APPELLATE CIVIL.

Before Mr. Justice Broomfield and Mr. Justice Tyabji.

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July 31

KHANGOUDA, ADOPTIVE FATHER SHIVANGOUDA, HEIR OF THE DECEASED SHIVANGOUDA FAKIRGOUDA KAREGOWDARA (HEIR OF ORIGINAL PLAINTIFF), APPELLANT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Bombay Hereditary Offices Act (Bom. Act III of 1874), sections 10, 11, 11A, 34, 36, clause (3)—Bombay Revenue Jurisdiction Act (X of 1876), section 4 (a), clauses (1), (3), (4)—Patilki watan—Two adoptions made by a widow of former watandar—Plaintiff's adoption recognised by Revenue authorities and his name entered as representative watandar—Both adoptions held invalid by Court—Order by Revenue authorities removing plaintiff's name from register—Whether orders ultra vires—*"Alienation", meaning of.*

"Alienation" as used in section 11 of the Bombay Hereditary Offices Act, 1874, means only the passing of watan property into the ownership or beneficial possession of any person other than the officiator or a person not a watandar of the same watan as the case may be. No transfer or conveyance by a watandar is necessary at all.

A civil suit in respect of a claim against Government relating to property appertaining to the office of a village patil is barred under section 4 (*a*), clause (1), of the Bombay Revenue Jurisdiction Act; it also comes under clause (*4*) of sub-section (*a*), if regarded as a claim against Government relating to land declared by Government to be held for service.

Held, also, that as there were no grounds for holding any of the orders of the Revenue authorities to be *ultra vires* the suit was barred as well under clause (*3*) of section 4 (*a*) of the Bombay Revenue Jurisdiction Act, 1876.

APPEAL against the decision of R. Baindur, Additional First Class Subordinate Judge at Dharwar.

Suit for declaration and possession.

One Fakirgouda, a holder of patilki watan, died in about 1877 leaving three widows, Fakirawwa, Shanavirawwa and Savakka. Savakka gave birth to a posthumous son Fakirgouda, who died shortly after his birth. After his death Fakirawwa made two adoptions. She adopted Chanviragouda in 1901 and Shivangouda (plaintiff) in 1908. The plaintiff was put in possession of the property of Fakirgouda. On June 29, 1909, the Revenue authorities

*First Appeal No. 241 of 1931.

recognised his adoption and entered his name in place of Fakirgouda as one of the representative watandars.

In 1920 Chanaviragouda brought a suit against Shivangouda (plaintiff) claiming the property as the adopted son of Fakirgouda. The lower Court held that both the adoptions were proved, but both were invalid and dismissed the suit. The decree was confirmed in appeal by the High Court. The plaintiff, however, continued in possession of the property.

In 1926, one Fakirgouda Irangouda (defendant No. 4) relying on the decision of the civil Court applied to the Revenue authorities for restoration of watan lands to him as the heir of the second Fakirgouda.

On September 22, 1926, the District Deputy Collector, on the application of defendant No. 4, and in view of the decision in Chanaviragouda's suit and the confirmation of that decree by the High Court, decided that Shivangouda (plaintiff) was a stranger to the watan and held that the alienation of the lands to him was null and void under section 11 of the Watan Act. He also made an order that the plaintiff's name be struck out of the register.

On June 27, 1927, the Commissioner, on the recommendation of the Collector, cancelled the order of June 29, 1909, by which the plaintiff's name had been entered as the adopted son of the former watandar, and ordered that the District Deputy Collector should hold a fresh inquiry for determining who was entitled to be the representative watandar and to hold the land.

On April 10, 1929, as the result of the inquiry, the District Deputy Collector ordered the lands to be restored to two members of the watandar family, namely, Lingangouda and Basangouda (defendants Nos. 2 and 3). In June 1929, the order was confirmed in appeal by the Collector. The Revenue authorities accordingly gave possession of the lands to Lingangouda and Basangouda (defendants Nos. 2 and 3).

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On April 15, 1930, Shivangouda (plaintiff) filed the suit for a declaration of his title to the watan property and for possession of the same.

The Secretary of State for India in Council (defendant No. 1) contended that the suit was barred under section 4 (*a*), clauses (*1*) and (*3*) of the Bombay Revenue Jurisdiction Act; that the adoption of the plaintiff was not true and valid in law; that the plaintiff was estopped from contending that the act of the Collector in resuming the plaint lands and altering the entry in the watan Register was unlawful.

The contentions of the other defendants were to the same effect.

The Subordinate Judge held that the orders of the Revenue authorities setting aside the alienation and resuming the land and removing the plaintiff's name from the register were *ultra vires* but he dismissed the suit on the ground that it was barred by section 4 (*a*) of the Bombay Revenue Jurisdiction Act, 1876.

The plaintiff appealed to the High Court.

S. V. Palekar, for the appellant.

Dewan Bahadur P. B. Shingne, Government Pleader, for respondent No. 1.

R. A. Jahagirdar, for respondent No. 3.

BROOMFIELD J. The plaintiff has appealed against the dismissal of his suit, against the Secretary of State for India and other defendants, for a declaration of his title to and for possession of patilki watan lands in the village of Hulgur.

The material facts are these. Fakirgouda, the former holder of the watan, died in about 1877 leaving three widows, Fakirawwa, Shanavirawwa and Savakka. The last of these gave birth to a posthumous son Fakirgouda, who however died shortly after his birth. After his death Fakirawwa made two adoptions. She adopted one Chanaviragouda in 1901 and the plaintiff in 1908. The plaintiff was put in

possession of the property of Fakirgouda and the Revenue authorities recognised his adoption and entered his name in place of Fakirgouda as one of the representative watandars. That happened in 1909. In 1920 Chanaviragouda brought a suit against the plaintiff claiming the property as the adopted son of Fakirgouda. An issue was raised in that suit as to the fact and validity of both adoptions, viz., of Chanaviragouda and of the present plaintiff, and the Court held that both adoptions were proved, but both were invalid. The suit was accordingly dismissed, and the decree was confirmed in appeal by the High Court. However, the plaintiff continued in possession of the property, but in 1926 the present defendant No. 4 relying on the decision of the civil Court applied to the Revenue authorities for restoration of the watan lands to him as the heir of the second Fakirgouda.

It is desirable to set out much more clearly than the trial Judge has done the actual orders which were made by the Revenue authorities. On September 22, 1926, the District Deputy Collector, on the application of the present defendant No. 4 and in view of the decision in Chanaviragouda's suit and the confirmation of that decree by the High Court, decided that the present plaintiff was a stranger to the watan. He, therefore, held that the alienation of the lands to him was null and void under section 11 of the Watan Act. He also made an order that his name should be struck out of the register. On June 27, 1927, the Commissioner, on the recommendation of the Collector, cancelled the order of June 29, 1909, by which the plaintiff's name had been entered as the adopted son of the former watandar. At the same time the District Deputy Collector was ordered to hold a fresh inquiry for determining who was entitled to be the representative watandar and to hold the land. Final orders were passed on April 10, 1929, when as the result of the inquiry the District Deputy Collector ordered that the lands should be restored to two members of the watandar

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family who are defendants Nos. 2 and 3 in the present suit. This order of the District Deputy Collector was confirmed in appeal by the Collector in June, 1929.

This suit was tried by the Additional First Class Subordinate Judge at Dharwar. He has held that the orders of the Revenue authorities setting aside the alienation and resuming the land and removing the plaintiff's name from the register are *ultra vires*, but he dismissed the suit on the ground that it was barred by section 4 (*a*) of the Revenue Jurisdiction Act. In this appeal the learned advocate for the plaintiff naturally supports the findings of the trial Court in his favour, and he contends that, as the orders of the Revenue authorities were *ultra vires*, the suit is not barred by the Revenue Jurisdiction Act. The learned Government Pleader who appears for defendant No. 1, the Secretary of State for India, argues, firstly, that the suit is barred by section 4 (*a*) of the Revenue Jurisdiction Act in any case, and secondly, that the orders of the Revenue authorities were not *ultra vires*. In our opinion the learned Government Pleader is right on both points.

The suit apparently comes under section 4 (*a*), clause 1, of the Revenue Jurisdiction Act, that is to say, it must be regarded as a claim against Government relating to property appertaining to the office of a village patil. It also apparently comes under clause 4 of sub-section (*a*), that is to say, it must be regarded as a claim against Government relating to land declared by Government to be held for service. The lands in suit are described in the pleadings as patilki service watan lands and it appears from the judgment that it was not disputed at the trial that they are service lands. Section 4 of the Revenue Jurisdiction Act enacts that no claim against Government of this kind can be entertained by civil Courts. It is not as if Government were merely a formal party. Plaintiff claims relief against Government, i.e., restoration of possession. The question whether the orders of the Revenue authorities were *ultra vires*

or not does not arise in connection with these provisions in section 4 (*a*). That question only arises where a suit comes under clause 3 of section 4 (*a*) which relates to suits to set aside or avoid any order under the Watan Act passed by Government or any officer duly authorised in that behalf.

However as the question of the validity of the orders passed by the Revenue authorities is of some importance and as the learned trial Judge's finding appears to us to be wrong, I will briefly deal with it. Two separate orders have been held to be *ultra vires*, viz., the order annulling the alienation under section 11 of the Watan Act and the order removing the plaintiff's name from the register of representative watandars. Section 11 provides that when any alienation of the nature described in the preceding section shall take place otherwise than by virtue 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, and when he does this he has power under section 11A to resume possession of the property. The trial Judge has held that there was no alienation of the property and therefore the Collector had no power to resume the land. According to him the word "alienation" implies a transfer or conveyance by a watandar to a stranger. He says at page 4: "the express prohibition is against alienation only and that term has a meaning which is generally accepted and that meaning does not include the passing of the property into the hands of trespasser". I can see no justification for placing this narrow construction on the word "alienation". If a watandar conveys watan property to a stranger there is of course an alienation by a watandar, but if watan property passes into the hands of a stranger, though without any conveyance, as for instance by devolution or usurpation, there is equally an alienation from the watandar family. If a widow of a watandar makes a valid adoption and the property passes to the son, there is no alienation, but the reason is not that there has been no conveyance, but that the

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person to whom the property passes is not a stranger. If the adoption is not valid, there is an alienation.

The meaning of the word "alienation" as used in section 11 is, I think, quite obvious if we compare the section with section 10 to which it refers. Under section 11 the Collector is required to set aside any alienation of the nature described in section 10. Now the transactions referred to in section 10 are transactions where any watan or any part thereof has passed without the sanction of Government into the ownership or beneficial possession of any person other than the officiator, or, if the property has not been assigned, into the ownership or beneficial possession of any person not a watandar of the same watan. So that what is meant by "alienation" under section 11, is only the passing of watan property into the ownership or beneficial possession of any person other than the officiator or a person not a watandar of the same watan as the case may be. No transfer or conveyance by a watandar is necessary at all.

In the present case the Collector's power to set aside the alienation and to resume the property depended simply on the question whether the plaintiff is a stranger to the watan. That again depends upon the question whether he is or is not a validly adopted son of the former holder. There was an issue as to the validity of the adoption and the finding is against the plaintiff. Apparently it was so found on the admission of the plaintiff's pleader that the adoption was invalid. The learned advocate for the appellant has suggested that in view of recent decisions of the Privy Council the adoption may have been valid and the previous decision of the Court incorrect. I may mention here that in addition to Chanaviragouda's suit of 1920 there was another suit brought by the plaintiff himself against defendant No. 4 in 1928 in which he sought a declaration that he is the validly adopted son of Fakirgouda, and his suit was dismissed. Mr. Palekar's argument on this part of the case has not been developed in a way to make it in the least convincing and

there are no materials before us on which we could possibly hold that Fakirgouda's widow Fakirawwa had power to adopt the plaintiff. Moreover if she had power to adopt at all, her adoption of Chanaviragouda in 1901 would *prima facie* be valid also, and that would render the subsequent adoption of the plaintiff invalid. It appears, therefore, that the Revenue authorities were justified in holding the plaintiff to be a stranger to the watan and the orders annulling the alienation under section 11 and resuming the lands under section 11A were legal orders.

As to the order for the removal of the plaintiff's name from the register, the argument for the appellant is based on section 34 of the Watan Act, which provides, in the first place, that the Collector is to register the name of an adopted son of a representative watandar on report of the adoption being made to him, and, in the second place, that if such adoption be subsequently set aside by a decree of a competent Court, the Collector shall remove such name from the register. The trial Judge holds, and he may be right, that a finding in a judgment that an adoption is invalid is not equivalent to a decree setting aside an adoption, though I think myself that the word "decree" in section 34 must be deemed to include the judgment on which the decree is based. But section 34 does not say that the name of an adopted son can only be removed when there is a decree setting aside the adoption. There is also section 36, clause (*3*), of the Act which as amended by Act XI of 1930 provides as follows :

> "If any person shall by production of a decree of a competent Court, satisfy the Collector that he is entitled to have his name registered as the nearest heir of such deceased watandar in preference to the person whose name the Collector has ordered to be registered, at any time within six years of such order, the Collector shall, subject to the foregoing provisoes, cause the entry in the register to be amended accordingly."

It would certainly be a strange position if the Collector could declare an alienation null and void and resume the land, and yet should have no power to remove from the Register

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of representative watandars the name of the person held to have no title. Another point to be noted in this connection is that the original order of 1909 for the entry of the plaintiff's name has been cancelled by the Commissioner's order of June 27, 1927. The effect of that would apparently be that the position is the same as if the plaintiff's name had never been entered at all. As there are no grounds for holding any of the orders of the Revenue authorities to be *ultra vires*, the suit would be barred under clause 3 as well as clauses 1 and 4 of section 4 (*a*) of the Revenue Jurisdiction Act.

The appeal must be dismissed with costs. Two sets of costs, one for respondent No. 1 and one for respondent No. 3.

Appeal dismissed.

J. G. R.

APPELLATE CRIMINAL.

Before Mr. Justice Broomfield and Mr. Justice Sen.

1936
October 6

RAM NARAYAN BABURAO KAPUR (ORIGINAL ACCUSED), APPELLANT *v.* EMPEROR.*

Indian Penal Code (Act XLV of 1860), sections 498, 497—Enticing or taking away married woman—To constitute enticing, a person must have the care of woman on behalf of husband—Offence of enticing or taking, complete as soon as control has ceased—"Detains", meaning of—Adultery—Complaint by husband necessary—Criminal Procedure Code (Act V of 1898), section 199—"In his absence" and "On his behalf"—Interpretation.

The meaning of the words "in his absence" in section 199 of the Criminal Procedure Code, 1898, explained.

The words "on his behalf" in section 199 of the Criminal Procedure Code, 1898, must be given some meaning. It is not enough that a person should take care of the wife instead of the husband because the husband will not take care of her and there is no one else to do it. It must be shown that the person has the care of the wife on behalf of her husband.

*Criminal Appeal No. 59 of 1936.