter, as the land to which the award related had been acquired and paid for many years previously, but the District Judge (Mr. Khareghat) held that the proceedings could not be withdrawn by the Collector after a reference had been made to the District Judge. He ordered the Collector to pay

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the amount awarded with interest and costs, but fixed no date for payment.

On the 1st March, 1894, the new Land Acquisition Act (I of 1894) came into force.

On the 26th February, 1895, the claimant applied to enforce the payment ordered by the award. The Assistant Judge (Mr. Knight) held that although under the old law (section 34 of Act X of 1870) the Judge had no power to order execution, the new law (section 53 of Act I of 1894) by making the Code of Civil Procedure applicable to all proceedings under the Act authorized an order for execution. He was also of opinion that the proceedings in this matter must be regarded as pending, and that, therefore, the new Act was applicable under section 2, clause 2, of Act I of 1894. He, therefore, re-affirmed the order of payment already made by the Judge, and directed that payment should be made on or before the 20th May, 1896.

The Collector, however, did not make any payment as directed, and the matter came before the new District Judge (J. Fitz-Maurice) for final order. The Collector again contended that neither under the old nor the new act had the Judge any power to enforce the award by ordering payment. The Judge agreed with this view, and dismissed the claimant's application for payment.

The claimant appealed to the High Court.

The appeal came on first for hearing before Parsons and Ranade, JJ., by whom it was referred to a Full Bench consisting of Farran, C. J., Parsons and Ranade, JJ.

Daji Abaji Khare for the appellant:—The Judge made an order for payment. His successor (Mr. FitzMaurice) had no jurisdiction, at the instance of the Collector, who had not appealed, to re-open the matter. Section 40 of the old Act (X of 1870) made it obligatory upon the Collector to pay when the award was made. The new Act (I of 1894) was in force when we applied for payment, and section 53 of that Act adopts the procedure prescribed by the Civil Procedure Code (Act XIV of 1882). The matter was still pending when the new Act came

into force, and, therefore, that Act applies: see clause 2 of section 2.

Rao Bahádur *V. J. Kirtikar* for the respondent:—The award was merely in the nature of a declaration, not of a decree. It could not be executed as a decree. The only mode of enforcing such an award is by a suit. Neither the old Act (X of 1870) nor the new one (I of 1894) does more than provide for fixing the amount of compensation. They do not provide for enforcing the award. The Court becomes *functus officio* as soon as it fixes the amount. Even if the new Act (I of 1894) be held applicable to this case, it only provides for payment of interest (section 28). Article 19 of the Limitation Act (IX of 1871) and article 17 of the Limitation Act (XV of 1877) show that the Legislature intended that a suit should be brought in cases of compensation under the Act.

FARRAN, C. J.:—I am of opinion that the decision of the District Judge in this matter was correct and that the appeal must be dismissed.

It appears to me to be quite clear that the “Land Acquisition Act, 1870,” which, as its preamble declares, was an Act “to consolidate and amend the law for the acquisition of land for public purposes and for companies and for determining the amount of compensation to be made on account of such acquisition,” did not provide for or contemplate an “award” made under its provisions being enforced against the Collector by execution proceedings. The only provisions which the Act makes for payment are those contained in section 40 and section 42, the former of which imposes a statutory liability upon the Collector to pay the compensation according to the award to the person named therein, and the latter imposes upon him the further statutory liability, when the amount is not paid on taking possession, of paying the amount awarded and the added percentage with interest on such amount and percentage at the rate of six per cent. per annum. There is no general law, of which I am aware, which enables a civil Court to enforce such a statutory liability when imposed upon a Collector or other public officer by means of execution proceedings without a suit. The ordinary mode of enforcing such an obligation is by suit, unless

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the Legislature when it creates the obligation prescribes some other special means of enforcing it. The question, therefore, is "Has the Land Acquisition Act of 1870 prescribed any special mode of action against the Collector?" In my opinion, it has not. Directly it certainly has not done so, and I cannot find any indication of its intention to do so indirectly.

An award under the Act could have been made either by the Collector himself under section 14, or by the Judge and assessors or concurring assessors (not by the Court) under section 34. The decision of the Judge (again not of the Court) if he differed from the assessors was not called an "award" but a "decision," and that decision was appealable. There was no provision made for the contingency of there being no appeal from the "decision" of the Judge, but the intention was, I think, in that case, to treat it as an "award." Hence, in the event of there having been no appeal, an award under the Act could be made in three ways: i, by the Collector under section 14; ii, by the Judge and the one or more concurring assessors under section 34; iii, by the Judge alone under section 35, which in this case was called a "decision."

In none of these cases is any provision made for the Court passing a decree in "accordance with the award," nor is section 205 of the Civil Procedure Code or any section contained in Chapter XVII of the Code made applicable to the proceedings. This consideration would doubtless lose much of its force if the contents of the award drawn up in pursuance of the Act included a direction that the Collector was to pay the amount awarded. The contrary is the case. Section 34 prescribes the particulars which the award is to contain, *viz.*, the amounts awarded under each clause of section 24 so far as applicable to the particular case together with the grounds of awarding each of the said amounts. So far as the compensation is concerned, that is the only matter which the award is to contain. Costs are differently dealt with, but as to the compensation itself the obligation on the Collector to pay it rests solely on the provisions of the sections (sections 40 and 42) of the Act to which I have referred and which apply alike whether the award is made by

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the Collector under section 14 without reference to the Court or made by the Judge and assessors or the Judge alone after such a reference. The terms of the latter section appear to provide that the percentage payable under it is not to be mentioned in the award. These considerations appear to me to be conclusive against the power of the Court to carry the "award" into effect by execution.

There are some further provisions of the Act which tend very strongly to show that the above conclusion is correct and in accordance with the intention of the Legislature:—

(1) The special provisions as to costs contained in the Act. The Collector is to pay them all in the first instance (section 32), but if he is allowed any costs by the award, a special provision is introduced in his favour, that if he does not deduct them from the amount awarded, they may be recovered from the person interested as if they were costs incurred in a suit and as if the award were the decree therein (section 34). There is no such provision made in favour of the person interested as against the Collector. The liability of the latter is left to rest upon the statutory obligation contained in section 32, and the Act prescribes no means for enforcing it.

(2) The provisions of the Code of Civil Procedure made applicable by section 34 of the Act to proceedings before the Court do not include any reference to the execution provisions and sections of the same Code, and upon the general principle *expressio unius alterius exclusio* their application is apparently excluded.

(3) The Legislature, by article 19 of the Schedule II to the Limitation Act, IX of 1871, recognized a suit as the appropriate remedy against Government for compelling payment of compensation for land acquired for public purposes. The present Limitation Act (XV of 1877) contains a similar provision (article 17); and Act XIV of 1859, section 1, clause 6 (applicable only to Bengal), contemplates suits as the proper remedy open to suitors for enforcing awards under the Bengal regulations therein referred to. For these reasons, I have come, with-

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out hesitation or doubt, to the conclusion stated at the beginning of this judgment.

I have gone into this question somewhat fully, because a clear conclusion upon it appears to me to dispose of the appeal. If the Act (X of 1870) prescribed no mode of compelling payment, by the Collector, of the compensation awarded under its provisions, but left the persons interested to a suit to enforce such payment, all proceedings under the Act were at an end when the award was made. Nothing more could be done under the Act, no further step could be taken under its provisions. The proceedings then ceased to be pending. They were at an end. As then no proceedings were pending in this case under Act X of 1870 when Act I of 1894 came into force on March 1st, 1894, it follows that there were no proceedings to which the provisions of the latter Act could be applied under section 2, clause (2). It is, to my mind, quite impossible to continue, under Act I of 1894, proceedings which were completed under Act X of 1870. The order of the Assistant Judge in this case, which was virtually to pass under Act I of 1894 a decree in accordance with the award made under Act X of 1870, was passed without jurisdiction, and the order of the District Judge refusing to proceed against Government under the execution sections of the Code, including section 429, is correct. The District Judge, as I understand his proceedings, did not purport to set aside the order of the Assistant Judge, but declined to further execute the award notwithstanding the order of the Assistant Judge. Even if this view of his procedure is not correct, it appears to me that we cannot now order execution to issue, which we should have to do if we allowed the appeal.

In the above view it is unnecessary for me to consider whether an award made under the provisions of Act I of 1894 can be enforced against the Collector by execution proceedings. That is a complex problem which has been set by the Legislature for solution by the Judges. Such problems often arise when the provisions of one Act are introduced by reference into another and incorporated with it. Whether section 205 and the execution sections of the Civil Procedure Code are inconsistent with the provisions of Act I of 1894, is a question which

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may have hereafter to be determined. I shall offer no opinion upon it. It will be for the Collector to consider whether he is not estopped from disputing the applicant's demand for the compensation awarded to him. On that point also I offer no opinion. I would confirm the order dismissing the application. Costs on the appellant.

PARSONS, J.:—I concur. The questions at issue have been so exhaustively dealt with that it is quite unnecessary for me to say more.

RANADE, J.:—The award in this case was made on 16th February, 1894, by Mr. Pratt, the Assistant Judge, on a reference by the Collector of Thana under section 15 of Act X of 1870. Later on, an attempt was made by the Collector to withdraw the land-acquisition proceedings on the ground that the reference was made by mistake, as the land to which the award related had been acquired and paid for twenty years ago. Mr. Khareghat, the Judge, however, held that there was no provision in the Act for the withdrawal of proceedings by the Collector after a reference had been made to the District Judge. He ordered the Collector to pay the sum awarded with interest and costs, but fixed no date for the payment.

Act No. I of 1894 came into force on 1st March, 1894, a few days after the award was made, and the present application was made by the claimant on 26th February, 1895, to enforce the payment ordered by the award. The application was referred to Mr. Knight, the Assistant Judge, and it was contended before him on behalf of the Collector that the award was incapable of execution. On the 18th February, 1896, Mr. Knight held that although, under section 34 of the old law, the District Judge had no power to order execution, such power was conferred on the Court by the extended scope of section 53 of Act I of 1894, and that, though the award was made under the old Act, its enforcement was regulated by the new Act, as the proceedings must be regarded as pending within the terms of section 2, clause 2, of the new Act. He accordingly re-affirmed Mr. Khareghat's order, filling up the omission in it of the date of payment, and directed that the payment should be made on or before 20th May,

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1896. As no payment was made by the Collector within the time fixed, the matter again came up for final orders before the District Judge. The Collector again raised the contention that neither under the old nor under the new Act had the District Judge any power to enforce the award. This contention was upheld by the District Judge, who accordingly dismissed the claimant's application. The present appeal is against this order of dismissal.

The case was at first argued before Mr. Justice Parsons and myself, but as there was a difference of opinion between us on the points of law raised in the appeal, it was arranged that it should be re-heard before a Bench of three Judges, consisting of the two before whom it was first heard and the Chief Justice.

At this second hearing, a preliminary point was raised that the District Judge had no power to revise and set aside an interlocutory order passed by the Assistant Judge. That order was made after full enquiry on 18th February, 1896, and it re-affirmed the previous order of Mr. Khareghat. The Collector's representation to the District Judge against Mr. Knight's order was not made till 2nd July, 1896. The Bombay Civil Courts' Act (sections 14—19) regulates the powers of Assistant Judges. It is not clear whether the reference to the Assistant Judge in this case was made under section 16 for inquiry and report, or whether the Assistant Judge was invested with the powers of District Judge under section 19. The wording of the order shows that the Assistant Judges, Mr. Khareghat and Mr. Knight, did not merely inquire and report. Under these circumstances, it may be presumed that they had jurisdiction to pass the order. And even if their order was not proper, it could not be set aside in the way it was done by the District Judge, as if an appeal lay to him from such order. I am, therefore, of opinion that the District Judge's order appealed from in this case was improperly made.

This circumstance by itself does not, however, preclude this Court in regular appeal from considering the validity or otherwise of the order passed by the Assistant Judge directing the enforcement of the award. It was admitted in the course of the

argument, and in fact it is clear from the Assistant Judge's own reasoning, that, as far as Act X of 1870 was concerned, there was no provision by which the Judge who made the award could direct its enforcement against the Collector, as though it were a decree between the claimant and the Collector. Section 34 of the old law, it is clear, only extended the provisions of the Civil Procedure Code so far as they relate to the inquiry before the award was made. The functions of the Court do not, as remarked by the District Judge, absolutely cease with the determination of the compensation ; for in the matter of costs directed to be paid by the claimant, power is given to the Court to enforce an order about costs as though the award were a decree in a suit. This special provision shows that, in other respects, no such power was conferred on the District Judge. Sections 40, 41 do indeed impose a statutory liability on the Collector to make the payment, but there is no procedure laid down by which this liability can be enforced, except by a separate suit as provided for by articles 17 and 18 of the Limitation Act. This was the view taken by this Court in the ruling referred to by the District Judge, and that decision must govern the present case.

The Assistant Judge, however, was of opinion that the new Act I of 1894 was applicable to this proceeding, and that, therefore, the Courts had power to enforce this award. When the case was first argued, I was inclined to take this view, especially as it appeared to me to be the intention of the Legislature to extend the scope of the old section 34 re-enacted as section 53, and thus to make the whole Code applicable as far as possible to land-acquisition disputes. The words employed in sections 31—34 are also more significant, as they direct the Collector to make the payment with interest and costs, if any. On further consideration of the whole subject, I have come to agree with the Chief Justice and Mr. Justice Parsons, and to hold that this case must be disposed of independently of the new Act. The award cannot be held to have been a pending proceeding under section 2, clause 2. If the award was not enforceable on the date when it was signed, no subsequent enactment could alter its character, unless there was any express provision to that effect in the Act. Section 2, clause 2, contains no such provision.

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The irregularity of the District Judge's order has thus clearly led to no failure of justice, and falls under section 578 of the Civil Procedure Code. The order of dismissal must, therefore, be upheld, and the claimant referred to the only remedy open to him under Act X of 1870.

Costs on appellant.

Order confirmed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Kanade.

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July 26.

MULCHAND KUBER (ORIGINAL PLAINTIFF), APPELLANT, v. BHUDHIA
AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Marriage—Marriage of a girl without her father's consent—Suit by father to have marriage declared void—Factum valet—Applicability of the doctrine to marriage.

Under the Hindu law a duly solemnized marriage cannot be set aside in the absence of fraud or force, on the ground that the father did not give his consent to the marriage.

The texts relating to the eligibility of persons who can claim the right of giving a girl in marriage, are directory and not mandatory.

SECOND appeal from the decision of B. H. Leggatt, Assistant Judge of Ahmedabad.

Suit by a father to have the marriage of his daughter (defendant No. 2) to the first defendant declared null and void.

The parties to this suit were Lewa Kumbis by caste. Plaintiff was a resident of Ahmedabad. In consequence of some dispute in the family, his wife (defendant No. 3) left his house and went to live with her mother at Gomtipur, a village about two miles distant from Ahmedabad. She took with her his infant daughter Mahalaxumi (defendant No. 2) who was about 3½ years old.

Thereupon the plaintiff applied to the District Court to obtain the custody of his child and for an injunction restraining his wife from disposing of her in marriage.

This application was rejected. Shortly afterwards the girl was given in marriage to defendant No. 1 by her mother (defend-

* Second Appeal, No. 249 of 1897.