

1900.

ANKLESVAR
MUNI-
CIPALITY
vs
RIKHAY-
CHAND.

It is only public streets which are vested in the Municipality, while over private streets the Municipality may exercise certain powers, but the property in land in those streets does not necessarily belong to the Municipality.

The fact that the Municipality declined to take any action to remove the *olla* in 1887 strengthens the view taken by the lower Appellate Court. We have arrived at this conclusion independently of the evidence of the alleged mortgage and release. The Court of first instance held that the mortgage was proved, but that the land was not identified. The lower Appellate Court held the identification proved. If it was necessary for us, in the view taken above, to find on this point we should be inclined to think that these documents were not altogether free from suspicion, and the identification was not satisfactory. It is, however, not necessary to come to any finding on these points to support the decision of the lower Appellate Court. The street is not proved to be a public street and plaintiff-respondent has been in possession of the *chora* from 1887 as his own property with the knowledge of the appellant-defendant. The burden of proof lay on the appellant under the circumstances, and it failed to justify its conduct in removing the *olla*. We must therefore dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

APPELLATE CIVIL.

*Before Mr. Justice Candy, Mr. Justice Ranade, Mr. Justice Crowe and
Mr. Justice Whitworth.*

1900,
November 21.

DEORAV AND OTHERS (ORIGINAL DEFENDANTS), APPELLANT, vs. NARAYAN-
DAS HARAKCHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

*Land Revenue Code (Bombay Act V of 1879), secs. 4, 13, 15, 18, 19 and 20—
Mámlatdárs' Courts Act (Bombay Act III of 1876), sec. 3—Mámlatdár—Substi-
tute designated under the Land Revenue Code—Exercise of the powers of
Mámlatdár.*

A substitute designated under section 15 of the Land Revenue Code (Bombay

* Application No. 119 of 1900 under Extraordinary Jurisdiction.

Act V of 1879) cannot exercise the powers conferred by the Mámílatdárs' Courts Act (Bombay Act III of 1876) on the Mámílatdár to whose office he has temporarily succeeded.

1900.

DEORAY
v.
NARAYANDAS.

APPLICATION under the extraordinary jurisdiction of the High Court (Civil Procedure Code, Act XIV of 1882, section 622,) against the decision of Ráo Sáheb Krishnaji Vasudeo Natu, acting Mámílatdár of Sholápur, in a possessory suit.

The plaintiff brought a possessory suit in the Court of the Mámílatdár of Sholápur. While the proceedings were going on, the Mámílatdár was transferred to another district. Pending the arrival of his successor the Collector appointed one Krishnaji Vasudeo Natu, a clerk in his office, to act as Mámílatdár, and he decided the suit in plaintiff's favour.

The defendants applied to the High Court under its extraordinary jurisdiction contending that the acting Mámílatdár had no jurisdiction to try the suit, inasmuch as he was not invested with the powers of a Mámílatdár under the Mámílatdárs' Courts Act (Bombay Act III of 1876). A rule *nisi* was granted calling on the plaintiff to show cause why the decision of the acting Mámílatdár should not be set aside.

Ganpat S. Mulgaokar for the applicants (defendants) in support of the rule.

Mahadeo B. Chavhal for the opponent (plaintiff) showed cause.

JENKINS, C.J.:—The Mámílatdár of Sholápur having vacated his office, a subordinate, designated by an order issued in this behalf by the Collector under section 15 of the Bombay Land Revenue Code, 1879, succeeded temporarily to the Mámílatdár's office. The sole question for our determination is, whether this subordinate during his temporary tenure of office was competent to exercise the judicial functions vested in a Mámílatdár by the Mámílatdárs' Courts Act, 1876.

Section 3 of this Act provides that "the word 'Mámílatdar' shall include any revenue officer ordinarily exercising the powers of a Mámílatdár and any other person who may be specially authorized by the Governor in Council to exercise the powers of a Mámílatdár." It has been argued before us that a temporary incumbent does not come within this definition; because he does

1900.

DEORAV
v.
NARAYANDAS.

not *ordinarily*, but *extraordinarily*, exercise the powers of a Mámíatdár. This argument has the sanction of a decision of this Court in *Ningapa v. Dodapa*⁽¹⁾; but for this we should have held the argument to be unsustainable. In the first place it appears to us that a force is ascribed to the words "ordinarily exercising" that does not belong to them: in our opinion they are merely used in contrast with the words "specially authorized." But apart altogether from this, the argument gives the go-by to the very specific terms of the Bombay Land Revenue Code, 1879. By section 15 of that Act the temporary incumbent "shall be held to be the Mámíatdár under this Act." By section 20 it is provided that "the appointment of all officers mentioned in sections 4 to 13 and 18 and 19 shall be duly notified. Any officer appointed to act temporarily for any such officer shall exercise the same powers and perform the same duties as might be performed or exercised by the officer for whom he is so appointed to act." It is clear that a subordinate appointed under section 15 is an officer appointed to act temporarily within the meaning of this section; and when we turn to section 12 we find that a Mámíatdár's "duties and powers shall be such as may be expressly imposed or conferred upon him by this Act or by any other law for the time being in force." Therefore we see no escape from the conclusion that the designated subordinate can, and shall, exercise the powers vested in the Mámíatdár by the Mámíatdárs' Courts Act, 1876.

We have been referred, in the course of the argument, to the collected opinions of a former Legal Remembrancer; they are interesting rather than authoritative; nor is their value enhanced by the fact that the writer of these opinions was the draftsman of the Act.

The decision, however, to which we have alluded, places a real difficulty in the way of our giving effect to the opinion we have formed, and it is for this reason that we refer to the Full Bench the following question:—

Can a substitute designated under section 15 of the Bombay Land Revenue Code, 1879, exercise the powers conferred by the

(1) (1896) 21 Bom. 585.

Mámíatdárs' Courts Act, 1876, on the Mámíatdár to whose office he has temporarily succeeded?

1900.

DEORAY

v.

NARAYANDAS.

The case being thus referred, it was heard by a Full Bench consisting of Candy, Ranade, Crowe and Whitworth, JJ.

Ganpat S. Mulgaokar for the applicants (defendants) in support of the rule :—The point is whether the temporary appointment of a Mámíatdár invests him with the powers of a Mámíatdár under the Mámíatdárs' Act. We submit that he is not a Mámíatdár under the Act : see section 3. The question turns upon the construction to be put on the words "ordinarily exercising the powers of a Mámíatdár" in the section. A temporary appointment is a special appointment and the person so appointed cannot be said to be ordinarily exercising the powers of a Mámíatdár. Section 12 of the Land Revenue Code refers to the duties of a Mámíatdár. Section 15 of the Code refers to the filling up of a temporary vacancy, and the expression "under this Act" in the section shows that the Mámíatdár is Mámíatdár for revenue administration. When a person is appointed as an acting Mámíatdár, he must be so appointed by the Commissioner and his appointment must be notified in the Government Gazette. A subordinate officer in the Collector's office can be appointed temporarily for purposes of revenue as a Mámíatdár by the Collector without the sanction of the Commissioner, and his appointment need not be notified. Further, section 20 of the Code also refers to the appointment of a Mámíatdár. In the present case the acting Mámíatdár was not a Mahálkari, but he was a clerk in the Collector's office. Thus sections 15 and 20 show what is the difference in an acting Mámíatdár and a Mámíatdár temporarily appointed. A temporary appointment, such as the one in question, does not carry with it the powers conferred by the Mámíatdárs' Act—*Ningapa v. Dodapa*.⁽¹⁾ See Batty's Rules, page 518. The appointment contemplated by the latter part of section 3 of the Mámíatdárs' Act is the appointment made by Government.

Mahadeo B. Charbil for the opponent (plaintiff) to show cause :—In the former Acts relating to possessory suits, the func-

(1) (1836) 21 Bom. 585.

1900.

DEORAY
*
NARAYANDAS.

tions of Mámíatdár were not defined, therefore any revenue officer could take cognizance of such suits. The duties of Mámíatdár were defined in the Land Revenue Code of 1879. The word "ordinarily" in section 3 of the Mámíatdárs' Act is used in contrast to "specially." A Mahálkari is not a person ordinarily exercising the powers of a Mámíatdár. He is a revenue officer, and if he has to decide a possessory suit he must be specially invested with that jurisdiction, that is, he must be a Mámíatdár for the purpose of the suit. The word "Mámíatdár" was for the first time used in a definite sense in the Land Revenue Code of 1879. Formerly the terms used were Mahálkari, Kamávisdár, &c., but the Code of 1879 has made the meaning clear. Sections 12, 15 and 20 of the Code when read together show that a temporary appointment of a Mámíatdár carries with it the powers conferred upon the officer ordinarily exercising the powers of a Mámíatdár under the Mámíatdárs' Act.

[CANDY, J.:—But in the present case there was no delegation by the Collector of the duties conferred by that Act.]

The acting appointment was made by the Collector under section 15 of the Land Revenue Code. That section is an enabling section and it empowers the Collector to act in an emergency. A Mámíatdár so appointed is a Mámíatdár under section 12 of the Code. Section 20 of the Code also shows that sections 12 and 15 should be read together.

The expression "ordinarily exercising the powers of a Mámíatdár" in section 3 of the Mámíatdárs' Act means exercising the powers which a Mámíatdár usually has. The presumption is that a person who is designated as holding a public office discharges the duties which appertain to that office. In the present case the Mámíatdár has styled himself acting Mámíatdár, and therefore the presumption is that he is discharging the duties of a Mámíatdár. It was argued that as the appointment was not gazetted, the acting Mámíatdár was not competent to discharge the duties of a Mámíatdár. When a Collector makes a temporary appointment under section 15 of the Land Revenue Code, there is nothing to prevent him from notifying such appointment in the Gazette. The notification of the appoint-

ment is not, we submit, the test to decide whether the person appointed Mámíatdár is ordinarily exercising the duties of a Mámíatdár.

1800.

DEORAY
v.
NARAYANDAS.

Mulgaokar in reply.

The judgment (Candy, Ranade and Crowe, JJ.) was delivered by

CANDY, J. :—The question referred is—can a substitute designated under section 15 of the Bombay Land Revenue Code, 1879, exercise the powers conferred by the Mámíatdárs' Courts Act, 1876, on the Mámíatdár to whose office he has temporarily succeeded?

In our opinion the answer to the question does not depend upon what powers had been conferred by the Mámíatdárs' Courts Act, 1876, on the Mámíatdár to whose office the substitute has temporarily succeeded. The answer depends simply upon the further question whether the "substitute" comes within the interpretation clause, section 3, of Bombay Act III of 1876. The provisions of that section may be shown thus :—

The word "Mámíatdár" shall include

1, any revenue officer ordinarily exercising the powers of a Mámíatdár, and

2, any other person (a) who may be specially authorised by the Governor in Council to exercise the powers of a Mámíatdár under this Act, or

(b) who at the time of the framing of this Act is duly authorised to exercise the powers of a Mámíatdár under Bombay Act V of 1864.

It must be remembered that in 1876, when the Mámíatdárs' Courts Act was passed, the Land Revenue Code was not in existence. The intention of the Act of 1876 was to bring into one consolidating and amending Act so much of the old law (Act XVI of 1838 and Act V of 1864) and such new law as appeared necessary for the continued regulation of the existing Courts—(*Bai Jamna v. Bai Jadav*).⁽¹⁾ Turning to Bombay Act V of 1864 we find that the interpretation clause (section 20) ran thus : "The powers of a Mámíatdár under this Act may be exercised

(1) (1879) 4 Bom. 163 at p. 170.

1900.

DEORAY
NARAYANDAS.

by any revenue officer possessing powers corresponding to the powers of a Mámíatdár as defined in Chapter II of Regulation XVI of 1827, or by any other person who may be specially authorised by the Governor in Council to exercise the powers of a Mámíatdár under this Act." It will be observed that the contrast is between "any revenue officer" and "any other person;" and as there were obvious objections to the phrase "possessing powers corresponding to the powers of a Mámíatdár," the language of the interpretation was changed in the amending Act III of 1876, as shown above. The contrast, again, is between the revenue officer who exercises the powers of a Mámíatdár and any other person who is specially authorised &c. But the framers of Bombay Act III of 1876 did not say simply "any revenue officer exercising the powers of a Mámíatdár." If they had, there would have been no difficulty. But they inserted the word "ordinarily," and either this word must be a mere surplusage, intended simply to denote that the revenue officer must be one who exercises the ordinary powers of a Mámíatdár, or else it must be inferred that the Legislature had a special object in inserting the word, the intention being that the judicial duties under the Act of 1876 should not be exercised by any inexperienced revenue subordinate, who might in cases of emergency be placed in temporary charge of a Mámíatdár's office, and who would thus be exercising the powers of a Mámíatdár, though he would not in the ordinary sense of the term be a Mámíatdár. The reasonableness of such an intention is patent. And this is the view which was apparently taken of the intention of the Legislature in *Ningapa v. Dodapa*⁽¹⁾ by the late Sir C. Farran, C.J., and Parsons, J.

This interpretation of section 3 of Bombay Act III of 1876 is not affected by the subsequent Act V of 1879 (Land Revenue Code), chapter II of which refers to the constitution and powers of revenue officers. No doubt under section 15 the subordinate succeeding temporarily to the Mámíatdár's office "shall be held to be the Mámíatdár under this Act until the Mámíatdár resumes charge or until such time as a successor is duly appointed and

(1) (1896) 21 Bom. 585.

takes charge of his appointment." But a distinction is apparently drawn in the Act between an Acting Mámíatdár appointed by the Commissioner, the appointment being duly notified, and the case of a subordinate succeeding temporarily to the Mámíatdár's office under section 15. The latter appointment is not notified, section 15 not being mentioned in section 20. Of course the Commissioner may accept the Collector's nomination and then the appointment of the substitute would be duly notified and the officer so appointed would no doubt have jurisdiction under the Mámíatdárs' Act. Such a course would be obvious in the case of a vacancy likely to last for any time. But in the case of a substitute temporarily succeeding to the office as contemplated in section 15, there might be no necessity for such an appointment; and equally there would be no necessity for such substitute having jurisdiction under the Mámíatdárs' Courts Act. So there is no argument on the score of inconvenience. On the contrary, as shown above, the inconvenience would be in giving such a substitute the judicial powers under Bombay Act III of 1876.

Having regard, then, to the fact that the matter is not *res integra*, and that the question has already been judicially decided by this Court, and that we are not prepared to dissent from that decision, which receives some support from the language of the Act and from the apparent intention of the Legislature, we answer the question referred to us in the negative.

WHITWORTH, J.:—Bombay Act V of 1879, which deals with the administration of land, is concerned with the Mámíatdár only as a revenue officer. Bombay Act III of 1876 makes a certain limited use of the Mámíatdár as a judicial officer. In so doing it seems to me in section 3 to carefully restrict the judicial office to such officers, among Mámíatdárs, as have been deemed fit to exercise a Mámíatdár's powers *ordinarily*, and to exclude mere temporary officiators. The distinction appears natural: it is necessary that the multifarious duties of a Mámíatdár under Act V of 1879 should be carried on, somehow, without a break, however ill qualified the substitute may be; it is *not* necessary that the judicial function under Act III of 1876 should be so continued. On the contrary, it is far better that cases under that Act should be suspended during the absence of the duly

1900.

DEORAV
r.
NARAYANDAS.

1900.

DEORAY

v.
NARAYANDAS.

qualified Mámlatdár and pending his return or the appointment of a successor.

That the Land Revenue Code is later in date than the Mámlatdárs' Act, does not affect this view. The framers of the Code in 1879 must have been aware of the special limitation imposed by section 3 of the earlier Act for its purposes; and they left it undisturbed while they made provision for vacations of office under the Code for its purposes. Section 20 of the Code provides in its second clause that temporary officiators shall exercise the same powers as the officers for whom they act. But this is still for the purposes of the Code, and the exception provided by section 3 of the Mámlatdárs' Act is still undisturbed. Indeed the second clause of section 20 of the Code is shown by its position to be only in the nature of a proviso or exception to the main clause which deals only with the question of the *notification* of appointments.

Section 12 of the Code again provides that a Mámlatdár's "duties &c. shall be such as may be expressly imposed &c. by this Act *or by any other law* for the time being in force." But while this defines a Mámlatdár's ordinary duties it does not, I think, imply that the special limitation provided with reference to the judicial function to be discharged under Act III of 1876 should cease to have effect.

Following the ruling in *Ningapa v. Dodapa*⁽¹⁾ I would answer the question referred in the negative.

The question referred being answered in the negative, the rule was made absolute with costs.

Rule made absolute.

(1) (1896) 21 Bom. 585.