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agreement for sale and is willing to perform his part of it with the plaintiff." That decision was based on the fiduciary aspect of the vendor's position and the impropriety of permitting him to succeed against his vendee in a suit for possession. That argument must also apply where the vendee in possession has allowed the time for filing a suit for specific performance to expire.

In this case, therefore, the defendant is entitled to remain in possession against the plaintiff. He will not be able to sue the plaintiff for a sale-deed, and so will have to remain in possession for twelve years before he can acquire a good title, but in the light of our decision the plaintiff might now be well advised if he passed the sale-deed. The appeal will be dismissed with costs.

SHAH, J. :—I agree.

*Appeal dismissed.*

R. R.

## APPELLATE CIVIL.

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

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December 6.

GANESH RAMCHANDRA KULKARNI (ORIGINAL PLAINTIFF), APPELLANT  
v. LAKSHMIBAI BERATAR VENKATESH NARAYAN KULKARNI  
AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS\*.

*Hereditary Offices Act (Bom. Act III of 1874), section 5—Money decree against Vatanadar—Execution after death of judgment-debtor—Vatan property purchased at Court sale by a Vatanadar of same Vatan—Suit by reversioners to set aside sale—Validity of sale—Res judicata.*

In execution of a money decree, obtained in his life-time against a deceased Vatanadar, his Vatan property was put up for sale and purchased by a Vatanadar of the same Vatan in 1896. In the execution proceedings the judgment-debtor

\* Second Appeal No. 912 of 1918.

was represented by his widow. She raised no objection to the sale at the time but later filed a suit (No. 682 of 1897) for a declaration that the sale was illegal. The suit was dismissed on the ground that it was barred by section 244 of the Code of Civil Procedure, 1882. Thereafter, the widow having died, the reversioners sued to set aside the sale and to recover possession. The lower appellate Court dismissed the suit on the ground that the question whether the sale was invalid was *res judicata* by virtue of the decision in suit of 1897 filed by the widow. On appeal to the High Court,

*Held*, (1) that the plea of *res judicata* failed, as it appeared that in the suit of 1897 there had been no adjudication on the merits, the ground of dismissal being that the question as to the validity of the sale, should have been raised in execution proceedings :

(2) that the sale was valid and binding upon the reversioners, as the auction purchaser was a Vatanadar of the same Vatan and the sale was effected for a legal necessity inasmuch as the widow was bound to pay the decretal debt of her deceased husband.

SECOND appeal against the decision of A. Montgomerie, Assistant Judge of Belgaum, modifying the decree passed by A. K. Asundi, Subordinate Judge at Gokak.

Suit for partition.

The plaintiffs and defendants were all *bhaubands* and members of the Kulkarni family at Kamatnur. The lands in suit, viz., four lands of Kamatnur and one of Gavnal were Vatan property and belonged to one Gopal Ramkrishna Kulkarni who was a *bhauband* of the parties to the suit.

In 1891 a money decree was obtained against Gopal by one Venkaji.

In 1894, Gopal died and his widow was brought on the record.

In 1896, in execution of the decree, the property (Survey No. 4 and eastern half of Survey No. 96 of Kamatnur) was put up for sale and purchased by one Narayan (father of defendant No. 11 and uncle of defendant No. 12).

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In 1897, the widow of Gopal filed a suit (No. 682 of 1897) for a declaration that the sale was illegal. The suit was dismissed on the ground that it was barred by section 244 of the Code of Civil Procedure, 1882, and that she should have raised the objection in execution proceedings.

In 1901, the widow died.

In 1913, the plaintiffs as the reversionary heirs of Gopal sued to recover a fourth share out of the plaint lands by actual partition alleging that they and defendants Nos. 1 to 7 were heirs of Gopal; that the sale of property in 1901 was illegal and not binding on the plaintiffs.

The principal contending defendants Nos. 11 and 12, pleaded that the lands (Survey No. 4 and eastern half of Survey No. 96 of Kamatnur) which were purchased at Court sale by Narayan had been in their possession since 1897; that Narayan was a *bharband* of the same Kulkarni Vatan to which the deceased Gopal belonged, and hence there could be no legal objection to the property being purchased; and that the claim was barred by adverse possession.

The Subordinate Judge held that the property being Vatan, Gopal had a life-interest only under section 5 of the Hereditary Offices Act, 1874, which ceased after his death in 1894 and the property could not, therefore, be brought to sale in execution of the decree against Gopal; that the widow of Gopal represented the property and was the heir in respect of it and so the sale held in execution of the decree was illegal; that the reversioners did not derive their title through the widow but from the last full owner and the possession which might be adverse against her might not be adverse against the reversioner: *Runchordas v. Parvatibai*

(1899) 23 Bom. 725. He, therefore, decreed the plaintiff's suit for one-fourth share in the plaint properties.

On appeal, the Assistant Judge modified the decree by holding that, by reason of the dismissal of the widow's Suit No. 682 of 1897, the present suit was barred by *res judicata* in respect of the lands purchased at Court sale by Narayan.

The plaintiffs appealed to the High Court.

*Nilkant Atmaram*, for the appellant.

*H. G. Kulkarni*, for the respondent No. 2.

SHAR, J. :—In this second appeal we are concerned only with Survey No. 4 and the eastern half of Survey No. 96 of Kamatnur. These were Vatan lands held by Gopal. He died in 1894. In execution of a money decree obtained against Gopal during his lifetime, the property was put up for sale by the Court and purchased by one Narayan in 1896. He got possession in September 1897. He was a Vatandar of the same Vatan. In these execution proceedings the judgment-debtor was represented by his widow. It does not appear whether she raised any objection to the sale in the execution proceedings: but she filed Suit No. 682 of 1897 for a declaration that the sale was illegal. This suit was dismissed on the ground that it was barred by section 244 of the Code of Civil Procedure of 1882 and that she should have raised the objection in the execution proceedings. The sale certificate does not in terms state whose right, title and interest were put up for sale but it shows that there was a sale of the lands in question. The widow died in November 1901. The present suit is filed by some of the reversioners as the heirs of Gopal. The claim is resisted in respect of these particular lands by the defendants who claim under Narayan on the

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ground that the sale is binding upon the reversioners and that they have acquired a title by adverse possession for over twelve years from the time they got possession in 1897.

The trial Court held that the cause of action accrued to the reversioners on the death of the widow in 1901 and that as the claim was made within twelve years from that time the suit was not time-barred. It further held that as the land was Vatan property the sale was inoperative as it was not liable to be sold after the death of the last male holder. Accordingly the plaintiff's claim in respect of the lands was decreed.

The lower appellate Court has dismissed the plaintiff's suit on the ground that the question whether the sale was invalid, was *res judicata* in virtue of the decision in Suit No. 687 of 1897 filed by Kashibai.

In the appeal before us it is urged that the sale is not binding upon the reversionary heirs of Gopal and that the question is not *res judicata*.

As regards the plea of *res judicata*, the lower appellate Court apparently had only the decree in the suit and not the judgment. A certified copy of the judgment has been put in here as it was not possible to deal with this point satisfactorily without referring to the judgment. The lower appellate Court should have insisted upon having the judgment before deciding the point. It appears from the judgment that the suit was dismissed on the ground that it related to a question which should have been raised in execution proceedings and that it was barred by section 244 of the Code then in force. There was no adjudication on the merits of the question. It does not appear that in the execution proceedings the widow had raised any objection to the sale. Thus there was no adjudication

as between the widow and the purchaser which could affect the reversioners. The plea of *res judicata* must, therefore, fail.

As regards the question as to the validity of the sale, it seems to us that it was valid and binding upon the reversioners. The auction-purchaser is a Vatandar of the same Vatan; and an alienation of these Vatan lands by Gopal during his life-time in favour of the purchaser would not have been invalid under section 5 of the Bombay Hereditary Offices Act. But Gopal did not effect any alienation during his life-time. The widow inherited her husband's property including these Vatan lands. She would be able to alienate her husband's immovable property for legal necessity; and though there would be a special restriction on her powers in virtue of section 5 of the Bombay Hereditary Offices Act, she might be able to deal with the Vatan property as a Hindu widow for legal necessity, provided the alienee was a Vatandar of the same Vatan. That being her position, it is clear that at the Court sale the auction-purchaser could get only such right as she could have conveyed by a private sale to him. At the date of the sale Gopal was dead: and though the sale deed refers to the lands it seems to me that at the date of the sale the purchaser could get only the right, title and interest of the widow. In the present case the sale was in execution of a money decree against Gopal. The widow would be bound to pay the decretal debt of her deceased husband: and unless it were proved that she had other moveable estate of her husband from which the debt could have been defrayed the sale would be for a legal necessity and as such it would be binding upon the reversioners. We have the fact that she allowed the Vatan property to be sold in execution of the decree, which she was bound to satisfy. An alienation by her for that purpose would be binding

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upon the reversioners: and I do not see any reason why the Court sale should not convey such title, as a sale by her for the purpose could have conveyed. On the whole, therefore, I am of opinion that the sale was good not only during her life-time, but also against the reversioners.

The decree of the lower appellate Court as regards these lands is right and must be confirmed with costs. The appeal is dismissed.

MACLEOD, C. J. :—I agree.

*Decree confirmed.*

J. G. R.

### APPELLATE CIVIL.

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

1921.

December 6.

MAHADEV GANESH JAMSANDEKAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS<sup>o</sup>.

*See Customs Act (VIII of 1878), section 182—Adjudication on confiscation and penalty—Principles to be acted on by Customs Officer.*

A Customs Officer acting under section 182 of the Sea Customs Act, 1878, should proceed according to general principles, which are not necessarily legal principles, and is not bound to adjudicate on confiscation and penalty as if the matter was proceeding in a Court of law according to the provisions of the Civil or Criminal Procedure Code.

FIRST appeal against the decision of C. C. Dutt, District Judge of Ratnagiri.

Suit for a declaration.

The plaintiff Ganesh sued to obtain a declaration that the orders passed by defendant No. 2, the Collector

<sup>o</sup> First Appeal No. 222 of 1920.