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there being conflicting decisions of Courts of co-ordinate jurisdiction, we are entitled to adopt our own view. In my opinion the absence of attachment did not vitiate the sale for the reasons which I have already given.

Beaumont C. J.

Both appeals fail and must be dismissed with costs.

LOKUR J. I agree and have nothing to add.

Appeals dismissed.

Y. V. D.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Lokur.

1939
January 13

WASUDEO VISHNU DESHPANDE (ORIGINAL PLAINTIFF), APPELLANT *v.* PANDU VITHU YADAV AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Bombay Hereditary Offices Act (Bom. Act III of 1874), ss. 9, 11—Alienations prior and subsequent—Validity—Suit to recover possession after alienor's death—Revenue Officer's order—Effect—Jurisdiction of Civil Court—Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (a).

The land in suit was a Deshpande *watan* land belonging to the appellant's family. In 1868, the appellant's father mortgaged with possession its middle half to respondent's ancestor. Subsequently, that is, in 1877, the appellant's father executed in favour of the mortgagee a *miraspatra* in consideration of the amount due on the mortgage of 1868 and of a certain amount paid in cash. In 1891, the father mortgaged in favour of respondent's ancestors the remaining half of the land.

After the death of the appellant's father in 1922, the appellant applied to the Assistant Collector to have the alienations declared null and void and to have the land restored to him. The Revenue Officer refused to set the alienation of 1877 aside, but he set aside the alienation of 1891, ordering the respondents to pay full rent to the appellant instead of restoring possession to him.

In a suit by the appellant to recover possession of the land from the respondents it was objected that the suit was barred under s. 4 (*a*) of the Bombay Revenue Jurisdiction Act, 1876:—

Held, that the Court had jurisdiction to consider whether the alienation of 1877 was valid or not, but had no jurisdiction to consider the validity of the alienation of 1891.

The *ratio decidendi* in *Dattatraya Keshav* v. *Tukaram Raghu*,[1] explained.

* First Appeal No. 328 of 1936.

[1] (1920) 45 Bom. 1141, F. B.

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FIRST APPEAL from the decision of V. R. Chaubal, First Class Subordinate Judge, Satara, in Civil Suit No. 1475 of 1934.

Suit to recover possession of land.

The material facts appear sufficiently from the judgment.

B. N. Gokhale, with *M. G. Chitale*, for the appellant.

K. N. Dharap, for respondents Nos. 1 to 3 and 6.

LOKUR J. This is an appeal from a decree passed by the First Class Subordinate Judge of Satara, dismissing the appellant's suit on the preliminary ground that it is barred under the third paragraph of s. 4 (*a*) of the Bombay Revenue Jurisdiction Act, 1876.

The land in the suit, Survey No. 475, is Deshpande *watan* land belonging to the appellant's family. The appellant's father Vishnu mortgaged the middle half of the land with possession to the defendants' ancestor Subhana for Rs. 300 in 1868. Subsequently in 1877 Vishnu passed a *miraspatra* in favour of the mortgagee in consideration of a premium of Rs. 500 which was made up of Rs. 300 due under the mortgage of 1868 and Rs. 200 paid in cash. The remaining half portion of the land was subsequently mortgaged by the plaintiff's father to the defendants' ancestors in 1891 for Rs. 1,600, and thus the defendants' family came to be in possession of the entire survey number. Vishnu having died in 1922, and the defendants being strangers to the *watan*, the plaintiff made an application to the Assistant Collector to have the alienations declared null and void and the land restored to his possession. The Assistant Collector, after hearing the parties, thought that as the alienation

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Lokur J.

of the middle half of Survey No. 475 was prior to the passing of the Watan Act, it was in his discretion to order restoration under s. 9 of the Act, and in his discretion he refused to pass an order of restoration in respect of that portion of the land. But as regards the other half of the survey number, he declared the alienation null and void under s. 11 of the Watan Act, and instead of restoring its possession to the plaintiff, he ordered the defendants to pay full rent to the plaintiff under s. 11-A read with s. 9 cl. (2) of the Act. The plaintiff thereafter filed this suit to have all the alienations set aside and the entire land restored to his possession. The lower Court held that the suit was barred under s. 4 (*a*) of the Bombay Revenue Jurisdiction Act, 1876, and dismissed it.

It is conceded in this Court that, so far as the alienation of 1891 is concerned, the Assistant Collector did pass an order under section 11-A of the Watan Act, and, therefore, the Civil Court has no jurisdiction to entertain a suit to set aside or avoid that order. The appeal is, therefore, pressed with regard to the alienation of the middle half of Survey No. 475 only. So far as that portion of the land is concerned, the Assistant Collector observed:

"The first alienation of the central half of the land being prior to the passing of the Watan Act, i.e., in the year 1868 A. D. it falls under s. 9 of the Watan Act, the powers under which are discretionary and I do not see any valid grounds to interfere with this alienation."

On this ground he refused to grant the plaintiff's request in respect of this portion of the land. When the Revenue authorities refuse to pass an order setting aside an alienation under the Watan Act, it is held by a full bench of this Court in *Dattatraya Keshav* v. *Tukaram Raghu*[1] that there being no order under the Watan Act, a civil suit is not barred. It is contended on behalf of the defendants in this Court that the full bench ruling referred to an order passed

[1] (1920) 45 Bom. 1141, F. B.

under s. 11 of the Watan Act, whereas in the present case the Assistant Collector refused to restore the middle half portion of Survey No. 475 in exercise of the discretion vested in him under s. 9 of the Watan Act. It is true that s. 11 requires the revenue authorities to declare an alienation made after the passing of the Watan Act to be null and void if the alienee is a stranger to the *watan*, while in the case of a similar alienation prior to the Watan Act the revenue authorities are given a discretion whether to declare the alienation to be void or not. But this makes no difference as regards the effect of the refusal to interfere with the alienation. The effect of the full bench decision is that when the revenue authorities refuse to interfere with the alienation, it is not necessary to have such refusal set aside. Civil Courts have an inherent jurisdiction to declare such an alienation of *watan* property to a stranger void after the alienor's death. The Watan Act provides an additional quicker remedy by empowering the revenue authorities to grant the same relief. If they refuse to grant that relief, there is no reason why the Civil Courts should not exercise their inherent jurisdiction to consider whether the alienation should be set aside or not. If, on the other hand, the revenue authorities pass an order setting aside the alienation, then the civil Courts cannot entertain a suit in respect of the same matter since the relief prayed for will necessarily have to be to have that order set aside or avoided. In the present case the Assistant Collector refused to exercise his discretion in favour of the plaintiff and set aside the alienation in respect of the middle half of the land. Even if that order stands as it is, it causes no harm to the plaintiff. All that it means is that the plaintiff has failed to secure his remedy in a summary way at the hands of the revenue authorities, but that cannot debar him from filing a regular suit for the same relief. This is plainly the effect of the ruling of the full bench, and the refusal of the Assistant Collector to interfere with the alienation does not

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oust the jurisdiction of the civil Court. Hence this appeal must be allowed so far as the alienation of the middle half of survey No. 475 is concerned. In this case there were eight defendants in the lower Court and although all the eight of them were joined as respondents in this appeal, the names of the respondents Nos. 7 and 8 have been struck out as notices were not served on their guardian. It is not necessary to express an opinion as to what the effect of the absence of the respondents Nos. 7 and 8 from the record in this appeal will be ; but obviously they would not be bound by the decree passed in this appeal. For these reasons I record a finding on the first issue that the Court has jurisdiction to consider whether the alienation of April 11, 1877, is valid or not but has no jurisdiction to consider the validity of the alienation of June 15, 1891. The decree of the lower Court must be set aside and the suit remanded to the lower Court for further hearing and disposal in the light of this finding.

BEAUMONT C. J. I agree and will add a few words. The only effective point in this appeal is whether the alienation of April 11, 1877, can be challenged in view of the refusal of the Assistant Collector to make any order on the application made to him by the plaintiff. Now the Assistant Collector held, rightly or wrongly, that the case fell under s. 9 of the Watan Act and that he had jurisiction to set the alienation aside, but that in the exercise of his discretion it would not be proper for him to do so. He therefore refused the plaintiff's application. The learned trial Judge held that that order refusing the plaintiff's application was an order which the plaintiff in this suit will have to avoid or set aside and therefore the Court had no jurisdiction to entertain the suit having regard to the provisions of s. 4 (*a*), third paragraph, of the Bombay Revenue Jurisdiction Act of 1876. It seems to me that that point is concluded by the full bench decision of this Court in *Dattatraya Keshav*

v. *Tukaram Raghu*,[1] which was not cited before the learned trial Judge. That no doubt was a case under s. 11 of the Watan Act, and under s. 11, if the Collector holds that the facts are proved, he is bound to set the alienation aside; that is to say, he must either set the alienation aside or refuse to set it aside and he has no discretion as he has under s. 9. But whether the order is made under s. 9 or under s. 11 of the Watan Act, if the Collector refuses to make an order, the result must be exactly the same. The order in either case is one refusing the plaintiff's application for possession. The *ratio decidendi* of the full bench decision in *Dattatraya Keshav* v. *Tukaram Raghu*,[2] was that an order of the Collector refusing the plaintiff's claim for possession was not an order which is required to be avoided or set aside under s. 4 of the Bombay Revenue Jurisdiction Act, 1876. It is true that Mr. Justice Hayward held in that case that the order was not an order at all under the Watan Act. It is difficult, I think, to justify that view because plainly an order dismissing an application is an order. It does not leave the parties in the same position as before the order was made, because it debars a similar application in future. But I think the *ratio decidendi* of the full bench decision really was that an order refusing the plaintiff's application made by the revenue authorities was an order which the plaintiff could ignore in a subsequent suit in a Civil Court for possession and which he need not seek to set aside or avoid. The reasoning seems to me as applicable to cases arising under s. 9 of the Watan Act as to those arising under s. 11. We must therefore hold that the Court has jurisdiction to entertain the plaintiff's suit as to the alienation of April 11, 1877. The order will be that the appeal is allowed as against respondents Nos. 1 to 6. The names of respondents Nos. 7 and 8 are struck out and the issue No. 1 is answered as my learned brother has suggested. There will be no order as to the costs of the appeal.

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Per Curiam. The Court allows the appeal as against the respondents Nos. 1 to 6 so far as the alienation of April 11, 1877, is concerned. It records a finding on the first issue that the trial Court has jurisdiction to entertain the suit in respect of the alienation of April 11, 1877, but not in respect of the alienation of June 15, 1891. The decree of the lower Court is set aside and the suit is remanded to the lower Court for further hearing and disposal in accordance with this finding. There will be no order as to the costs of the appeal.

Decree set aside.

Y. V. D.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.

1939
February 28

EMPEROR *v.* NATHALAL VANMALI AND OTHERS (ORIGINAL ACCUSED NO. 1 AND OTHERS—NOS. 2, 3, 4, 6, 7, 9 AND 10).*

The Bombay Prevention of Gambling Act (Bom. Act IV of 1887, as amended by Act I of 1936), ss. 6 and 7—Raid—Seizure—Instruments of gaming—Presumption—Interpretation.

In construing a section of a penal Act which casts upon the accused the burden of proving his innocence the Court must act strictly.

A reading of s. 7 of the Bombay Prevention of Gambling Act, 1887, shows that there are two events on which a presumption under that section arises. The

* Criminal Appeal No. 195 of 1938.

Section 7 runs as follows:—

"When any instrument of gaming has been seized in any house, room or place entered under section 6 or about the person of any one found therein, and in the case of any other thing so seized if the court is satisfied that the Police officer who entered such house, room or place had reasonable grounds for suspecting that the thing so seized was an instrument of gaming, the seizure of such instrument or thing shall be evidence, until the contrary is proved, that such house, room or place is used as a common gaming-house and the persons found therein were then present for the purpose of gaming, although no gaming was actually seen by the Magistrate or the Police Officer or by any person acting under the authority of either of them."