APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

1911. *November* 13.

MALKAJEPPA BIN MADIVALAPPA BULLA (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (XV of 1877), Schedule II, Article 14—Order—Suit to set aside order—Collector—Order ultra vires—*Land Revenue Code (Bombay Act V of 1879), section 37.*

Article 14 of the Second Schedule of the Indian Limitation Act only applies to orders passed by a Government officer "in his official capacity." The article does not apply to orders which are *ultra vires* of the officer passing them.

When a Collector passes an order, under the provisions of section 37 of the Land Revenue Code (Bombay Act V of 1879), with reference to land which is *primâ facie* the property of an individual who has been in peaceful possession thereof and not of the Government, he is not dealing with that land in his official capacity, but is acting *ultra vires.*

APPEAL from the decision of T. D. Fry, District Judge of Dharwar.

The facts are fully stated in the judgment.

Coyaji, with *G. S. Mulgaokar*, for the appellant.

G. S. Rao, Government Pleader, for the respondent.

RUSSELL, J. :—The plaintiff herein sued to be declared owner of a piece of ground in Mouje Gadag measuring eight feet long from north to south and thirty-three feet broad from east to west, immediately to the south of the present building of the plaintiff and also for an injunction to restrain the defendant, the Secretary of State, from interfering with the plaintiff's enjoyment of the ground or extending his building thereover. Although the plaint does not, in so many words, pray to set aside the Deputy Collector's order hereinafter set out still paragraph 4 which says *inter alia* that "this order is erroneous and illegal. Government had no title whatever to the plot" obviously involves such a consequence. It appears that the plaintiff purchased first a plot of land from the Basel Mission which is marked on the plan (Exhibit 18) measuring as stated in the deed

* First Appeal No. 89 of 1910.

1911.

MALKAJEPPA
v.
SECRETARY
OF
STATE
FOR
INDIA.

(Exhibit 10) fifty-six feet east and west to the north, twenty-nine feet east and west to the south, and fifty-seven feet on the east side and fifty-four feet on the west side, the southern boundary being given as Government Betta land. Subsequently, the plaintiff bought another piece of land to the north of the former thirty-five feet east to west and eight feet north to south, and the plaintiff has built upon the said pieces of ground.

The learned Judge in the Court below has found, and we have had no argument addressed to us to the contrary that the plaintiff purchased and is entitled to sixty-two feet from north to south, but that, as a matter of fact, he has up to the present time built over only sixty feet; in other words that he is entitled to build over a space of two feet further to the south than what he has already built over.

On the 27th December 1906, the District Deputy Collector passed the order (Exhibit 24), the effect of which was to restrain the plaintiff from building over the said two feet. It was in the following terms:—

I personally inspected the ground in dispute and also took measurements. It is not now in the condition in which it was when it was purchased. The building of that time is removed and the present one is newly built. In the deed of sale under which this ground was purchased, the boundaries of the ground purchased have been mentioned. It is mentioned therein that on the north there is the backyard of Gowda. Recently out of that backyard a portion adjoining this ground in dispute was got by Malkajeppa by way of purchase. To the east thereof he now holds what has now come to the share of Dyamangowda. The old wall built on the boundary of the backyard of his share exists now. That wall alone is the index to determine the ground purchased. In the deed of sale, the measurements of four sides have been mentioned. From the corner between the north and the east, (that is) from the north-east corner of the above wall, the measurement north to south from the corner to the east along the whole length of the building is fifty-seven feet. Malkajeppa says that the measurement of the building should be taken in a straight line and that thus the ground upto the point at which it measures fifty-seven feet to the south belongs to him. What he says is not correct. In the deed of sale, it is mentioned that towards the east the measurement of the building including an open ground and trees is fifty-seven feet. It is also mentioned that the measurement east to west is fifty-six feet towards the north. These two measurements are found to be correct if they are taken from the abovementioned north-east corner. What Malkajeppa says is wrong. The building now existing and the measurement in the sale-deed tally (a difference of one foot or half a foot is not of any importance. Now, after the

dispute arose, the Circle-Inspector took measurements according to scale. They might not have been taken in that manner when they were entered in the deed of sale formerly). From the existing condition it does not appear that the Government land is included in the building now built by Malkajeppa. Therefore it does not appear necessary to take further steps in this matter. But now the building should not be allowed to be extended on the south over a larger space than it occupies at present. It should be allowed to remain in its present dimensions. Besides informing Malkajeppa in writing of the above decision, steps should be taken to supply a Dakhla (a copy of it) to the village also.

We have set the order out at length, for it seems to us that it is an order which "interfered with the plaintiff's possession so as to give rise to a cause of action, and not simply an administrative order which needs no setting aside." See per Parsons, J., in *Surannanna* v. *Secretary of State for India*[1]. The plaint was filed on the 11th of August 1908, and the defendant has raised a plea of limitation, under Article 14 of the Limitation Act of 1877. The plaintiff in his plaint says that he unsuccessfully filed before the revenue authorities appeals against the District Deputy Collector. But we agree with the learned Judge's opinion that that fact will not affect the question of limitation. See *Abaji* v. *Secretary of State for India*[2]. The learned Judge held, as we have pointed out, that the plaintiff is in fact entitled to the two feet extra to the south of his present building; but that the suit is barred under Article 14 of the Limitation Act.

The question we have to decide is: Is this view correct? It is admitted that the Deputy Collector in passing the said order purported to act under section 37 of the Land Revenue Code, which runs thus:—

All public roads, lanes and paths, the bridges, ditches, dikes and fences, on, or beside, the same, the bed of the sea and of harbours and creeks below high water-mark and of rivers, streams, nalas, lakes and tanks and all canals and watercourses, and all standing and flowing water, and all lands, wherever situated, which are not the property of individuals, or of aggregates of persons legally capable of holding property, and except in so far as any rights of such persons may be established in or over the same, and except as may be otherwise provided in any law for the time being in force, are and are hereby declared to be, with all rights in or over the same, or appertaining thereto, the property of Government;

(1) (1904) 24 Bom. 435 at p. 455. (2) (1896) 22 Bom. 579 at p. 582.

1911.

MALKAJEPPA v. SECRETARY OF STATE FOR INDIA.

and it shall be lawful for the Collector, subject to the orders of the Commissioner, to dispose of them in such manner as he may deem fit, or as may be authorized by general rules sanctioned by Government, subject always to the rights of way, and all other rights of the public or of individuals legally subsisting.

Explanation.—In this section "high water-mark" means the highest point reached by ordinary spring-tides at any season of the year.

Obviously the important words in that section are "all lands, wherever situated, which are not the property of individuals, etc.; and except in so far as any rights of such persons may be established in or over the same."

Section 135 of the Land Revenue Code runs as follows :—

"Any suit instituted in a Civil Court to set aside any order passed by the Collector under section 37 or 129, in respect of any land situated within the site of a village, town or city, shall be dismissed, although limitation has not been set up as a defence, if it has not been instituted within one year from the date of the order."

Article 14 of the Limitation Act of 1877 runs as follows :— "To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for." The words "or order" were not in the Limitation Act of 1871. The important words in that article are "in his official capacity." Judging of this case by the light of this Legislation alone it appears to us that, if a Collector purports to deal with land which is *primâ facie* the property of an individual who has been in peaceful occupation thereof and not of the Government, and passes an order with reference thereto, he is not dealing with that land in his official capacity, but is acting *ultra vires*. If this is so, then the judgment of Jenkins, C. J., in *Surannanna* v. *Secretary of State for India*[1], is directly applicable; so also is *Bejoy Chand Mahatab Bahadur* v. *Kristo Mohini Dasi*[2] (see especially Trevelyan, J.'s judgment in that case); and *Balvant Ramchandra* v. *Secretary of State*[3]. We have read the three judgments in *Surannanna's case*, but have been quite unable to differentiate this case from

(1) (1904) 24 Bom. 435 at p. 441. (2) (1894) 21 Cal. 626.
(3) (1905) 29 Bom. 480.

the judgment of Jenkins, C. J., nearly the whole of whose judgment is applicable to the present case.

If we are right in this opinion, it follows that the decree in the lower Court must be reversed and the decree we would pass is :—Declare the plaintiff entitled to the strip of land measuring two feet north and south and thirty-three feet east and west, and grant an injunction restraining the defendant, his servants and agents, from interfering with his possession thereof, dismiss the plaintiff's suit in so far as he claims any relief in respect of the remaining six feet of the said southern strip and direct each party to bear his own costs throughout.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

GANGADAS DAYABHAI (ORIGINAL OPPONENT), APPELLANT, *v.* BAI SURAJ (ORIGINAL APPLICANT), RESPONDENT.*

1911. *November* 23.

Civil Procedure Code (Act XIV of 1882), sections 287 and 293—Execution of decree—Attachment of a house—Proclamation of sale—Auction sale—Default in payment of price by auction purchaser—Proclamation of re-sale—Errors in the proclamation of re-sale—Application by plaintiff's widow to recover from the defaulting purchaser the deficiency of price in the re-sale—Liability creature of statute relating to procedure—At the re-sale statute not complied with.

One Shivlal brought a suit against Bai Samrath. The suit was dismissed and a decree for defendant's costs, namely Rs. 96-2-10, was passed against the plaintiff. The defendant sold the decree to one Nathu, who, in execution attached Shivlal's house. A proclamation of sale was published and at the auction sale one Gangadas Dayabhai purchased the house for Rs. 1,325 and deposited one-fourth of the purchase money. The purchaser, however, made a default in the payment of the balance in time and the house was again put up to sale. A second proclamation of sale was issued, but the descriptions contained in this proclamation were discrepant and did not tally with those in the previous one. At the re-sale only Rs. 260 were realized. Subsequently Shivlal's widow Bai Suraj having applied to recover from the defaulting purchaser the loss on the re-sale,

Held, that the liability of the defaulting purchaser was the creature of a statute relating to procedure and that statute laid down in very clear terms that

* Second Appeal No. 299 of 1910.