

1888

AUG. 9.

APPEL-

LATE

CIVIL.

13 B. 160=

13 Ind. Jur.

229.

hold that any one of the junior widows might perform the formal act of adoption of the selected child whenever it pleased her, would be tantamount to enabling her to force the hand of the elder widow, and compel her to complete the adoption which, at the most, was only *in fieri*.

It was said, however, that the elder widow's right is only a preferential and not an exclusive right, and, therefore, that the doctrine of *factum valet* applies. But it is plain that until the elder widow waives her preferential right to adopt, her right is exclusive, and that the other widows have no authority to adopt. In *Lakshmappa v. Ramava* (1) which was referred to with approval in *Gopal v. Hanmant* (2) it was said in discussing the application of the rule of *factum valet* to cases of adoption, "that its proper application must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction of adoption." In the present case, therefore, as the widow Bachabai had no authority to adopt without Lalitabai's consent, which was clearly wanting, the principle of *factum valet* relied on by the appellant cannot assist the validity of his adoption. The decree of the Court below must, therefore, be confirmed with costs.

Decree confirmed.

13 B. 168.

[168] CRIMINAL REVISION.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* TULSIRAM.* [3rd May, 1888.]

Penal Code (Act XLV of 1860), ss. 99 and 186—Voluntarily obstructing a public servant in discharge of his duties—Mamlatdar's decree—Execution by a surveyor under Collector's orders—Public functions—Right of private defence.

In a suit filed in a Mamlatdar's Court under Bombay Act III of 1876 the plaintiff obtained a decree against the accused for possession of a certain piece of land. When the Mamlatdar proceeded to execute the decree, he found that there was no land corresponding to the boundaries set forth in the plaint, and that the parties were joint owners and in joint occupation of the land in dispute.

Finding himself unable to execute the decree, the Mamlatdar referred the matter to the Collector for advice. The Collector, on looking into the papers of the case, ordered a surveyor to execute the decree by dividing the land in dispute and putting the decree-holder in possession of his share.

The surveyor, in attempting to execute the decree, was obstructed by the accused, who was thereupon tried and convicted of the offence of voluntarily obstructing a public servant in the discharge of his public functions, under s. 186 of the Indian Penal Code (Act XLV of 1860).

Held, reversing the conviction, that as the Collector had no legal authority to issue the order to the surveyor in execution of the Mamlatdar's decree, the surveyor acting under that order was not discharging a public function, and the act of the accused was not an offence against s. 186 of the Indian Penal Code.

Held, further, that the Collector's order was so entirely *ultra vires* as to leave no room for the operation of either the first or the second clause of s. 99 of the Indian Penal Code.

[F., 22 C. 286 (290); 2 Cr.L.J. 64=10 P.R. 1905 Cr.=68 P.L.R. 1905; R., 24 C. 320 (323); 21 M. 78 (79)=1 Weir 123; 10 Bom.L.R. 761 (763)=8 Cr.L.J. 269; 14 Cr.L.J. 512=20 Ind. Cas. 992=325 P.L.R. 1913=38 P.W.R. 1913; D., 21 M. 296 (298)=1 Weir 136.]

* Criminal Review, No. 10 of 1888.

(1) 12 B.H.C.R.A.C.J. 364.

(2) 3 B. 273 (293 and 294).

THIS was an application under s. 435 of the Code of Criminal Procedure (Act X of 1882).

One Akhya Mahar obtained a decree against the accused in the Mamlatdar's Court, under Bombay Act III of 1876, for possession of a certain piece of land of which, he alleged, he had been forcibly dispossessed by the accused.

When the Mamlatdar proceeded to execute the decree, he found that there was no land corresponding with the boundaries set forth in the plaint or in the decree; and that the land in the possession of the accused was certain *inam* land held jointly by the accused as well as the decree-holder, of which he had no [169] jurisdiction to effect a partition. Finding himself unable to execute the decree, the Mamlatdar referred the matter to the Collector for advice.

The Collector, after looking into the record of the case, ordered one of his surveyors to measure the land in the joint possession of the accused and the decree-holder, and, after ascertaining their respective shares, put the decree-holder in separate possession of his share of the land.

When the surveyor proceeded to measure the land, the accused resisted him, on the ground that neither he nor the Collector had authority to make a partition of the land.

The accused was thereupon tried and convicted, by the First Class Magistrate of Ahmednagar, of voluntarily obstructing a public servant in the discharge of his public functions, under s. 186 of the Indian Penal Code (Act XLV of 1860), and sentenced to pay a fine of Rs. 5; or, in default, to undergo two weeks' rigorous imprisonment.

Against this conviction and sentence the accused applied to the High Court under s. 435 of the Code of Criminal Procedure (Act X of 1882).

N. G. Chandavarkar, for the accused.—The Collector's action was clearly *ultra vires*. He was not acting as a ministerial officer of a Civil Court. The Mamlatdar's decree was not sent to him for execution. That decree did not, and could not, direct a partition of joint property. And yet in execution of such a decree the Collector orders the surveyor to divide joint property. The Collector's order was, therefore, illegal. The surveyor acting under such an order was not discharging a public function. The accused had, therefore, a perfect right to resist an illegal act. Referred to *Reg. v. Gazi* (1); *Reg. v. Dhori Kullan* (2); *In re Savania* (3).

Pandurang Balibhadra, for the Crown.—The surveyor was acting under the Collector's orders. He was acting in good faith under colour of his office, though his act may not be strictly [170] justifiable by law. The accused had, therefore, no right to obstruct him in the discharge of his duties: Section 99, cls. 1 and 2, of the Indian Penal Code gives no right of private defence in a case of this kind—*Reg. v. Vyankatray Shrinivas* (4); *Queen-Empress v. Janki Prasad* (5); *Bhawoo Jivaji v. Mulji Dayal* (6).

JUDGMENT.

BIRDWOOD, J.—The accused in this case has been convicted of voluntarily obstructing a public servant in the discharge of his public functions. He obstructed a surveyor who was sent by the Collector to measure off rice land in the possession of the accused, and to give possession of it to the decree-holder in a suit brought against the accused in the

(1) 7 B. H. C. R. Cr. Cas. 83.

(4) 7 B. H. C. R. C. Cas. 50.

(2) 9 B. H. C. R. 165.

(5) 8 A. 293.

(3) 5 B 137.

(6) 12 B. 377.

1888

MAY 3.

CRIMINAL
REVISION.

13 B. 168.

Mamlatdar's Court under Bombay Act III of 1876. The Mamlatdar had found some difficulty in executing the decree in the manner contemplated in the Act, as the village officers had reported that there was no land corresponding to the boundaries specified in the plaint, and that the parties were joint owners and in joint occupation of the land in a suit. The decree-holder had sued for a certain specific portion of land, not for partition. Indeed, he could not have brought a suit for partition in the Mamlatdar's Court, nor could the Mamlatdar have decreed partition. In the difficulty in which the Mamlatdar found himself, he asked for advice and instructions from the Collector, who sent for the papers in the case and issued an order to the surveyor to execute the decree. That order was one which the Collector had no authority to issue. He was not asked by the Mamlatdar to execute his decree. Indeed, the Mamlatdar would not legally have asked him to do so. The surveyor acting under the Collector's orders was not, therefore, discharging a public function, and the act of the accused could not have been an offence against s. 186 of the Penal Code. It is argued by the Government Pleader that the surveyor was protected by the first paragraph of s. 99 of the Code, and that there was no right of private defence against any act done by him in good faith under colour of his office. But that was not so; for the protection given by that section to a public officer, who, acting in good faith under [171] colour of his office, does an act not causing the apprehension of death or grievous hurt which may not be strictly justifiable in law, does not extend to an officer whose act is altogether illegal. Nor was the surveyor protected by the second paragraph of s. 99; for though he was acting by the direction of the Collector, still the Collector's order was so entirely *ultra vires* as to leave no room for the operation of the section. We must, therefore, reverse the conviction and sentence recorded against the accused, and direct that the fine to which he has been sentenced be refunded.

Conviction and sentence reversed.

13 B. 171 = 13 Ind. Jur. 304.

ORIGINAL CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice
and Mr. Justice Scott.*

MUNMOHANDAS JAIKISONDAS (*Appellant*) v. VIZBAI (*Respondent*).*

[14th September, 1888.]

Civil Procedure Code (Act XIV of 1882), s. 295—Purchaser of decree against estate of a deceased person by the legal representative of such deceased person—Right of such purchaser to participate in proceeds realized in execution of decree.

Hurgovandas Kuber was the holder of a decree in suit No. 657 of 1869 for Rs. 69,467 against the firm of Hirji, Bhimji & Co., and in execution thereof he attached a certain house belonging to the estate of one Hirji Dossa, deceased, who had been a partner in that firm. Vizbai, (the respondent), was the legal representative of Hirji Dossa. On the 9th November, 1886, Vizbai purchased the decree from Hurgovindas Kuber for Rs. 18,000, which sum she obtained for the purpose as a loan from Canji Parbut & Co. As a security for this loan she gave Canji Parbut & Co., a letter, dated the 9th November, 1886, whereby she agreed to repay the loan out of the proceeds of the sale of the house which had been attached in execution of the decree which she had purchased. In the meantime

* Suit No. 8 of 1870 and Suit No. 657 of 1869.