1888
MARCH 15.
APPEL-
LATE
CIVIL.

We must, therefore, confirm the decree, except so far as it declares that the respondent is entitled to cut the timber on the uncultivated and forest land, and declare that the respondent is not so entitled. Parties to pay their own costs throughout.

12 B. 534.

12 B. 550.

[550] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

SHANKAR GOPAL AND OTHERS (*Plaintiffs*) *v.* BABAJI LAKSHMAN AND ANOTHER, (*Defendants*).* [5th April, 1888.]

Vatandars' (Bombay) Act, III of 1874, *s.* 10—*Decree—Execution—Transfer of* vatan *property from one not* vatandar—*Construction—Collector's certificate prohibiting delivery of decreed property—Practice—Procedure.*

The plaintiff Shankar and his brother, who were *vatandar deshpandes*, sued to redeem a certain property alleged to have been mortgaged by their undivided paternal aunt to the defendant Babaji. Babaji objected, on the ground that the plaintiffs were not the heirs of the widow, who had left a daughter. The daughter was joined as co-plaintiff, and a decree passed in her favour, and that decree was confirmed by the Special Judge. The plaintiffs being dissatisfied with this decision, applied to the Collector for the issue of a certificate, under s. 10 of (Bombay) Act III of 1874, prohibiting the property from passing out of the family. The daughter in the meanwhile obtained possession of the property under the decree. Subsequently the certificate applied for by the plaintiffs was filed by them. The lower Court, feeling doubt as to whether the Collector could legally issue the certificate and how far it would operate, referred the case to the High Court.

Held, that the Court should not act upon the certificate of the Collector. The effect of the decree being to transfer the property from the mortgagee, who was not a *vatandar*, to the daughter, who, according to the Collector's certificate, was also not one, s. 10 of (Bombay) Act III of 1874 had no application. The Collector, if he thought proper, should take proceedings under s. 6, cl. (1), of the Act.

[F., 13 B. 343 (347).]

THIS was a reference by Rav Saheb Ramchandra Balkrishna Chitale, Subordinate Judge of Sangola and Malsiras, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs Nos. 1 and 2 sued in the Subordinate Judge's Court at Sangola to redeem certain land from defendant No. 1, to whom they alleged it was mortgaged by their deceased parternal aunt one degree removed, who lived united with them and died leaving no heirs nearer than themselves. Defendant No. 1 pleaded that plaintiffs Nos. 1 and 2 were not the heirs of the deceased mortgagor, as she left a daughter surviving her. The daughter was accordingly made plaintiff No. 3 with her own consent, and the case was proceeded with to judgment, which was delivered on the 12th August, 1886, in favour of plaintiff No. 3. [551] Not satisfied with this decision, plaintiffs Nos. 1 and 2 applied for revision to the Special Judge, who confirmed the decree on the 21st April, 1887.

Before the decree was confirmed by the Special Judge, plaintiff No. 1 applied to the Collector of Sholapur praying for the issue of the certificate under s. 10 of the Vatan Act (Bombay) No. III of 1874, on

* Civil Reference No. 53 of 1887.

1888
APRIL 5.
APPELLATE CIVIL.
12 B. 550.

the ground that the property was *deshpande inam*, and could not pass, as such, out of the family of the *vatandars*. The certificate was granted accordingly and sent to the Subordinate Court at Sangola, in order that the decree might be cancelled. It was dated the 22nd March, 1887, and was received in the Subordinate Judge's Court on the 27th. Before the issue of this certificate, plaintiff No. 3 applied for possession of the property decreed to her, and it was given her on the 1st February, 1887.

The Subordinate Judge referred the following questions to the High Court for its decision :—

1. "Whether plaintiff No. 3 is a *vatandar* within the provisions of the Vatan Act (Bombay) No. III of 1874 ?

2. "If so, whether the Collector can legally issue his certificate under s. 10 of the Act when the service in respect of the *vatan* has become commuted ?

3. "If so, whether the certificate can operate in favour of plaintiffs Nos. 1 and 2 beyond the cancellation of the decree ?

4. "If so, whether plaintiff No. 3 can be ousted of her possession given to her before the issue of the certificate and properly made over to plaintiffs Nos. 1 and 2, because of it instead of the mortgagee ?

5. "Whether the Amending Act (Bombay) V of 1886 can operate retrospectively against plaintiff No. 3, to deprive her of her rights vested in her before the passing of it, by postponing her succession to all the male heirs of the *vatandars* ? "

The Subordinate Judge's opinion on the first point was in the affirmative, and on the second, third, fourth and fifth in the negative.

[552] *Mahadev Bhaskar Chaubal*, for plaintiffs Nos. 1 and 2.—The plaintiffs are the rightful heirs of the original mortgagor, their aunt, who was united with them. The Collector rightly issued to them the certificate, and the Civil Court ought to have estopped execution of the decree under s. 10 of the Vatandars' (Bombay) Act III of 1874. Under this Act a female cannot succeed to the *vatan*, and the plaintiff being the daughter of our aunt could not succeed. The *vatan* property is inalienable, whether services are dispensed with or not, and the circumstance that services have been commuted, does not change its nature—*Jagjivandas* v. *Imdad Ali* (1).

Balaji Abaji Bhagvat, for plaintiff No. 3.—Where services are dispensed with, the *vatan* property is alienable. A daughter is an heir : see s. 4 of (Bombay) Act III of 1874. The father of the plaintiff was a *vatandar* and was succeeded by his widow. Section 4 of the Act, as also the amending Act V of 1886, s. 2, include her in the definition of *vatandar*, though her succession is postponed. My client was a *vatandar*, and the Collector could not issue the certificate under s. 10 of the Act, which applies in cases where the property alienated is in the possession of a *vatandar*. Here the mortgagee was not a *vatandar*, and the section has no application.

Vasudev Gopal Bhandarkar, for the mortgagee, contended that should the certificate of the Collector be held valid, his client would be entitled to possession.

(1) 6 B. 211.

1888
APRIL 5.
APPELLATE CIVIL.
12 B. 550.

JUDGMENT.

SARGENT, C.J.—The effect of the decree of the 21st April, 1887, was to transfer the *vatan* property from the mortgagee to the third plaintiff, who, according to the Collector's certificate, is not a *vatandar*. But the mortgagee himself was not a *vatandar*, and under such circumstances we do not think that the decree was within the contemplation of s. 10 of (Bombay) Act III of 1874, the object of which was to give practical effect to the prohibition against alienations by *vatandars* as provided by ss. 5 and 7. The Court should, therefore, not act upon the certificate of the Collector, but leave him to take proceedings, if he thinks proper, under s. 6, cl. 1. Under these circumstances it is not necessary to answer the other questions.

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12 B. 553=13 Ind. Jur. 109.

[553] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

NARAYANDAS RAMDAS (*Plaintiff*) *v.* SAHEB HUSEIN (*Defendant*).*
[9th April, 1888.]

Practice—Minor, suit against—Nazir appointed guardian ad litem*—Power of Court to direct fee to be paid by plaintiff for communication with natural guardian—Civil Procedure Code (Act XIV of* 1882*), s.* 458*—Procedure.*

There is no power in the Court to order a plaintiff to pay a fee for the purpose of enabling the Nazir, who has been appointed guardian *ad litem*, to put himself in communication with the natural guardians and other friends, but the Court may refuse to go on with the suit if it should be of opinion that the Nazir has been unavoidably prevented from making himself acquainted with the case against the minor.

In a suit against a minor residing in a Native State at a distance from the Nazir of the Court, who was appointed guardian *ad litem*, and the Nazir was prevented from conducting the minor's defence without incurring expense which the plaintiff refused to pay.

Held, that the Court, if it chose, might cancel the appointment of the Nazir as guardian *ad litem* under s. 458 of the Civil Procedure Code (Act XIV of 1882).

[R., 28 B. 626 (628) ; 22 M. 314 (316).]

THIS was a reference by Rav Saheb Vyankatrav Rukmangad Inamdar, Subordinate Judge of Bijapur, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The facts of the case were stated as follows :—

"One Narayandas bin Ramdas sued one Gaffur Saheb, a minor, as the son and heir of Saheb Husain, the deceased executant of a bond dated 12th September, 1884, to recover Rs. 20 as principal and Rs. 11-14-0 as interest=Rs. 31-14-0, with costs from the estate of the deceased. The bond sued on was said to have been passed at Bijapur, and the cause of action was said to have accrued within the jurisdiction of the Subordinate Judge's Court at Bijapur. The minor defendant is residing with one Chandabi, his sister, in the Miraj State outside British India, and no other person is said to be living in British India who

* Civil Reference No. 4 of 1888.