APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

BÁLAJI RAMCHANDRA DESHPANDE (ORIGINAL DEFENDANT), APPELLANT, *v.* DATTO RAMCHANDRA (ORIGINAL PLAINTIFF), RESPONDENT.* 1902. *September* 16.

Vatan—Adoption of a person not a member of the Vatandár family—Gordon Settlement—Vatan Act (Bombay Act III of 1874).

A sanad with respect to vatan property which was subject to the Gordon Settlement contained the following clauses :

2nd.—No nazrana or other demand on the part of Government will be imposed on account of the succession of heirs, lineal, collateral or adopted, within the limits of the Vatandár family, and permission to make such adoptions need not hereafter be obtained from Government.

3rd.—When all the sharers of the vatan agree to request it, then the general privilege of adopting at any time any person (without restriction as to family) who can be legally adopted, will be granted by Government to the vatan on the payment from that time forward in perpetuity of an annual nazrána of one anna in each rupee of the above total emoluments of the vatan.

It was contended that the adoption of a person who did not belong to the Vatandár family in respect to whose vatan the said sanad was granted, was invalid.

Held, that the sanad did not prohibit such an adoption and that the adoption in question was valid.

APPEAL from the decision of Ráo Bahádur V. V. Paranjpe, First Class Subordinate Judge of Sátára.

The plaintiff sued to obtain a declaration of his right as adopted son of Kondo Narayan Deshpande and his widow Savitribai, and to recover possession of certain property.

The defendant denied the plaintiff's adoption, and also contended that, even if proved, it was invalid, inasmuch as the ceremony had been performed while the plaintiff's adoptive mother was in mourning. He further pleaded that the property in suit was Deshpande vatan and was subject to the Gordon Settlement, and that by the Gordon Settlement and the sanad issued thereunder the adoption of a stranger into a Vatandár family was not permitted; that the plaintiff was not a member of this Vatandár family to which the property in suit belonged, and that

* Appeal No. 57 of 1901.

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his adoption was therefore illegal: see also Vatan Act (Bombay Act III of 1874).

The following is the material portion of the sanad issued under the Gordon Settlement referred to:

Whereas in the zilla of Sátárá certain lands and cash allowances are entered in the Government accounts of the year 1886-87 as held on service tenure (here follow the description of lands and cash allowances), and whereas the holders thereof have agreed to pay to Government a fixed annual payment in lieu of service,

It is hereby declared, that the said lands and cash allowances shall be continued hereditarily by the British Government on the following conditions, that is to say, that the said holders and heirs shall continue faithful subjects of the British Government, and shall render to the same the following fixed yearly dues :.....In consideration of the fulfilment of which conditions:

1st.—The said lands and cash allowances shall be continued without demand of service, and without increase of the land-tax over the above fixed amount, and without objection or question on the part of Government as to the rights of any holders thereof, so long as any male heir to the vatan, lineal, collateral or adopted, within the limits of the Vatandár family, shall be in existence.

2nd.—No nazrána or other demand on the part of Government will be imposed on account of the succession of heirs, lineal, collateral or adopted, within the limits of the Vatandár family, and permission to make such adoptions need not hereafter be obtained from Government.

3rd.—When all the sharers of the vatan agree to request it, then the general privilege of adopting at any time any person (without restriction as to family) who can be legally adopted, will be granted by Government to the vatan, on the payment from that time forward in perpetuity of an annual nazrána of one anna in each rupee of the above total emoluments of the vatan.

The Judge allowed the plaintiff's claim and passed the following decretal order:

Ordered that the plaintiff do recover possession of lands specified in the schedule annexed to the plaint with trees and such other things as are permanently attached to them. Possession of such lands as are stated in the schedule as held by tenants to be taken by notice in the manner laid down in section 264 of the Civil Procedure Code.....It is further declared that the plaintiff is the lawfully adopted son of Kondo Narayan and his widow Savitribai and the lawful heir of their estates. The defendant is hereby enjoined not to interfere with plaintiff's *vahivat* of the estate of the said Kondo and Savitribai. The defendant to deliver to plaintiff documents such as rent-notes, &c., which he may have taken in his own name relating to the properties awarded to the plaintiff. The plaintiff is also entitled to recover mesne profits of the awarded properties received by defendant from date of the suit,.....Costs on the defendant.

The defendant appealed.

Branson (with *B. A. Bhagat*) for the appellant (defendant) :—Our main contention is that the adoption is inoperative with respect to the Deshpande vatan property in dispute. The Gordon Settlement applies to this vatan. By the terms of the sanad issued under that settlement, if a person who is not a member of the Vatandár family is adopted, such adoption must be sanctioned by Government and nazrána must be paid; the plaintiff was not a member of the family to which this vatan belonged: *Appaji Bapuji* v. *Keshav Shamrav*,[1] *Madhavrav Manohar* v. *Atmaram Keshav*.[2] When a settlement is made with a Vatandár under the Gordon Settlement, the Vatandár undertakes to obtain the sanction of Government in case of an adoption. This provision is made with a view to prevent the alienation of the vatan (section 15 of the Vatan Act). The third clause of the sanad provides that in case of the adoption of a person outside the Vatandár family, all the members of the Vatandár family must consent.

Chimanlal H. Setalvad (with *M. V. Bhat*) for the respondent (plaintiff) :—Irrespective of the Gordon Settlement there is nothing which prohibits the plaintiff's adoption. There is no restriction in the Vatan Act that the person adopted must be a member of the Vatandár family. A person outside the family can be adopted, and once adopted, he becomes a Vatandár with all a Vatandár's rights.

Next, does the Gordon Settlement prohibit the plaintiff's adoption? As to the operation and effect of that settlement, see *Appaji Bapuji* v. *Keshav Shamrav*.[1] It did not alter the nature of the vatan property. Its object was to protect the rights of Government as between Government and Vatandárs. It did not affect the rights of the Vatandárs *inter se*.

[JENKINS, C.J. :—If a Vatandár cannot alienate his vatan in favour of a person outside the vatan family, can he create a right in favour of an outsider by adopting him?]

(1) (1890) 15 Bom. 13. (2) (1890) 15 Bom. 519.

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Yes, because the adopted son fully represents and takes the place of a natural born son. There is no distinction between the rights of the two. Under Regulation XVI of 1827 there was no restriction of adoption. Act XI of 1843 contains no provision against alienation nor against the adoption of an outsider. Section 4 of the present Vatan Act distinctly recognizes the right to adopt. So far as legislative enactments are concerned there is nothing in them prohibiting such an adoption. The Gordon Settlement did not affect the rights of succession, &c., amongst the Vatandárs *inter se*.

It is not competent to the Collector to determine who is a Vatandár and who is not. He can pass orders for the restoration of vatan property on the assumption that the person in whose favour he passes the order is a Vatandár: *Ramrav* v. *The Secretary of State for India*.[1] The question of status as Vatandár can be determined by a Civil Court.

Branson in reply.

JENKINS, C.J.:—The plaintiff has brought this suit for a declaration of his right as adopted son of Kondo Narayan Deshpande and his widow Savitribai and to recover possession of the plaint lands. In the lower Court he has been successful, and the defendant has appealed.

The points urged before us are: first, that the adoption is not proved; secondly, that, if proved, it is invalid; and thirdly, that, in any case, it is ineffective to create a title in the plaintiff to so much of the plaint lands as are vatan property. It is the third of these points alone that calls for serious discussion, for Mr. Branson has in effect conceded (after stating the facts) that the theory of Savitribai's being under *sutak* (which was relied on as a circumstance both invalidating and making improbable the alleged adoption) could not be supported on the evidence, inasmuch as the relationship that would impose *sutak* had not been proved. On a consideration of the facts I have no hesitation in affirming the decision of the Subordinate Judge as to the fact and validity of the adoption. Therefore, I at once proceed to the third and more important point.

(1) (1896) P. J. p. 666.

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The argument in favour of this line of defence is principally rested on the terms of the sanad settling the vatan property, which ran as follows:

Whereas in the zilla of Sátárá certain lands and cash allowances are entered in the Government accounts of the year 1886-87 as held on service tenure (here follow the description of lands and cash allowances), and whereas the holders thereof have agreed to pay to Government a fixed annual payment in lieu of service,

It is hereby declared, that the said lands and cash allowances shall be continued hereditarily by the British Government on the following conditions: that is to say, that the said holders and heirs shall continue faithful subjects of the British Government, and shall render to the same the following fixed yearly dues .....In consideration of the fulfilment of which conditions:

1st.—The said lands and cash allowances shall be continued without demand of service, and without increase of land-tax over the above fixed amount, and without objection or question on the part of Government as to the rights of any holders thereof, so long as any male heir to the vatan, lineal, collateral or adopted, within the limits of the Vatandár family, shall be in existence.

2nd.—No nazrána or other demand on the part of Government will be imposed on account of the succession of heirs, lineal, collateral, or adopted within the limits of the Vatandár family, and permission to make such adoptions need not hereafter be obtained from Government.

3rd.—When all the sharers of the vatan agree to request it, then the general privilege of adopting at any time any person (without restriction as to family) who can be legally adopted, will be granted by Government to the vatan, on the payment from that time forward in perpetuity of an annual nazrána of one anna in each rupee of the above total emoluments of the vatan.

The third clause, it is urged, is a bar to an adoption by a single Vatandár without both the request of the other Vatandárs and the consent of Government.

But to appreciate the force of the words used in this sanad, one must see what in this respect was the position prior to the Gordon Settlement (for this sanad was issued under the scheme familiar under that name) of Vatandárs. The earliest British legislation on the subject of vatans is to be found in Regulation XVI of 1827, section 20. Prior to that a Vatandar's power of alienation appears to have been unfettered, at least so far as his co-Vatandárs were concerned. According to Mr. Steele, however, the consent of the Sirkar and of the pergunnah Vatandárs was necessary to *adoptions* by Vatandárs. Nazar, too, was paid to the

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Native Government on occasions of granting permission (Steele's Law and Custom, 183). This view apparently is based on the information received from the Poona castes (see page 386).

How far, however, the consent of the Government and the kinsmen ever was requisite for a legal adoption is at least doubtful. Thus, in the Dattaka Mimansa it is laid down that kinsmen and relations should be "earnestly invited," and notice to the king is enjoined (section V, pl. 8 and 43), but it is clear that the failure to observe these behests would not now invalidate the adoption: for "the invitation of kinsmen and the others is for the sake of their witnessing: in the same manner as the invitation of the king" (*ibid*, pl. 9). It would seem that the participation of the king and the kinsmen was evidentiary and not essential. The cited passages from the Dattaka Mimansa make it probable that the usual practice was to act in accordance with what is there enjoined, and it may be that the information received from the castes merely recorded that which was customary in practice. Be that however as it may, it was determined as far back as 1870 [1] by a Division Bench of this Court "that a formal adoption should not be set aside because it has not received the sanction of the ruling power, and that there are no good grounds for the argument that a distinction should be made when the property to be inherited is of the nature of a vatan." This was followed in *Narhar Govind Kulkarni* v. *Narayan Vithal*,[2] where the objection urged against the adoption was that it was invalid, inasmuch as it had been strictly prohibited by the Government. Sir Michael Westropp, in delivering the judgment of the Court, said (p. 609):

We have here simply to deal with the office of a Kulkarni and its appendant rights or vatan. No authority, either in a text-book of Hindu Law nor in the reports, has been cited to show that the sanction of Government to an adoption by a Kulkarni, or his widow, or by a coparcener in a Kulkarniship, or his widow, is necessary to give it validity, or that Government has any right to prohibit or otherwise intervene in such an adoption. It has been argued for the appellant (the defendant) that Government ought to have a voice in such a matter in order to insure to itself a succession of suitable hereditary officers. No such right of intervention in adoption was claimed for Government by Act XI of 1843, when, if such a right existed, we might fairly expect to find that

(1) See *Ramchandra* v. *Nanaji*, (1870) 7 B. H. C. R. 26 p. 30.
(2) (1877) 1 Bom. 607.

it would have been recognized; and sections 33 and 34 of Bombay Act III of 1874 are inconsistent with the existence of any such right. The provisions of these sections seem to be in accord with the passage in Steele's Hindu Law, page 51, para. XL. 1st edition; page 45, para. XL. 2nd edition, where it is said: 'It is enjoined that notice of an adoption should be given to the relations within the *sagotra sapinda* and to the Rája, though no provision appears in case of their disapprobation, even in adoption by widows.' Those Acts made sufficient provision for securing to Government the services of competent officiators: so that no such objection, in that respect, as suggested by the appellant's pleader, can arise. In the case of *Ramchandra* v. *Nanaji*(1) the defence was that the adoption had been disallowed by Government; but that defence failed in the High Court. That, like the present case, related to vatan appendant to the office of Kulkarni.

The decisions, it is true, only deal expressly with the question whether the *Government's* assent is required, but I find from the paper book in appeal No. 313 of 1876 that the defendant pleaded that the adoptive mother was not justified in adopting without the consent of her *bhaubands*. In my opinion the consent of the *bhaubands* was as little necessary to the validity of an adoption among Vatandárs as under the general Hindu Law.

Such, then, being the law apart from the scheme of the Gordon Settlement, has the sanad in this case framed in accordance with that settlement rendered the consent of the Government and the kinsmen necessary? This is a question of construction of the sanad which I have read in an earlier part of my judgment.

In construing this document it must be borne in mind that it relates to the whole vatan and not merely to a takshim in the vatan. Looking then to the terms of the sanad, nowhere is any express prohibition imposed on adoption, whether the person proposed for adoption was or was not a member of the Vatandár family; but while in the second clause there is express provision that no nazrána shall be chargeable in respect of the adoption of a member of that family, the third clause provides for the recognition by Government of a general power to adopt without restriction as to family on the entire body of Vatandárs accepting liability to a perpetual nazrána in consideration thereof, and applying collectively for the purpose. There has been some discussion before us as to how the words "lineal,

(1) 7 Bom. H. C. Rep. 26 A. C. J.

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collateral or adopted, within the limits of the Vatandár's family," should be read; for the punctuation of those words in the first clause agrees neither with the phraseology of the vernacular, nor with the punctuation in the second paragraph, while at the same time it is only by adherence to the punctuation in the first clause that tautology is escaped. I do not, however, think it necessary in reference to this to do more than express surprise that, in a document of this class, such want of care should have been shown; and I so think because, whichever way the words be read, I fail to see that the document can or does create in favour of kinsmen a right to object that would not otherwise exist. In my opinion, therefore, the adoption in this case is valid and affected the succession to the vatan lands to the extent that the plaintiff has become entitled to succeed thereto as against the other Vatandárs.

But in so holding I do not mean to say that the tenure of the lands would be prolonged or the rights of Government would be curtailed in case the body of Vatandárs were to die out and the plaintiff or his successors were alone left to claim the vatan lands. As to this I would repeat what was said in *Ramchandra's case*:[1] "We consider that the result of the suit will not affect the interests of Government, and that we should, therefore, confine ourselves to the point at issue between the parties who are before the Court."

The decree will be confirmed with costs.

BATTY, J.:—It may perhaps be worthy of notice that lands held for service were, both by clause 2 of section 1 of Bombay Act II of 1863 and by clause 2 of section 2 of Bombay Act VII of 1863, expressly excepted from the category of holdings in respect of which, under those enactments, an indefeasible, heritable and transferable title was claimable on acceptance, by the holders for the time being, of the terms prescribed.

By clause 3 of section 2 of the latter Act, lands held for service were declared resumable or continuable under such rules as Government might think proper from time to time to lay down. And under section 16 of Bombay Act II of 1863, as

(1) (1870) 7 Bom. H. C. Rep. 26 (A. C. J.)

under section 32 of Bombay Act VII of 1863, the phrase lands held for service" was declared applicable to all lands granted, held or continued nominally for the performance of service whether performed or not, or partly in consideration of past and partly for the performance of prospective service; but the phrase was not to include lands granted solely in consideration of past services, *i.e.*, the heritable and transferable estate was not claimable as of right in respect of lands *pro servitiis impendendis* or *pro servitiis impensis et impendendis*. But the question whether any particular lands fell within this class or not, was left by both the sections to the decision of Government.

The result appears to be that so far as lands held *pro servitiis impendendis* or *pro servitiis impensis et impendendis* were concerned, Government could determine the conditions on which they should be continuable or determinable. But while reserving this power to Government, the Legislature seems to have left the devolution of interests among the members to whom they were continuable, to be determined by the ordinary law governing the community to which those members belonged. If that ordinary law recognized an unrestricted right of adoption, the power given to Government of deciding as to the conditions of continuance, had no operation on that right so long as those conditions of continuance remained satisfied. And reading the sanad in the light of the provisions of law above referred to, it would appear that the clause relating to the unrestricted right of adoption could have had reference only to the rules determining the continuance, and not to the principles of devolution that were to regulate the interests in question.

While the rights of individuals were left untouched by the sanads, Government offered to relax the rules as to the continuance of the collective rights, on the whole body undertaking, thenceforward in perpetuity, a liability for an additional payment under the name of nazrána, as consideration (not for any modification of their rights *inter se*, which were settled by the law whereto they were subject, and not by Government, but) for an enlargement of the conditions to which under pre-existing rules or practice Government had theretofore subjected the continuance of lands held for service.

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The sanads, therefore, appear only to determine what Government had power to determine—the conditions of continuance or resumption and the terms on which such conditions would on application and payment be enlarged; but, so long as those conditions were fulfilled, no more affected the right which adoption might confer than the right which survivorship or inheritance might confer under the law applicable to the holders.

Decree confirmed.

CRIMINAL REVISION.

Before Mr. Justice Crowe and Mr. Justice Aston.

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EMPEROR *v.* VARJIVANDAS *alias* KALIDAS BHAIDAS.*

Jurisdiction—Revisional Jurisdiction of High Court—Criminal Procedure Code (Act V of 1898), sections 423, 439—Presidency Magistrate—Discharge of accused person under section 209 of Criminal Procedure Code (Act V of 1898)—Order of discharge set aside by High Court and order made that accused be arrested and committed for trial at the Sessions of the High Court—Practice—Procedure—Sufficient ground for committing for trial, what is.

Under sections 439 and 423 of the Criminal Procedure Code, the High Court has jurisdiction to set aside an order of discharge passed by a Presidency Magistrate, if such preliminary be necessary, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial.

The fact, that by section 439 of the Criminal Procedure Code (Act V of 1898) the High Court in its revisional jurisdiction may exercise all the powers given to it as a Court of Appeal (by section 423), except (see paragraph 4) the power of converting a finding of acquittal into one of conviction, seems to point to the conclusion that all other powers not expressly excluded may be exercised by the High Court as a Court of Revision.

The words in section 209 of the Criminal Procedure Code "sufficient ground for committing" mean, not sufficient ground for convicting, but refer to a case in which the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses make statements which, if believed, would sustain conviction. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out

*Criminal Application for Revision, No. 142 of 1902.