

to bring a fresh suit on the 28th July 1921. The application for that purpose was based upon the ground that notices on the heirs could not be served. This is hardly a ground for allowing the plaintiff to withdraw a suit with liberty to bring a fresh suit. It was a suit of 1919 and in July 1921 the heirs were already on the record. There is no reason why the plaintiff should not have made proper efforts to serve the notices upon the heirs and proceeded with the suit. In any case no valid ground for allowing the withdrawal with liberty to bring a fresh suit has been made out. We set aside the order allowing the plaintiff to withdraw the suit and direct the papers to be sent back to the trial Court in order that the suit may be proceeded with and tried according to law.

Costs of this application to be costs in the suit.

Order set aside.

J. G. R.

APPELLATE CIVIL.

*Before Sir Lallubhai Shah, Kt., Acting Chief Justice,
and Mr. Justice Crump.*

MAHADU KASHIBA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS
v. KRISHNA WALAD TATYA MAHAR AND OTHERS (ORIGINAL PLAINTIFFS),
RESPONDENTS^o.

Bombay Hereditary Offices Act (Bom. Act III of 1874), sec. 18—Appointment of Panch—Procedure—Award, validity of—Civil Court—Jurisdiction.

Unless the provisions of section 18 of the Bombay Hereditary Offices Act (III of 1874) are substantially complied with, the award of a Panch purporting to act thereunder can have no validity.

A Civil Court has no jurisdiction to determine disputes, procedure for the determination of which is laid down in the above section.

^o Second Appeal No. 568 of 1919.

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SECOND appeal against the decision of N. S. Lokur, Assistant Judge, A. P., at Satara, confirming the decree passed by C. D. Pandya, Joint Subordinate Judge at Islampur.

Suit for an injunction.

This action was instituted by the Mahar Community of the village of Peth against the villagers of the two hamlets of Mahadevvadi and Naikwadi, for an injunction restraining them from giving the skins of dead animals to any one other than the plaintiffs, who were entitled to take the same as their perquisites. The plaintiffs alleged that they had been given the skins and had performed the services till 1912-13, from which date the villagers, defendants Nos. 1 to 12, had begun to give the skins to defendants Nos. 13 to 15, the Mangs.

The defendants contended that the plaintiffs had no right to the skins and that there had been no such practice as that claimed, that the employment of Mahars by the villagers was optional and a matter of contract and not of right; and finally that the suit was barred under the provisions of the Watan Act and the Land Revenue Code.

The Subordinate Judge held that, although both parties had led oral evidence on the question of the existence of these rights, the power of determining such rights rested exclusively with the Collector under section 18 of the Watan Act, and that, accordingly, the matter was determined by the Panchas' decision, Exhibit 54, dated the 22nd January 1912. He was of opinion that the rights and duties having been duly defined the civil Court had jurisdiction to enforce them (*Bhiva v. Vithya*, 25 Bom. 186) and granted the injunction claimed by the plaintiff.

⁽¹⁾ (1888) 13 Bom. 83.

⁽²⁾ (1900) 25 Bom. 186.

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On appeal before the Assistant Judge, the defendants contended (1) that the decision of the Panch was made on the order of the Assistant Collector and not the Collector who alone was empowered under section 18 of the Watan Act and it was, therefore, void and (2) that the jurisdiction of the civil Courts was barred under section 4 (a) of the Revenue Jurisdiction Act (X of 1876). The learned Assistant Judge held that the decision of the Panch was legal and binding, and that the suit was cognizable by the civil Courts.

In second appeal the High Court ruled that before expressing any opinion as to validity of the award it was necessary to know the facts relating to the constitution of the Panchas in the case and therefore sent down the following two issues for findings by the lower appellate Court :—

(1) Were the Panchas and Sar-Panch appointed in this case as required by section 18 of the Hereditary Offices Act?

(2) Whether the award, Exhibit 54, is valid?

The lower appellate Court found the Panchas and the Sar-Panch were appointed as required by section 18 of the Hereditary Offices Act and the award, Exhibit 54, was valid. The proceedings relating to the appointment of Panchas were briefly as follows :—

1st August 1911.—The petition of the Mahars (plaintiffs) to the Deputy Collector was referred by the latter to Mamlatdar for investigation and report.

3rd November 1911.—Mamlatdar solicited orders from Deputy Collector sanctioning appointment of a Panch according to section 18 of the Hereditary Offices Act.

21st November 1911.—Deputy Collector sanctioned Mamlatdar's suggestion for appointment of a Panch under section 18.

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24th November 1911.—Mamlatdar issued orders to special Head Karkun to get two Panchas appointed by each party and himself to act as Sar-Panch.

26th December 1911.—Head Karkun reported to the Mamlatdar that Mahars had appointed two Panchas but villagers had refused to do so. Sanction, therefore, requested for appointment of two persons on behalf of Government.

26th December 1911.—Mamlatdar ordered the Head Karkun to appoint the necessary two persons under section 18 as Deputy Collector had already given his sanction to action being taken under section 18.

15th January 1912.—Report of Head Karkun submitting finding of Panch.

30th January 1912.—Report of Mamlatdar to Deputy Collector submitting finding of Panch.

29th February 1912.—Deputy Collector conveyed to Mamlatdar his approval of the action taken and of the findings of the Panch and ordered same to be given effect to.

The defendants put in their objections to the findings.

N. M. Patwardhan with *V. D. Limaye*, for the appellants.

K. N. Koyaji, for respondents Nos. 1 to 15.

CRUMP, J. :—By our interlocutory judgment of 22nd June 1920 we sent down two issues for determination and we are now in possession of the findings of the lower Court upon those two issues and of the materials upon which those findings are based. The first issue was “were the Panchas and the Sar-Panch appointed in this case as required by section 18 of the Hereditary Offices Act?”, and, upon the facts stated in the judgment of the lower appellate Court upon remand, I think that this question must be answered in the negative.

Section 18 of the Bombay Hereditary Offices Act lays down the procedure to be followed in determining the rights and duties of certain classes of Vatandars, and it is necessary before the determination can be said to have been made under that section that the provisions of that section should have been complied with at least in substance. Now what the section requires is that the Collector, if he takes action under that section, shall cause the matter in dispute to be defined in writing by a Panchayat of five persons, whereof two shall be appointed by the villagers, two by the Vatandars, and one who shall be Sar-Panch by the Collector. That section further goes on to provide that in case the villagers or the Vatandars fail to nominate members within seven days, the Collector shall appoint such members as may be required to constitute a Panchayat of five.

It may be premised that the Deputy Collector who dealt with this matter had no doubt the powers of the Collector as explained in our previous judgment. It is clear, however, that the Legislature intends that the Collector shall himself appoint the Panchas in case the villagers or Vatandars fail to nominate members within seven days and also that the Sar-Panch shall be appointed by him.

Now what happened in this case was that on the 1st August 1911, a petition was made to the Deputy Collector by the Mahars and on the 3rd November 1911 the Mamlatdar wrote to the Deputy Collector soliciting the appointment of a Panch according to section 18 of the Bombay Hereditary Offices Act. Had the Deputy Collector proceeded to cause the appointment of a Panch to be made in the manner required by the section, all subsequent difficulties in the case would have been saved. But what he did was to write to the Mamlatdar directing him himself to take action in accordance with the

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suggestion made by him. From that time onwards he was in no way concerned in the matter. What appears to have happened afterwards is this. The Mamlatdar ordered his Head Karkun to get two Panchas appointed by each party and appointed the Head Karkun to be himself a Sar-Panch. The Head Karkun then reported to the Mamlatdar that the Mahars had appointed Panchas but that the villagers had refused to do so. Thereupon the Mamlatdar ordered the Head Karkun to appoint the necessary two persons under section 18. It thus appears that the Sar-Panch was not appointed by the Deputy Collector but by the Mamlatdar and that the two Panchas whose appointment became necessary owing to the failure of the villagers were not appointed by the Mamlatdar, still less by the Deputy Collector but by the Head Karkun. We are unable to consider that the action here disclosed was a substantial compliance with section 18 of the Bombay Hereditary Offices Act, or that a Panch so constituted could make a valid award. The fact that after the award was made the Deputy Collector approved the action taken and the finding of the Panch can give no kind of validity to that which had no validity at the time at which it was done. The approval of the Collector is not required by the Act in the case where the Panchas come to a decision. It is only where the Panchas fail to come to a decision that this approval is necessary and therefore the Deputy Collector's order cannot be considered as having been made in accordance with the proviso to the section. It follows that the award is invalid, in fact it is a nullity, not having been made in any respect whatever in accordance with the requirements of the Legislature. Therefore the result must be that the case must be approached as though there was no such award.

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Now what is the result? The suit was one by the Mahars to restrain the villagers from giving the carcasses of dead animals to the Mangs in contravention of the award which was thus passed and if the award was a nullity it must of necessity fail. It was, however, suggested that, apart from the award, the question of the rights of the Mahars arises to be decided on the merits. But it has been held by this Court in *Bhiva v. Vithya*⁽¹⁾ following the decision in *Parsha v. Lagmya Shan*⁽²⁾ that a civil Court has no jurisdiction to determine a matter of this kind having regard to section 18 of the Bombay Hereditary Offices Act which provides the procedure whereby such disputes are to be determined. Following those decisions there is no other course possible than to allow the appeal and to dismiss the suit.

In view of the fact that this point was not raised until the case came before us in second appeal, we direct that the parties should bear their own costs throughout.

We wish to add that we regret the result in this case and that we trust that if the Mahar-plaintiffs move the Collector for a fresh decision under section 18 of the Act, steps may be taken to ensure a speedy determination of the matter and that attention may be paid to the requirements of the Statute in order that so regrettable a result may not again occur.

SHAH, Ag. C. J. :—I agree.

Decree reversed.

J. G. R.

(1) (1900) 25 Bom. 186.

(2) (1888) 13 Bom. 83.