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close definitions, and the relations of a family transcend the sphere of law. The parties here, as in most such cases, allowed strict right, it may be assumed, to be absorbed in mutual benevolence so long as amity prevailed amongst them; and it was not necessary that Merbai should execute any formal instrument to warrant the expenditure which she tacitly sanctioned. Her husband, Ratanji, I cannot doubt, knew, as well as his brothers, that the notes had been sold. With the hopeful temperament of a spendthrift he reckoned on their being replaced when wanted.

While, therefore, Perozbai is not to charge the plaintiffs for their board and lodging during the years of her widowhood, neither is she to account for the interest she has drawn and expended in that time. She has not, it is true, set up the defence of a set off on this account. It never occurred to her, we may suppose, until lately, that her sons and their wives were not, of course, to sit at her table and share the shelter of her roof; but, if legal right is to take the place of kind impulses and religious duty, whose part it can but imperfectly fulfil, then it must, in justice, be applied all round. Perozbai had rights which she voluntarily sacrificed on the altar of the family. Merbai's non-assertion of her rights was a reciprocal sacrifice no less voluntary. What was distinctly her property she did not give up; the accruing proceeds she allowed to be employed for the domestic needs. At Burjorji's death a definite sum was due by him as trustee for the interest he had received in excess of what he had paid to Merbai. An account must be taken of it, interest being reckoned at 9 per cent. on each item, from its reaching his hands, and the total thus constituted, added to Rs. 2,200, must be paid by Perozbai and secured for the benefit of Merbai and her daughter according to a scheme on which I will hear counsel again when the account has been ascertained and the arrangement framed.

Decree for the plaintiffs.

Attorneys for the plaintiffs.—Messrs. *Ardesir and Hormusji.*
Attorneys for the defendant.—Messrs. *Chalk and Walker.*

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[283] APPELLATE CIVIL.—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice M. Melvill, Mr. Justice Kemball and Mr. Justice F. D. Melvill.

RACHAPA (*Original Defendant*), *Appellant v.* AMINGOVDA (*Original Plaintiff*), *Respondent.**

[30th and 31st August and 6th September, 1880.]

Regulation XVI of 1827, *s.* 20—*Vatan, alienation of—Bombay Act III of* 1874, *ss.* 5, 8, 9, 10—*Construction Certificate of Collector under s.* 10.

Previously to the year A. D. 1818, R, the great-grandfather of the plaintiff settled accounts with Rudrapa, the father of the defendant, in respect of debts due by himself (R) and his ancestors. The amount found due to Rudrapa was Rs. 20,000, and as security for this sum, R, by deed, dated A.D. 1818, mortgaged to Rudrapa certain vatani lands, and also an annual allowance of Rs. 200 received by him (R) on account of a *rusum.* Under this deed these properties were to be held by Rudrapa, in lieu of interest until repayment of the principal of Rs. 20,000.

* Miscellaneous Special Appeal No. 2 of 1877.

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A dispute subsequently arose as to the amount of the *rusum*, and A, the son and successor of R, the mortgagor, having by attachment interrupted Rudrapa's possession (as mortgagee) of the vatani lands, he (Rudrapa) presented a petition of complaint to the Sub-Collector of B, who issued an order on the 10th November, 1830, to the Mamlatdar, directing him to require the parties to refer their disputes to arbitration. The arbitration took place, and on the 20th August, 1831, both parties executed a *rajinama* (Ex. No. 20), which set forth the terms of settlement agreed upon. Rudrapa was to hold the mortgaged lands and *rusum* (annual allowance) for fifty years. At the end of that period the principal debt and all interest thereon was to be deemed to have been paid off, and the lands and *rusum* were to be surrendered to the mortgagor or his heir. Under this *rajinama* the mortgagee held uninterrupted possession of the mortgaged property until A.D. 1872. A, one of the signatories of the *rajinama*, died in 1843, and was succeeded as vatandar by R, and R, again was succeeded by the present plaintiff who in 1872 brought this suit against the defendant (Rudrapa's son) to recover possession of the mortgaged property.

The Subordinate Judge held that the mortgage of A. D. 1818 was not genuine, and that the *rajinama* of A. D. 1831, being an alienation of vatani property after the passing of Reg. XVI of 1827, s. 20, was invalid as against vatandars subsequent to the grantor. He, therefore, made a decree for the plaintiff. In appeal, the Assistant Judge held that the mortgage of A. D. 1818 was genuine, but he agreed with the Subordinate Judge in regarding the *rajinama* as a fresh alienation of vatani property, and, therefore, invalid as against the plaintiff, having been executed since the passing of Reg. XVI of 1827, s. 20. He, therefore, affirmed the decree of the Subordinate Judge. The defendant thereupon filed a special appeal in the High Court, which on the 29th September, 1875, reversed the decrees of the Courts [284] below, holding that the *rajinama* was not a fresh alienation of vatani lands, but a compromise of a dispute in regard to an alienation by way of mortgage, in A.D. of 1818, of vatan lands, and that the *rajinama* was, therefore, valid, and ought to be enforced, and was not affected by Reg. XVI of 1827, s. 20.

Previously to this decree of the High Court the plaintiff had applied for execution of the Subordinate Judge's decree, and had been put into possession of the mortgaged property on the 9th June 1873.

The decrees of the lower Courts being thus reversed by the High Court, the defendant in 1876 presented a petition to the Subordinate Judge, praying a restoration of the mortgaged property to his possession. The plaintiff did not oppose his application, but the Subordinate Judge refused it, on the ground that he had received a certificate from the Collector, issued under s. 10 of Bombay Act III of 1874, stating that the property, the subject of the application, formed part of a vatan. In appeal, this Assistant Judge affirmed the order of the Subordinate Judge, being of opinion that the receipt of the certificate by the Subordinate Judge compelled him to refrain from giving effect to the decree of the High Court. Thereupon the defendant filed a special appeal in the High Court.

Held that the certificate of the Collector was unlawfully issued and that the Subordinate Judge should proceed to give effect to the decree of the High Court of the 29th September, 1875, by reinstating the defendant in possession of the premises mentioned in the *rajinama*.

The certificate which the Collector is authorized to issue under s. 10 of Bombay Act III of 1874 should be sent to the Court, by whose decree or order the vatan is affected in the manner mentioned in the section. The Collector's certificate in this case, therefore, had not been issued to proper Court.

The restitution of the mortgaged property to the defendant in whose possession it was at the commencement of this suit in 1872, and until the execution of the erroneous decree of the Court of first instance in 1873, was not such a passing into the ownership or beneficial possession of any person not a vatandar of the same vatan as is meant by s. 10 of Bombay Act III of 1874.

The alienation of the vatani property to Rudrapa having, in 1831, received the sanction of the authorized officer of Government, s. 10 of Bombay Act III of 1874 did not apply,—the intention of the Act being that, whenever the alienation of a hereditary officer's vatan has received the sanction of Government, the Collector should not issue his certificate.

The words "without the sanction of Government" in s. 10 of the Act qualify the whole section.

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Bombay Act III of 1874 does not authorize the Collector to issue his certificate for the purposes of preventing the rectification of a Subordinate Court's decree by the High Court, or the reinstatement of a person in possession of which he has been deprived by the execution of the erroneous decree of a Subordinate Court.

[R., 14 B. 82 (89); 21 B. 55 (57); 35 B. 146 (152)=12 Bom. L.R. 839=8 Ind. Cas. 166; 4 C.P.L.R. 167 (168).]

THIS was a miscellaneous special appeal from the order of E. Hosking, Senior Assistant Judge at Kaladgi, in the district of [285] Belgaum, affirming the order of the Second Class Subordinate Judge of Bagalkot.

In the year A. D. 1818, Ramaradigovda (the great-grandfather of the plaintiff) who was sar-desai and sar-deshpande of Hungund, and sar-nadgauda of Balgundi, mortgaged by a deed dated in that year (Ex. No. 8) to Rudrapa, the father of the defendant, certain vatani lands, and also an annual allowance received by him (Ramaradigovda) on account of *rusum*. The mortgage was given as security for the repayment of Rs. 20,000, which was the amount found due on a settlement of accounts in respect of debts due by Ramaradigovda and his ancestors to Rudrapa. By the mortgage deed the above properties were to be held by Rudrapa in lieu of interest until repayment of the principal of Rs. 20,000.

Ramaradigovda died, and Amingovda, his son, succeeded him as vatandar. A dispute arose between him and Rudrapa as to the amount of the *rusum*, and Amingovda having by attachment interrupted Rudrapa's possession (as mortgagee) of the vatani lands he (Rudrapa) presented a petition of complaint to Mr. Elliott, Sub-Collector of Bagalkot, who issued an order to the Mamlatdar, directing him to require the parties to refer their disputes to arbitration. This arbitration was held, and on the 20th August, 1831, both parties executed a *rajinama* (Ex. No. 20) which contained the terms of settlement agreed upon. Rudrapa was to hold the mortgaged lands and *rusum* (annual allowance) for fifty years. At the end of that time the principal debt and all interest thereon, was to be deemed to have been paid off, and the lands and the *rusum* were to be surrendered to the mortgagor or his heir.

Under this *rajinama* Rudrapa, the mortgagee, held uninterrupted possession of the mortgaged property until A.D. 1872. Amingovda died in 1843, and was succeeded as vatandar by Ramradigovda, who in turn was succeeded by the present plaintiff, Amingovda.

In 1872, Amingovda, a minor, by his mother brought the present suit to recover possession of the mortgaged property.

The Subordinate Judge held that the mortgage of 1818 A.D. was not genuine, and that the *rajinama* of A.D. 1831 was an [286] alienation of vatan property, and was, therefore, invalid as against vatandars subsequent to the grantor under s. 20 of Reg. XVI of 1827. He, therefore, passed a decree for the plaintiff. In appeal, the Assistant Judge held that the mortgage of A. D. 1818 was genuine; but he concurred with the Subordinate Judge in holding that the *rajinama* was a fresh alienation of vatan property, and, therefore, invalid as against the plaintiff, having been executed subsequently to the passing of Reg. XVI of 1827, s. 20. He, therefore, affirmed the decree of the Subordinate Judge.

The defendant then filed a special appeal in the High Court, which on the 29th September, 1875, reversed (1) the decrees of the Courts below, holding that the *rajinama* was not a fresh alienation of vatan lands, but a compromise of a dispute in regard to the alienation by way of mortgage,

(1) See Printed Judgments for 1875, p. 269.

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in A. D. 1818, of vatan lands, and that the *rajinama* was, therefore, valid, and ought to be enforced, and was not affected by Reg. XVI of 1827, s. 20.

In the meantime, however, the plaintiff had applied for execution of the Subordinate Judge's decree, and had been put into possession of the mortgaged property on the 9th June, 1873.

The decrees of the lower Courts having been reversed by the High Court, the defendant in 1876 presented a petition to the Subordinate Judge, praying to be restored to the possession of the mortgaged property. The plaintiff did not oppose the application; but the Subordinate Judge refused it, on the ground that he had received a certificate from the Collector, issued under s. 10 of Bombay Act III of 1874, stating that the property, which was the subject of the application, was part of a vatan. In appeal, the Assistant Judge affirmed the order of the Subordinate Judge, being of opinion that the receipt of the certificate by the Subordinate Judge compelled him to abstain from giving effect to the decree of the High Court.

The defendant thereupon filed a special appeal.

Gokuldas Kahandas, for the appellant.

Shantaram Narayan, for the respondent.

[287] *Nanabhai Haridas* (Government Pleader), for the Collector.

The following authorities were cited:—*Lati Kader* v. *Sobadra Kader* (1); *Hurro Chunder Roy* v. *Sooradhonee Debia* (2); Broom's Legal Maxims (5th ed.), p. 131; *Gopal Hanmant* v. *Sakharam Govind* (3); *Mahadaji* v. *Rajaram* (Mis. S. A. 17 of 1876); *Visaji* v. *Rajaram* (Mis. S. A. 22 of 1876), (both decided by Westropp, C. J., and Melvill, J., on 19th December 1877); *Collector of Kaladgi* v. *Sitabai* (4); *Jagjivan* v. *Ismail Ali Khan* (5); *Davidas* v. *Ismail Ali* (6).

JUDGMENT.

6th September, 1880. WESTROPP, C. J.—The facts of the present case are simple. Previously to the Christian year 1818, Ramaradigovda (the great-grandfather of the present plaintiff) who was sar-desai and sar-deshpande of Hungund, and sar-nadgauda of Balkundi, came, with the assistance of mediators, to a settlement of accounts with Rudrapa of Honavar, the father of the present defendant Rachapa, in respect of the debts of himself (Ramaradigovda) and of his ancestors to Rudrapa, who then held title-deeds and papers belonging to Ramaradigovda, and relating to certain vatani property of the latter, as security for such debts. Those title-deeds, &c., were then produced, and copies furnished to Ramaradigovda, and the sum found due from him to Rudrapa on taking the account, was fixed at Rs. 20,000, as appears by Ex. 8, dated 19th July, 1881 (15 Ramazan Sursan 1219, 2nd Ashai Bahul Shalibahan 1740) which charged Ramaradigovda's sayar (to the extent of a *rusum* of Rs. 200 payable annually) and certain vatani lands with the above-named sum of Rs. 20,000. That document having been executed in 1818—*i.e.*, nine years before Reg. XVI of 1827, s. 20, was passed—was a valid alienation of the property therein mentioned, although it was vatani property. See the cases collected in 4 Bom. H. C. Rep., 14, 15, *et seq.*,

(1) 3 C. 720.
(2) B.L.R. (Full Bench Rul. 1862-68), 985=9 W.R. 403.
(3) 4 B. 254.
(4) Extraordinary Application, No. 45 of 1877, decided 6th December, 1877 (not reported).
(5) 4 B. 426.
(6) Extraordinary Application, No. 91 of 1879.

A. C. J. Those properties and their income were, under that document, [288] to be held by Rudrapa in lieu of interest "until repayment of the principal" of Rs. 20,000. All prior bonds, &c., for debts of Ramaradi and his ancestors to Rudrapa and his ancestors were then given up to Ramaradigovda.

The mortgage (Ex. 8) of 1818 is supported by Exs. 9 and 10 [bearing the same date (19th July 1818) as Ex. 8] whereby Ramaradigovda informed the officers of the villages, in which the vatan property is situate, of the execution of Ex. 8, and directed those officers to make over possession of the mortgaged premises to Rudrapa of Honavar.

Subsequently, in A. D. 1830, a dispute as to the amount of the *rusum* having arisen, and Amingovda the son and successor (as desai and deshpande) of Ramaradigovda, the mortgagor, having, by attachment, interrupted the mortgagee's possession of the vatani lands mentioned in the mortgage of 1818, he (Rudrapa of Honavar) took proceedings against Amingovda by presenting a pettition to Mr. Elliott, the Sub-Collector of Bagalkot, complaining of Amingovda's conduct—the result of which petition was that the Sub-Collector, on the 11th November, 1830 (Fasli 1240), issued an order Ex. 19) to the Mamlatdar of Hungund, referring to the mortgage of 1818 and to the question as to the *rusum*, and to the attachment, and stating "that it was not proper (for the desai) to realize the produce by attachment (of the lands); that, therefore, the desai should be requested to pay (make over) the produce to the Honavarkar, and that *rajinamas* should be taken from both the parties for the appointment of an arbitration to sit at Bagalkot or Badami, whichever they may choose, to settle all the disputes between the parties, and submitted to the Huzur.

The arbitration, thus directed by Mr. Elliott, was held at Badami, and the result of it was that a *rajinama* (Ex. 20), dated the 20th August, 1831 (Fasli 1241), was executed by both of the contending parties. It runs thus:—"To the Company's Government. A *rajinama* is executed by the plaintiff Rudrapa of Honavar, and the defendant Amingovda, desai and sar-desai in the pargana of Hungund, as follows:—The defendant's father had, in the Fasli year 1228 (A.D. 1818) assigned, in payment [289] of interest, ten kudas of land and the sayar *rusum* to the plaintiff. Latterly, in the Fasli year 1240, the defendant having taken objection to the continuance of the same in lieu of interest, and the plaintiff having preferred a complaint to the Huzur, (he) got an order to the Mamlatdar. The Mamlatdar took *rajinamas* from the plaintiff and defendant and sent (them) to Badami, where the parties came mutually to certain agreements, of which the following are the particulars:—300-0-0 being the amount settled for ten kudas of land assigned to the plaintiff by the defendant's father, 155-0-0 the sayar *rusum* in Company's coin. In this manner the defendant is to continue (the above) to the plaintiff for fifty years from the Fasli year 1241 (1831). In the fifty-first year (the plaintiff) is to give up the lands and *rusum* assigned by the defendants, and the plaintiff is to return to the defendant all the papers that have been given to the plaintiff. And, if the sayar amount fall short of Rs. 155 by any sum, the defendant is to make good to the plaintiff the sum. Thus a *rajinama* is executed by both the contending parties." Then followed the date and signatures of Rudrapa and Amingovda and those of the attesting witnesses. The certified copy of that document (Ex. 20) comes from the Mamlatdar's office, and was put in evidence on behalf of the present

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plaintiff. That exhibit proves a compromise, entered into at the suggestion and with the sanction of the Sub-Collector of Bagalkot, highly favourable to the then Desai Amingovda and his successors. Its legal effect is to reduce the amount of the annual *rusum* from Rs. 200 (stipulated for in Ex. 8) to Company's Rs. 155, and at the end of fifty years from A.D. 1831—*i.e.*, at the end of A.D. 1881—to relieve the lands and *rusum* altogether from the Rs. 20,000, pricipal secured by Ex. 8, which sum, together with all interest upon it, is then to be deemed to be paid off, and the lands and *rusum* are at that time to be surrendered to the debtor, or his heir.

Amingovda, one of the two signatories of Ex. 20, having died in or about 1843, was succeeded as vatandar by Ramradigovda, who appears not to have attempted to disturb the possession of the defendant. His successor Amingovda, a minor, by his mother, instituted in 1872 the present action of ejectment, which has, since his death, been continued by his widow Shivbasava **[290]** (also a minor) through the administrator of her estate under Act XX of 1864, the Collector of Kaladgi.

The Subordinate Judge, while of opinion that there had been an early mortgage of vatani property, regarded Ex. 8 as not genuine, and Ex. 20 as an alienation since Reg. XVI of 1827, s. 20, and, therefore, invalid as against vatandars subsequent to the grantor, and made a decree for the plaintiff. The defendant appealed, and the Senior Assistant Judge, Mr. Tagore, differing, with good reason, from the Subordinate Judge held the genuineness of Ex. 8 to be satisfactorily proved and that it had been acted upon by the parties and the defendant Rachapa, and his father Rudrapa had been in possession under it. The *rajinama*, Ex. 20, produced for the plaintiff is an official copy of its original in the Mamlatdar's office, and its original, though disputed by the defendant, was, by the Senior Assistant Judge, held to be proved. His finding as to its genuineness binds this Court. But he regarded it as a fresh alienation of the vatani property mentioned in it, and, it having been executed since Reg. XVI of 1827, s. 20, came into force, he pronounced it to be invalid as against the plaintiff, and on that ground affirmed the decree of the Subordinate Judge.

The defendant Rachapa instituted a special appeal to this Court, which was heard by my brother Kemball and myself on the 29th September, 1875. Both of the parties were represented by able counsel—Mr. *Inverarity* being for the special appellant, and Mr. *Branson* for the special respondent. Mr. Justice Kemball and I,—being of opinion that Ex. 20 was "not a fresh alienation of vatan lands," but a compromise of proceedings instituted before the Sub-Collector, made with the sanction of arbitrators and of the Sub-Collector in respect of a dispute arising in regard to "an alienation by way of mortgage (Ex. 8), in A.D. 1818, of vatan lands, &c., and, moreover, not an extension of that alienation, but a modification thereof, very much in favour of the mortgagor and those deriving under him,—held that Ex. 20 is valid and ought to be enforced, and was not affected by Reg. XVI of 1827." The decrees of the Courts below were accordingly reversed with costs. It may now be observed that, if Ex. 20 **[291]** had been held to be a fresh alienation and, therefore, invalid, as having been executed since Reg. XVI of 1827, s. 20, came into force, the result would have been that the defendant, the mortgagee, would have been wholly remitted to his mortgage of 1818, which was more unfavourable to the plaintiff, and would certainly, according to the authorities already mentioned, have bound him as having been executed before 1827.

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Previously to the decree of this Court of the 29th September, 1875, the plaintiff had applied for, and been put into, possession of the mortgaged property upon the 9th of June, 1873, under the decree of the Subordinate Judge.

The decrees of both of the Courts below having been reversed by the decree of this Court, the defendant Rachapa became, as a matter of course, entitled to have the mortgaged premises restored to his possession, and the moneys (mesne profits) which were received by the plaintiff, while in possession under the erroneous decrees of the Courts below, refunded to him. The defendant Rachapa presented in 1876 an application to the Subordinate Judge, praying a restoration of the mortgaged premises to his possession. The plaintiff did not appear to oppose his application; but the Subordinate Judge, on the 13th June, 1876, refused it on the ground that the Collector had issued a certificate (Ex. 5) under s. 10 of Bombay Act III of 1874 (the Hereditary Officers' Act) stating that the property, the subject of the application, formed part of a vatan. The defendant Rachapa appealed against that order, but it was affirmed by the Assistant Judge, who was of opinion that the receipt of the certificate by the Subordinate Judge compelled him to refrain from giving effect to the decree of this Court. Rachapa has made a special appeal to the High Court, which has been heard by a Full Bench. The parties have been represented before us by their respective pleaders, and notice of the case having by this Court been given to the Government Pleader, he has been heard on behalf of the Collector.

The questions are: first, whether, if the Collector were entitled to issue his certificate under Bombay Act III of 1874, s. 10, at all, he should have issued it to this Court and not to the Subordinate Judge's Court; secondly, whether, under the circumstances [292] above detailed, he was entitled to issue such a certificate to either Court.

As to the first question, the decree which the Subordinate Court was invited to execute, and which entitled Rachapa to be reinstated in possession, was that of the High Court, and not that of either of the Courts below. The last passage in s. 10 of Bombay Act III of 1874 leads to the conclusion that the Bombay Legislature intended the certificate to be sent to the Court, whose decree was supposed to give effect to an alienation of the vatan, for it provides that, on receipt of the certificate, the Court shall (*inter alia*) cancel the decree or order complained of, so far as it concerns the vatan. It is wholly improbable that the Bombay Legislature, even if it had the power so to legislate—a point which it is unnecessary now to discuss—could have intended that the Subordinate Judge should cancel the decree of the High Court. We think that the certificate, if properly issuable, should be sent to the Court, whose decree or order is that whereby the vatan is affected, in the manner mentioned in that section, and, therefore, that, in this case, the certificate, if properly issuable, should have been sent by the Collector to this Court, and not to the Subordinate Judge.

As to the second question, we think that the Collector had not any authority to issue, even to this Court, his certificate under s. 10 of Bombay Act III of 1874, under the circumstances of this case as above detailed.

It is admitted that none of the vatani property, the subject of this suit, has been assigned (under s. 23 of that Act or otherwise) as the remuneration of the officiator. Hence the first portion of s. 10, so far as it relates to vatan so assigned, is inapplicable. Seven or eight cases have been cited to us by the learned Government Pleader in which this Court has given

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effect to the certificate of the Collector. Those cases, however, are not in point, as in all of them the suits were brought against the vatandar, and sought to dispossess him, or to obtain from him a portion of the profits of the vatan. The present suit is brought by the vatandar, and seeks to dislodge the mortgagee from the possession which he has enjoyed since 1818 with the slight [293] interruption in 1831, which interruption was censured and put an end to by the intervention of the Sub-Collector in that year; and with his sanction, nay more (as it would appear from Ex. 19) at his command, the compromise was entered into in the same year, which compromise has been acted upon for forty-one years preceding the institution in 1872, of the present suit. Wholly erroneous decrees have been made in it in the Courts below, and have been reversed by the High Court's decree of 1875, which entitled the defendant Rachapa to be reinstated in the position which he occupied with respect to the mortgaged property before the Court of the Subordinate Judge executed its erroneous decree in the period intervening between the passing of it and its reversal. The contention of the plaintiff is that, in consequence of the issuing by the Collector of his certificate, this Court is bound, by s. 10 of Bombay Act III of 1874, to cancel its decree whereby it reversed the erroneous decrees of the Courts below, and to permit the execution of those erroneous decrees by allowing the plaintiff to remain in possession of the mortgaged premises wrongfully made over to him by the Court of first instance. We do not think that the Bombay Legislature had any such purpose in its contemplation, when enacting s. 10 of the Act, as to take advantage of the errors of the Civil Courts by maintaining a possession obtained by their wrongful operation, or to interfere with the jurisdiction of the High Court to reverse and prevent the execution of erroneous decrees of Courts subordinate to it. The restitution of the mortgaged property to the defendant Rachapa, in whose possession it was at the commencement of this suit and until the execution of the erroneous decree of the Court of first instance, does not appear to us to be such a passing into the ownership or beneficial possession of any person not a vatandar of the same vatan as is meant by s. 10. Moreover, the beneficial possession passed to Rudrapa, *qua* mortgagee, in 1818 was subsequently modified and confirmed with the direct intervention and sanction of the revenue officer (the Sub-Collector) of the locality in 1831. Upon that occasion that officer must be regarded as representing Government. Section 10, which is very ill-penned, uses the words "without the sanction of Government." The location of those words in that section may, [294] at first sight, lead to the supposition that they are limited to vatans assigned under s. 23 of the Act as remuneration of an officiator; but, on the purview of the Act, we think that those words are intended as a qualification of the whole of s. 10. We find them in s. 5, which is the leading section and indicates the general policy of the Act. It is as follows:—No vatandar shall, *without the sanction of Government* sell, mortgage, or otherwise alienate or assign any vatan, or part thereof, or interest therein to any person not a vatandar of the same vatan." The same words occur in s. 8, and equivalent words are to be found in s. 9. The general intention of the Act seems to us to be that, whenever the alienation of an hereditary officer's vatan has received the sanction of Government, the Collector should not issue his certificate.

Having arrived at the following conclusions—(1) that the Collector has not issued his certificate to the proper Court; (2) that the Act does not authorize the Collector to issue his certificate for the purpose of

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preventing the rectification of a Subordinate Court's decree by the High Court, or the reinstatement of a person in possession, of which he has been deprived by the execution of the erroneous decree of a Subordinate Court; and (3) that the alienation of the vatani property in this case to Rudrapa has received the sanction of the authorized officer of Government so far back as A.D. 1831: we must hold that the certificate of the Collector was unlawfully issued, and, accordingly, the orders of the lower Courts of the 13th June, 1876, and the 23rd October, 1876, must be reversed, and the Subordinate Judge must proceed to give effect to the decree of the High Court of the 29th September, 1875, by reinstating the defendant Rachapa in possession of the mortgaged premises in Ex. 20 and in the plaint in this suit mentioned. The plaintiff must pay to the defendant the costs of the application to the Subordinate Judge and of both appeals in the same. As a suit has been instituted for mesne profits in the Subordinate Judge's Court, and a regular appeal in that suit is now pending in the Assistant Judge's Court, we make no order as to mesne profits.

We may state that we do not suppose that, if the Collector [295] were fully informed of the circumstances of this case as above detailed, he would have issued his certificate.

Having formed the opinion which we have expressed as to the construction of the Act, and as to the alienation being one which had the sanction of the Sub-Collector, we do not discuss the point as to the authority of the Bombay Legislature (specially circumscribed as it is) to direct the cancellation of decrees of the High Court made in rectification of decrees of Courts subordinate to it, or to prevent the reinstatement of persons against whom execution has been had of wrongful decrees of the latter Courts in the position occupied by them before such execution.

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ORIGINAL CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

LUCKMIDAS KHIMJI (*Plaintiff*) *v.* MULJI CANJI (*Defendant*).*
[21st February, 1881.]

Small Causes Court—Jurisdiction—Equitable defence—Plea by defendant of his own fraud—Act IX of 1850, ss. 91, 98, 25.

The plaintiff in 1879 took out a summons, under s. 91 of the Presidency Town's Small Cause Court Act IX of 1850, calling on his nephew, the defendant, to deliver up possession of certain premises in his occupation belonging to the plaintiff. The plaintiff alleged that he had purchased the premises in question in 1870 from one N to whom the defendant had mortgaged them in 1866 with power of sale. The plaintiff produced the deed of mortgage to N; and the conveyance to himself. It was admitted on his behalf that he had never received any rent from the defendant, and never had manual possession of the premises occupied by him. But the plaintiff produced a writing of attornment dated April, 1873, passed to him by the defendant, whereby the latter acknowledged that he was occupying the premises in question as the plaintiff's tenant, and agreed to pay rent for the same at Rs. 25 a month. His defence was that the mortgage, the sale and the writing of attornment were all merely colourable, executed for the purpose of defeating his creditors and screening the property from execution; that no money had passed between the

* Suit No. 25320 of 1879.