

agree with the learned Judge in the Court below that there had been steps-in-aid of execution which have kept the order for restitution alive and therefore there was no bar. We dismiss the appeal with costs.

SHAH, J. :—I agree.

Appeal dismissed.

R. R.

FULL BENCH.

APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, Mr. Justice Shah and
Mr. Justice Hayward.*

DATTATRAYA KESHAV DESHPANDE (ORIGINAL PLAINTIFF), APPELLANT
v. TUKARAM RAGHU CHORAGE (ORIGINAL DEFENDANT), RESPONDENT².

1920.

December 23.

*Bombay Revenue Jurisdiction Act (X of 1876), section 4 (a)—Vatandar—
Alienation—Declaration that alienation by Vatandar is null and void—
Refusal of Collector to make the declaration—Suit in civil Court to obtain the
declaration—Cognizance of suit—Hereditary Offices Act (Bombay Act III
of 1874), sections 10, 11.*

Where a Vatandar applies to the Collector to declare that a particular alienation of vatan property is null and void and the Collector refuses to make the order declaring the alienation null and void, the party aggrieved can file a suit in a civil Court against the alienee in respect of the alienation.

APPEAL from an order passed by N. S. Lokur, Assistant Judge with appellate powers at Satara, reversing the decree passed by and remanding the suit to V. G. Gupte, Joint Second Class Subordinate Judge at Karad.

Suit to recover possession of vatan property.

² Appeal No. 49 of 1919 from Order.

1920.

DATTATRAYA
KESHAV
v.
TUKARAM
BAGHU.

One Narayan owned the property. He died leaving him surviving a widow Yamunabai.

In 1907, Yamunabai mortgaged the property to defendant. The deed of mortgage was attested by the plaintiff, who was Narayan's brother's son.

Yamunabai died in 1908.

The plaintiff applied to the Collector for an order declaring that the alienation of vatan property beyond her lifetime was null and void. The Collector refused to make the order, on the following grounds :—

“Since the document passed by Yamunabai bears your attestation, it has to be said that the said document was passed with your consent. Therefore the land . . . cannot for the present be delivered over to you.”

The plaintiff filed the present suit in the civil Court to recover possession of the property.

The trial Court held that the refusal by the Collector to pass an order declaring the alienation null and void was no bar to the cognizance of the suit by the civil Court ; and that the alienation was not binding on the plaintiff. The suit was therefore decreed.

On appeal, the Assistant Judge was of opinion that the refusal by the Collector to make an order prevented the civil Court from taking cognizance of the suit, under section 4, clause (a) of the Bombay Revenue Jurisdiction Act, 1876. He therefore reversed the decree and remanded the suit for trial to the first Court.

The plaintiff appealed against the order of remand.

The appeal was first heard by Macleod C. J. and Shah J. on the 19th November 1920, when their Lordships referred the case to a Full Bench in the following judgments.

MACLEOD, C. J. :—The plaintiff instituted this action to recover possession of certain lands which had been

mortgaged to the defendant by Yamunabai, the plaintiff's predecessor-in-title, on the ground that on her death the alienation became void under section 5 of the Vatan Act. The first issue in the trial Court was whether the Court had jurisdiction to try the suit in view of the fact that the matter in suit was dealt with before by the Assistant Collector. It appears that the plaintiff had applied to the Assistant Collector for an order that the Vatan land should be removed from the possession of the defendant and delivered into the possession of the petitioner. On that petition the Assistant Collector replied "since the document passed by Yamunabai bears your attestation, it has to be said that the said document was passed with your consent. Therefore the land bearing survey No. 270 cannot for the present be delivered over to you, and as you do not want Survey No. 271 to be removed and given to you your application is disposed of."

The trial Court held that the order of the Assistant Collector refusing to grant relief to the plaintiff was no bar to the suit. Then it held on the merits that the fact that the plaintiff had attested the mortgage deed executed by Yamunabai could not extend the period of the mortgage beyond the life-time of the mortgagor, and it passed a decree in favour of the plaintiff that the defendant should deliver up possession of the plaintiff property to him.

In first appeal it was argued that the Revenue Authorities having declined to restore the lands to the plaintiff under the provisions of the Vatan Act, the suit was barred by the Bombay Revenue Jurisdiction Act. The learned appellate Judge came to the conclusion that the decision of the Assistant Collector refusing the relief asked for by the petitioner was an order within the meaning of section 4, clause (a) of the Bombay

1920.

DATTATRAYA
KESHAV
v.
TUKARAM
RAGHU.

1920.

DATTATRAYA
KESHAV
v.
TUKARAM
RAGHU.

Revenue Jurisdiction Act, and that therefore the Court had no jurisdiction to set it aside. He referred to two unreported decisions in the cases of *Somappa v. Naglingappa*⁽¹⁾ and *Madivalappa v. Bhimappa*⁽²⁾ and it cannot be denied that the decisions in those appeals afforded some ground for the learned appellate Judge's decision. In both those cases there had been a decision of the Revenue Authorities that a particular disputed alienation was not null and void. In both those cases it was held by the High Court that the civil Courts had no jurisdiction thereafter to consider whether or not the alienation was null and void. A similar decision was recently given by Heaton Acting C. J. and Crump J. in *Govindrao v. Hanmappa*⁽³⁾. There are, however, kindred decisions of this Court, which, though not directly conclusive on the exact point before us, nevertheless tend to throw considerable doubts on the correctness of those decisions. It is admitted by Mr. Rao, for the appellant, that if the Collector had declared that this mortgage was null and void as against the petitioner, now the plaintiff, this Court had no jurisdiction to consider whether the Collector's decision was wrong. But it was argued that the fact that the Collector refused to declare the alienation null and void did not amount to an order with which this Court could not interfere, but that it was still open to the parties to get the question decided in a civil Court. I think, therefore, it is necessary that this question should be referred to a Full Bench. The question would be:—Whether, after the Collector, on an application by a Vatandar to declare that a particular alienation is null and void, has refused to make an order that the alienation is null and void, the party

(1) (1917) S. A. No. 879 of 1915 (Unrep.).

(2) (1918) F. A. No. 229 of 1916 (Unrep.).

(3) (1920) S. A. No. 940 of 1918 (Unrep.).

1920.

aggrieved can file a suit in a civil Court against the alienee in respect of that alienation ?

DATPATRAYA
KESHAV
v.
TUKARAM
RAGHU.

SHAH, J.:—I concur in the proposed reference. I desire to add that it is not without significance that in a case where the Revenue Authorities had dealt with the question whether a particular alienation was null and void, and had ultimately decided not to declare it to be null and void, the suit was entertained by civil Courts up to the Privy Council, and apparently no question as to the bar of jurisdiction under section 4, clause (a), of the Bombay Revenue Jurisdiction Act was raised. See *Padapa v. Swamirao*^(a). Further it seems to me that it is necessary to consider in connection with the question referred to the Full Bench whether on a strict construction of section 4 of the Bombay Revenue Jurisdiction Act, a suit between private parties to recover possession of the Vatan property on the footing that the alienation has come to an end on the death of the original alienor can be treated as a suit to set aside or avoid an order under Bombay Act III of 1874 within the meaning of that section.

THE reference was heard by a Full Bench consisting of Macleod C. J., Shah and Hayward JJ., on the 23rd December 1920.

G. S. Rao, for the appellant:—The order of the Collector refusing to declare the alienation null and void is not an order under section 11 of the Hereditary Offices Act. The order contemplated by section 11 is an order by the Collector declaring an alienation to be null and void if it is of a nature described in section 10. Section 10 contemplates a case where in execution of a decree of the civil Court the Vatan property has passed into the possession of a stranger. Section 11 contemplates the case of a private alienation by a Vatandar.

^(a) (1900) L. R. 27 I. A. 86.

1920.

DATTATRAYA
KESHAV
v.
TUKARAM
BAGHU.

The refusal to declare an alienation null and void is not an order under the Vatan Act. If the Collector stays his hand and declines to interfere, his order cannot be treated as passed under section 11. The section is imperative in its terms: it gives no discretion to the Collector to decline or refuse to set aside the alienation. If the Collector declines, his order in favour of the alienee is *ultra vires*. Section 11 has been strictly construed: *Maganchand v. Vithalrao*⁽¹⁾; *Ramchandra Vasudeo v. Balvant Bapuji*⁽²⁾.

The cases of *Somappa v. Naglingappa*⁽³⁾; *Madivalappa v. Bhamappa*⁽⁴⁾ and *Govindrao v. Hanmappa*⁽⁵⁾ are against me; but the cases of *Madhavrao v. Venkatesh*⁽⁶⁾ and *Bhimangauda v. Secretary of State*⁽⁷⁾ are in my favour.

Patvardhan, with *M. V. Bhat*, for the respondent:—
An order passed by the Collector under section 11 of the Bombay Hereditary Offices Act, either declaring an alienation null and void or refusing to make the declaration is a valid order. The words of the section are quite clear and wide enough to cover such an order. The order once passed ousts the jurisdiction of the civil Court under section 4 (a) of the Bombay Revenue Jurisdiction Act.

Further, where a statute empowers the Court or an officer to pass an affirmative order, it includes also the power to refuse to pass the order: *Zipru v. Hari Supdushet*⁽⁸⁾.

⁽¹⁾ (1912) 14 Bom. L. R. 793.

⁽²⁾ (1920) S. A. No. 781 of 1919 (Unreported), per Macleod C. J. and Shah J.

⁽³⁾ (1917) S. A. No. 879 of 1915 (Unreported), per Scott C. J. and Beaman J.

⁽⁴⁾ (1918) F. A. No. 229 of 1916 (Unreported), per Scott C. J. and Hayward J.

⁽⁵⁾ (1920) S. A. No. 940 of 1918 (Unreported), per Heaton Ag. C. J. and Crump J.

⁽⁶⁾ (1919) Civ. App. No. 758 of 1918 (Unreported), per Scott C. J. and Hayward J.

⁽⁷⁾ (1912) F. A. No. 47 of 1910 (Unreported), per Scott C. J. and Batchelor J.

⁽⁸⁾ (1917) 42 Bom. 10.

MACLEOD, C. J.:—The facts of the case are set out in the referring judgments from which it appears that the plaintiff claiming to be the Vatandar for the time being, asked for possession from the defendant who was a mortgagee from the previous Vatandar, on the ground that the alienation could not hold good beyond the life of the mortgagor. The Collector was of opinion that the alienation was good as against the applicant, and therefore dismissed the application. The question referred to us is, whether, after the Collector, on an application by a Vatandar to declare that a particular alienation is null and void, has refused to make an order that the alienation is null and void, the party aggrieved can file a suit in a civil Court against the alienee in respect of that alienation. It was decided by a Bench of this Court in *Somappa v. Naglingappa*⁽¹⁾, that an order or decision by the Revenue Authorities that an alienation which had been challenged was not null and void, was an order under section 11 of the Vatan Act, and therefore, a suit to set it aside would not lie under section 4, clause (a) of the Bombay Revenue Jurisdiction Act.

Again in *Madivalappa v. Bhamappa*⁽²⁾ there was in the first place an order by the Assistant Collector that a certain alienation of Vatan land which had been challenged was null and void. That order was reversed by the higher Revenue Authorities, the result being, therefore, that there was a decision that the alienation was good. The learned Judges there held that a suit filed for the purpose of challenging the alienation was a suit to set aside or avoid an order which had been made under section 11 of the Vatan Act, and jurisdiction of the civil Court was excluded.

⁽¹⁾ (1917) S. A. No. 879 of 1915 (Unrep.).

⁽²⁾ (1918) F. A. No. 229 of 1916 (Unrep.).

1920.

DATTATRAYA
KESHAV
v.
TUKARAM
RAGHU.

1920.

DATTATRAYA
KESHLAV
v.
TUKARAM
RAGHU.

Then in *Madhavrao v. Venkatesh*^(a) which was an application for review of the decision of the Court on the ground that an order of a Revenue Officer under section 9 of the Vatan Act had been overlooked, and that the suit was in effect to set aside such order, it was held by this Court that at the time the suit was filed there was no order by a Revenue Officer under section 9 of the Vatan Act, for the order which had been passed by the Collector had been set aside by the Commissioner, and there was no order to the effect that the alienation was good.

Now sections 9, 10 and 11 of the Vatan Act have been framed for the purpose of protecting Vatan property against unauthorised alienations. Under section 9 alienations made before the Act came into force, and without the consent of the Collector, may be declared by the Collector to be null and void, but the Collector has a discretion to uphold an alienation, apparently on the ground that there may be cases where the alienees have been in possession so long that it would be inequitable to disturb them. Section 10 deals with attachments of Vatan property after the Act came into force, and also with alienations to persons who were not Vatandars of the same Vatan. Then by section 11 when any alienation of the nature described in section 10 of the Act shall take place otherwise than by virtue of, or in execution of, a decree or order of any British Court, the Collector shall, after recording his reasons in writing, declare such alienation to be null and void.

The Collector, therefore, on the plaintiff's application in this case, had the power to declare that the alienation consisting of the mortgage in suit was null and void as against the plaintiff, and it has been conceded

(a) (1919) C. A. No. 758 of 1918 (Unrep.).

for the present appellant that if such an order had been made, it would have been beyond the jurisdiction of this Court to entertain a suit filed for the purpose of setting it aside, although it may be noted that in *Bhimangouda v. The Secretary of State for India*⁽¹⁾, it was decided by a Bench of this Court consisting of Scott C. J. and Batchelor J., on the 10th of April 1912, that an order made by the Collector that a particular alienation was null and void, when as a matter of fact on the appreciation of the evidence and the law on the subject the alienation was good, would not be an order that could be made under the Vatan Act, and therefore, a suit to set it aside would not be a suit falling within section 4, clause (a) of the Bombay Revenue Jurisdiction Act. But conceding that if the Collector had made an order in this case that the alienation was bad, this Court would not have interfered with it, the question arises, whether, as the Collector refused to make any such order and rejected the application of the plaintiff to get possession of the land on the ground that the mortgage was no longer binding on him, there is an order which has to be set aside before the plaintiff can get relief, and that, therefore, the jurisdiction of the civil Court is ousted. We think that section 4 of the Bombay Revenue Jurisdiction Act, which ousts the jurisdiction of the civil Courts in particular cases, should be very strictly construed, and that when the Collector on an application that an alienation is null and void refuses to make a declaration to that effect there is no such order against the applicant which prevents his going to a civil Court for the determination of the question whether or not the alienation is binding on him, and that, therefore, it is still open to him to ask the Courts to decide that question, and that the Courts would have jurisdiction to decide it. We think, therefore, that

1920.

DATTATRAYA
KESHAV
v.
TUKARAM
RAGHU.

⁽¹⁾ (1912) F. A. No. 47 of 1910 (Unrep.).

1920.

DATTATRAYA
KESHAV
v.
TUKARAM
RAGHU

the question referred to us should be answered in the affirmative.

SHAH, J. :—I agree.

HAYWARD, J. :—I concur. The Collector has been given certain powers under the legislation relating to hereditary offices in section 6, and for the present purposes section 10, read with section 11 of the Vatan Act. The Collector's powers were no doubt given mainly in order to secure that the duties of hereditary officers should be properly performed and it does not seem to me that it was any part of the scheme of the legislation to disentitle Vatandars from also enforcing their private rights in civil Courts. The Collector has power under section 6 to institute suits to protect a Vatan, but it is not stated, nor in my opinion implied, that this was to bar the right of suit by a Vatandar. Similarly, although the Collector has been given power under section 10, read with section 11, to declare an alienation of Vatan property null and void, it does not seem to me that it was intended that, if he should either not be called upon to make such a declaration, or should refuse to make it, that the Vatandar should be deprived of his ordinary relief in a civil Court. It seems to me that it was intentionally stated in section 11 that the Collector shall declare the alienation to be null and void and not that the Collector shall declare whether or no the alienation was null and void. If that is so, the refusal to declare the alienation to be null and void would not be an order under section 11 of the Vatan Act, and further litigation would not be barred under section 4, clause (a) of the third paragraph of the Bombay Revenue Jurisdiction Act X of 1876.

I have thought it desirable to state my view upon the subject because I was a party to the decision

following the ruling in *Somappa v. Naglingappa*⁽¹⁾, that is to say, to the decision in *Madivalappa v. Bhamappa*⁽²⁾, and also a party to the contrary decision in *Madhavrao v. Venkatesh*⁽³⁾. It seems to me after having heard the matter fully re-argued, that the later decision was the right one and ought to be affirmed by the Full Bench.

AFTER the decision by the Full Bench, the case was placed for final orders by the Court, when the following order was passed.

MACLEOD, C. J.:—After the finding of the Full Bench on the question referred to it, the appeal must be allowed, the order of the lower appellate Court set aside, and the case remanded to that Court to be decided on its merits on the footing that the Court has jurisdiction to go into the merits. The appellant to get his costs of the appeal. The cost of the lower appellate Court will be costs in the appeal to that Court.

Appeal allowed.

R. R.

(1) (1917) S. A. No. 879 of 1915 (Unrep.).

(2) (1918) F. A. No. 229 of 1916 (Unrep.).

(3) (1919) C. A. No. 758 of 1918 (Unrep.).

CRIMINAL APPELLATE.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

EMPEROR v. RAMRAO ABAJI PRABHU^{*}.

Bombay District Municipal Act (Bombay Act III of 1901), sections 3 (7), 96 (5)†—Building, erection of—Notice to Municipality—Erection of compound-wall—Compound-wall is building.

The compound-wall of a house is included in the term "building" as defined in section 3, clause 7, of the Bombay District Municipal Act, 1901. Before erecting such a wall notice must be given under section 96 of the Act.

^{*} Criminal Appeal No. 38 of 1921.

1920:

DATTATRAYA
KESHAV
v.
TUKARAM
RAGHU.

1921.

June 9.