1920.

RAMNATH v. GAJANAN.

In *Ramchandra Govind* v. *Jayanta*[1] a very similar question arose, and the Court said :

" Whatever powers the Court had to decide questions relating to the execution of the decree, we are of opinion that it is perfectly clear that the Court had no power to deal with the decree itself. The Court executing the decree cannot deal with the question whether the decree should stand or whether it should be set aside on any of the grounds on which a decree can be set aside. "

And it was further held that section 151 of the Code did not give the lower appellate Court authority to interfere in the way it did. Therefore this appeal must be allowed with costs throughout, and the order of the lower Court directing execution to proceed restored.

Appeal allowed.

R. R.

(1) (1920) 45 Bom. 503.

APPELLATE CIVIL.

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

1920. *September* 27.

KHUSHALBHAI PARAGJI DESAI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS *v.* DULLABHBHAI PARAGJI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Surat District—Desaigiri allowance.

In the District of Surat, Desaigiri allowance is alienable.

Bai Jadav v. *Narsilal*[1], referred to.

SECOND appeal from the decision of W. Baker, District Judge of Surat, confirming the decree passed by T. N. Desai, Additional Subordinate Judge at Bulsar.

Suit for declaration.

One Bhaidas, who owned a Desaigiri allowance in Kharsad, devised it by will to Khandubhai in 1872. On

* Second Appeal No. 235 of 1919.

(1) (1900) 25 Bom. 470.

Khandubhai's death, his father Lallubhai filed the present suit for a declaration that he was entitled to the allowance in question, and to recover the allowance from the defendants.

The trial Court decreed the claim.

On appeal, the District Judge confirmed the decree for the following reasons :—

"In Government Resolution No. 6502 of October 16, 1900, Government while declining to confer the absolute right of alienation of Watans waived any objections to such alienations, without affecting the rights and interests of third parties.

"The terms of this Resolution are somewhat ambiguous. Reference is made in it to the settlement with the District Hereditary officers of Surat and Broach Districts, sanctioned by Government in Government Resolution No. 3929 of November 14, 1867, in which the proposal of the Watan Commission to confirm the Watan emoluments as absolute private property without restriction of transfer or alienation was approved. It will, therefore, appear that the Watan emoluments were regarded by Government as private property liable to transfer or alienation, and that Government withdrew any objections to such transfer."

The defendants appealed to the High Court.

K. H. Kelkar, for the appellants.

G. N. Thakor, for respondents Nos. 2 to 5.

FAWCETT, J.:—The plaintiffs sued for a declaration that plaintiff No. 1 had a right to receive a certain proportion of a Desaigiri allowance, which stands in the name of the defendants, and which the defendants have been receiving. The plaintiff No. 1 claims the allowance under the will of one Bhaidas, dated the 28th September 1872, in favour of plaintiff No. 1's deceased son Khandubhai whose heir is plaintiff No. 1. The defendants denied the will, and also urged that the allowance was inalienable. They further set up an alleged custom under which the Desaigiri Hak in question could not go out of the family.

1920.

KHUSHAL-BHAI v. DULLABH-BHAI.

The trial Court held that the will was proved; that the cash allowance was alienable and that the alleged custom was not proved. It accordingly gave plaintiff No. 1 a declaration that he had a right hereditarily to receive the amount he claimed.

On appeal, this decree was confirmed by the District Judge. The defendants now come in second appeal, and two points only have been taken before us. The first is that the lower Courts were not justified in finding the alleged will proved. This, however, is a matter of appreciation of evidence, and no question of law arises that would justify our interference.

The second point is that the lower Courts erred in holding that this allowance was alienable, and, therefore, could become the property of the plaintiff No. 1's son. This question has been very fully discussed in the two judgments of the lower Courts, and no sufficient reason has been shown for our coming to a different opinion. It has already been held in *Bai Jadav* v. *Narsilal*[a] that in general Vatans of the kind here in question under the service commutation settlement effected in Gujarat in or about 1873 are alienable. The District Judge has also referred to two cases in which similar Vatans of the Surat District, from which this appeal comes, have been held by this Court to be alienable. The point is dealt with in the introduction to Phadnis' Hereditary Offices Act, and the facts there mentioned show beyond any reasonable doubt that, although in the Broach and Surat Districts the Sanad issued to district hereditary officers, such as these Desais, did not expressly confer a power of alienation, as it did in the case of those issued in the Ahmedabad and Kaira Districts, yet there was nothing in the Sanads prohibiting such alienation, and Government have recognised the right of alienation without restriction. There is a

[a] (1900) 25 Bom. 470.

Government Resolution of 1867, cited by the District Judge, in which a proposal of the Vatan Commission to confirm the Vatan emoluments as absolute private property in Surat and Broach Districts without any restriction of transfer or alienation, was approved. There is a subsequent Resolution of 1900, which, while declaring that, so far as Government were concerned, there is no objection to any one who holds a share of a Vatan by virtue of the settlement, alienating his share out of the family, says that such declaration should not prejudice the rights of other persons. This, however, is a safeguard that does not affect the recognition by Government in favour of the alienability of such Vatans. In view, therefore, of the High Court decisions and the Government Resolutions, the fact that no Sanad is forthcoming in this particular case does not affect the question. There is a presumption that the Sanad issued in this case was given in the form prescribed.

The learned pleader for the appellant also referred to a reply given by the Collector in 1876 in which he says Bhaidas' name was entered only for his life-time. But I do not think that this means anything more than that Bhaidas was entitled to the allowance for his life-time. It does not mean that he could not have alienated it, if he had wanted to, and it in no way suffices to outweigh the presumption that under the settlement the Vatan had become his private property. Accordingly the appeal fails and should be dismissed with costs.

MACLEOD, C. J.:—I agree.

Appeal dismissed.

R. R.