
(1936) 08 BOM CK 0018
In the Bombay High Court

Mallappa Basvantrao Desai

APPELLANT

Vs

Tukko Narasinha Mutalik and Others

RESPONDENT

Date of Decision : 14-08-1936

Acts Referred:

Maharashtra Revenue Jurisdiction Act, 1876 — Section 4(a)

Citation : AIR 1937 Bom 307

Hon'ble Judges : Broomfield, J

Bench : Division Bench

Judgement

Broomfield, J.—The suit from which this appeal arises was brought by respondents 1 to 8 as plaintiffs against the Desai of Rudrapur as defendant 1 and the Secretary of State, for a declaration that they are watandars of the same watan as defendant 1, for recovery of watan lands which were taken from their possession and handed over to the possession of defendant 1 by orders of the revenue authorities in January 1926, and for mesne profits. The suit has been decreed, and defendant 1 has appealed.

2. The suit lands which are situated in Budikop in Murgod Mahal of the Belgaum District form part of a Nadgoudki watan inam granted to the ancestor of defendant 1 in 1694. It is the plaintiffs' case that they were granted in pot inam to their ancestor Tukadev some time prior to 1818, that is before the introduction of the British Rule in Murgod Mahal, which took place in 1827 or 1828. The plaintiffs claim to have been in possession ever since that time until evicted by the revenue authorities. In 1862 defendant 1's grandfather Shivlingappa brought an ejectment suit against Annaji, a member of the plaintiffs' family. He obtained a decree in 1864 which was confirmed in appeal in 1866. Annaji's claim to hold under an old grant was held to be fraudulent. When Shivlingappa tried to execute his decree, however, he was obstructed by Annaji's nephew Narso, and under the procedure then in force he had to file a fresh suit against Narso which he did in 1867.

3. Narso claimed under a sanad, which is Exh. 120 in this case, given to his

father by Shivlingappa in renewal of an older grant. In the course of the execution proceedings, Shivlingappa appears to have made a statement in writing to the effect that he had come to an amicable settlement with Narso, that he admitted his claim, and had no objection to the lands remaining with him. This statement was produced at the trial of the suit in 1867, and the Munsif, after framing an issue as to whether it was proper to act upon it or not, decided in the affirmative and dismissed the suit. There was no further litigation and apparently the plaintiffs' family remained in undisturbed occupation for the next half century, and when the Recoord of Rights was compiled in 1907, they were duly entered as pot inamdars. In 1924 defendant 1 applied to the revenue authorities for restoration of the lands to him under the Watan Act. The District Deputy Collector found that the plaintiffs had been in possession from before the introduction of the British Rule, and that they were watandars and declined to interfere. On appeal, the Collector reversed, his order and allowed defendant 1's claim on 13th November 1925, and this decision was confirmed by the Commissioner on 19th May 1926. These officers relied on the decree in the suit of 1862 against Annaji, disregarded the decree of 1867 on the ground that it had been obtained by fraud, and held that the plaintiffs had obtained possession after 1843, and that too, fraudulently and not under any valid grant. The Commissioner was of opinion that the plaintiff's possession probably only dated from 1867, the year of the compromise decree. Government declined to interfere with these orders, and in consequence the plaintiffs, who were evicted in January 1926, failed to recover possession.

4. The plaintiff alleged that the orders of the revenue authorities were ultra vires and not binding on the plaintiffs and that they are entitled to the lands in suit as watandars of the same watan, the lands having been granted to them by defendant 1's ancestor Kashappa before 1818. Defendants denied that the plaintiffs are watandars by reason of any grant or otherwise, and contended that the suit is barred by the Revenue Jurisdiction Act, Section 4(a), by limitation, not having been brought within a year of the Collector's order or the date of dispossession of the plaintiffs, and also by resjudicata by reason of the decree in the suit of 1862. The main findings of the trial Judge on the law points are: (1) the suit is not barred either by Clause (1) or Clause (3), Section 4(a), Revenue Jurisdiction Act - not by Clause (1) because there was no claim against Government, not by Clause (3), because he held that the orders of the revenue authorities were without jurisdiction, there being no power to ignore the decree of 1867; (2) there is no bar of limitation as it was not necessary to set aside ultra vires orders; (3) there is no bar of res judicata because the decree in the suit of 1862 was against Annaji Narso.

5. The plaintiffs are the descendants of Annaji's brother Tukadev: see the pedigree at page seven of the print; and the Judge finds that there was a separation between Annaji and his brother prior to 1844, and that the suit lands had fallen to the share of the plaintiff's branch. On the merits the Judge finds that there was a grant of the lands to the plaintiffs' ancestor in 1811, and they

are therefore watandars of the same watan within the definition in Section 4, Watan Act. The principal issues in this appeal are these: (1) Whether the jurisdiction of the civil Court is barred by the Revenue Jurisdiction Act, Section 4(a), Clause (1) or Clause (3). (2) Whether the revenue authorities acted within their jurisdiction in declaring the alienation null and void and dispossessing the plaintiffs. (3) Whether the plaintiffs are watandars of the same watan, which means, as admittedly they are not members of the watan family, whether there was a grant to them before the introduction of the British Rule in 1827 or 1828: see the definition of "watandar" in Section 4, Watan Act. (4) Whether the suit is barred by limitation; and (5) whether it is barred by resjudicata.

6. Clause (1), Section 4(1), Revenue Jurisdiction Act, was not specifically referred to in the written statement of either defendant. The written statement put in on behalf of the Secretary of State suggests that Clause (3) only was relied upon. However both clauses were set up in bar of the suit at the hearing, and it is clear, I think, that the Court itself must take notice of any statutory bar to the entertainment of the suit. In Section 4(a) a distinction is made between claims and suits. Clauses (1) and (4) speak of claims against Government; Clause (2) speaks of claims to perform duties; and Clause (3) speaks of suits to set aside or avoid orders. Under Clauses (2) and (3) it may not be necessary that Government should be a party. On the other hand, Clauses (1) and (4) will as a rule only apply where Government is a party, since otherwise it could hardly be said that there was any claim against Government. But the mere fact that Government is a party will not be enough to bring the case under those clauses. The words "claim against Government relating to property or lands" may fairly be said to imply that relief of some kind is sought against Government. Government must be more than a purely formal party. If Government is to be bound by the decree to make any payment or to restore any property, or if an injunction is sought against Government, the position is clear—that is a claim against Government: see *De Souza Devino v. Secretary of State* (1893) 18 Bom. 319, *Appaji v. Secretary of State* (1904) 28 Bom. 435 and *Khangouda v. Secretary of State* AIR 1937 Bom. 121.

7. It has been argued by the learned counsel on behalf of the appellant, that the authorities go further than this and show that even a prayer for a declaration of title, if it is inconsistent with orders made by the revenue authorities and if the object of making Government a party is to make the declaration binding upon Government, is a claim against Government. For this proposition reliance has been placed on *Sagunappa Shankarappa Nadgauda v. Bhau Annaji Patil*, First Appeal No. 269 of 1918 and on *Baslingappagouda Shivlingappagouda Vs. Secretary of State*, in which the observations of Fawcett, J., in the former case are cited and approved; also on *Madivalappa v. Bhomappa*, First Appeal No. 328 of 1926 in which *Baslingappagouda Shivlingappagouda Vs. Secretary of State*, was followed. I do not, however, understand these cases as laying it down that a prayer for a declaration of the title against Government is a claim against Government within the meaning of Clause (1). Rather it seems to have been held

to come under Clause (3). In *Sagunappa Shankarappa Nadgauda v. Bhau Annaji Patil*, First Appeal No. 269 of 1918 Fawcett, J. said this (p. 169 of the paper book):

It is contended that the Court has power to make a declaration of the kind granted by the lower Court, because this does not directly touch the Collector's order u/s 9 of Bombay Act 3 of 1874, but merely deals with the reasons on which that order was passed. But, in my opinion, when an order is based on a specific decision that a person is not a watan-dar, a person seeking to obtain a declaration from a civil Court that that decision is bad, certainly seeks to avoid that order. The word "avoid" is a very wide one. Its literal meaning is "to make empty" and the particular meaning, which affects Clause 4(a), Bombay Revenue Jurisdiction Act, is given in Webster's Dictionary as "to make void, to annul or vacate or to refute". It will obviously refute the Collector's order if a declaration is obtained that the basis on which it is made is erroneous ; and it is not denied that the real object of the suit is to take this declaration to the Collector and endeavour to induce him to reverse his previous order against the plaintiff.

8. Then, a little further on, the learned Judge says:

Accordingly, I think the case clearly falls within para. 3, 01. (a), Section 4. Also so far as the suit seeks relief against Government relating to watan land, it falls within the first paragraph of that clause.

9. The plaintiff in that case claimed possession of watan lands as against two defendants one of whom was the Secretary of State. It was that claim which brought the case within Clause (1) and it is that circumstance which in that respect distinguishes both that case and the present from *Bhimangouda v. Secy. of State*, First Appeal No. 47 of 1910, which has been relied on by the trial Judge. In the latter case a declaration was sought both against the Secretary of State and other defendants, but possession of the lands in suit was sought against the latter only, and that explains why the Court said "the suit was not on the face of it a claim against Government", a position which was conceded on behalf of Government. If what the plaintiffs seek is an order for delivery of possession of property which is merely to bind a private party and is not to be enforced against Government, the suit may offend against Clause (3) but can hardly be brought within Clause (1). That, it is true, is not the position in the present case. Here the plaintiffs did not say in the plaint that they wanted an order for possession as against defendant 1 only, without seeking to bind the Secretary of State, and it is perfectly obvious that Government was made a party in order that their claim to possession of the lands might be enforced against Government. That being so, there was a claim against Government, namely a claim for possession, which a civil Court could not entertain. As a matter of fact, however, the Court did not entertain it. The order for delivery of possession has been made against defendant 1 only. In these circumstances even on the authorities relied on by Mr. Coyajee, e.g., *Appaji v. Secretary of State* (1904) 28 Bom. 435. I do not think the suit is liable to be dismissed as barred by Clause

(1). If it is barred it must be by Clause (3).

10. Clause (3), Section 4(a) has been considered by a Full Bench of this Court in *Dattatraya Keshav v. Tukaram Raghu* AIR 1921 Bom. 17. The actual point decided was that an order of the Collector refusing to declare an alienation null and void u/s 11, Watan Act, is not an order which has to be set aside, and a suit against the alienee is not barred by Section 4(a), Revenue Jurisdiction Act. It was conceded in the argument in that case that Section 4(a) would have barred the suit if the order had declared the alienation null and void, and that was assumed to be so, though Macleod, C.J., mentioned *Bhimangouda v. Secretary of State* First Appeal No. 47 of 1910 where it had been held that ultra vires orders declaring alienations null and void need not be set aside. That question was not judicially determined one way or the other in the Full Bench case. But it is certainly an authority for the view that a suit whether between private parties or against Government which would have the effect of nullifying an order by the Collector, would be barred by Section 4(a), Clause (3), at any rate if the order is validly made under the Watan Act. On that point Fawcett, J.'s observations in *Sagunappa Shankarappa v. Bhau Annaji Patil* First Appeal No. 269 of 1918 already cited are clearly in point. If the relief sought does not affect the position of Government at all, for instance if a person seeks a declaration of his status as a watandar simply with a view to approach the revenue authorities u/s 36(3), Watan Act, as in *Hanmant Ramchandra v. Secretary of State* AIR 1930 Bom. 254 it cannot be regarded as a suit to set aside or avoid an order. In that connection I may also refer to *Basangouda v. Baslingappa* AIR 1936 Bom. 301 in which the Privy Council case in AIR 1927 217 (Privy Council) is discussed. In such suits, as Patkar, J. said in *Hanmant Ramchandra v. Secretary of State* AIR 1930 Bom. 254 Government is neither a necessary nor a proper party. If however as in *Sagunappa Shankarappa v. Bhau Annaji Patil* First Appeal No. 269 of 1918 and in the present case, a declaration of status is sought, and a claim for possession of lands is made in flat contravention of the orders of the revenue authorities, the suit certainly comes within the mischief of Clause (3) assuming, as I am for the present assuming, that the orders are not ultra vires.

11. That I think is what the authorities say, and even apart from authority it must be so. It seems obvious that it must have been the intention of the Legislature that such a suit should be barred. If it were open to a party to ignore the Collector's order and claim relief in the civil Court in spite of it, there would be an end of the revenue jurisdiction which Act 10 of 1876 was devised to protect. There is no sense in saying that a party may not in terms seek to set aside an order. For if the order is within the powers conferred by the Watan Act, and it is not set aside, it follows that it remains in force, and the civil Courts could not grant relief inconsistent with it. But (and this is where the difficulty comes in the present case) it is not necessary to set aside an order made without jurisdiction. Such an order is no bar to a suit for relief inconsistent with it. The proposition which was assumed though not adjudicated upon in the Full Bench case, viz., that the civil Courts cannot entertain any suits to set aside an order

declaring alienations null and void, cannot be regarded as a correct statement of the law without qualification. An order validly made within the powers conferred by the Watan Act will bar a suit. An order without jurisdiction will not. In that connexion reference may be made to *Anantacharya v. Secretary of State* (1895) 19 Bom. 581, *Maganchand v. Vithalrav* (1913) 37 Bom. 37 and *Bhikaji v. Secretary of State* AIR 1925 Bom. 365. The order must have been made by an officer "duly authorized in that behalf" as Clause (3) says. This position is conceded by Mr. Coyajee for the appellant and by the Government Pleader.

12. In order, therefore, to decide whether the present suit is barred by Clause (3), we have to ascertain whether the orders of the revenue authorities were within their jurisdiction. The orders were passed u/s 9 and Section 12. We have had a very long and learned argument on the construction of the former section. Omitting what is unnecessary for our purpose, and reducing this rather clumsy and cumbrous piece of legislation to its simplest terms we may put it in this form : an alienation of a watan (that is the passing of the watan into the ownership or beneficial possession of a person not a watandar of the same watan), before the Act came into force, may be declared null and void by the Collector whenever it has taken place (a) otherwise than by virtue of a decree or order of a British Court; and (b) without the consent of the Collector and transfer of ownership in the revenue records. The section lays down two conditions which have to be satisfied before the Collector can set aside an alienation, and, as they are joined by the conjunctive "and" and not by the disjunctive "or", it appears that they must both be satisfied, that is to say, if this view is right, you must be able to predicate of the alienation in question that it took place both otherwise than by virtue of a decree or order of a Court, and without the consent of the Collector. If it took place by virtue of a decree it cannot be set aside even though the Collector did not consent to it. If the Collector consented to it and ownership was transferred in the revenue records, it cannot be set aside even though there was no decree. This seems to be the natural and grammatical meaning of the language used. The construction contended for by Mr. Coyajee, viz., that the Collector may declare an alienation null and void unless it took place by virtue of a decree or order which was consented to by the Collector, cannot possibly be deduced, in my opinion, from the language used in the section.

13. It seems to be sufficiently clear that this alienation took place without the consent of the Collector. (Mr. Thakor has pointed out that in 1907 when the Record of Rights was compiled the plaintiffs were entered in the records as pot inamdars in respect of these lands, but this is immaterial. The condition in Section 9 is that an alienation must have taken place before the Act came into operation, without the consent of the Collector. The consent must relate to the time when the lands passed into the ownership and beneficial possession of a non-watandar.) If in addition to being without the consent of the Collector the alienation took place otherwise than by virtue of a decree, the revenue authorities had power to declare it null and void. The trial Judge took the view that there was an alienation by virtue of the decree of 1867. After referring to

the litigation of that year, he says:

Whether the watandar's opponent occupies the position of a plaintiff and obtains a decree to recover possession of watan and recovers it accordingly, or whether he occupies the position of defendant and succeeds in defeating the watandar's suit to recover possession of the watan and as a result retains the possession thereof with himself, in either case the watan, I think, equally passes into the ownership or beneficial possession of an outsider of virtue by a decree of the Court.

14. Mr. Thakor for the respondents has supported this view, but in my opinion it is not tenable. The words "passed by virtue of a decree into the ownership or beneficial possession of a person not a watandar" surely imply that there must have been a change of ownership or possession effected by the decree. If the transfer of ownership and possession has taken place previously, and the decree merely recognizes or confirms it, it cannot with propriety be said that it has taken place by virtue of the decree. That seems to be the position here. The plaintiffs alleged and the trial Judge has found it proved that there was a grant to their predecessor in 1811. On any reasonable view of the evidence it is impossible to avoid the conclusion that there had been an alienation to the plaintiffs long before 1867. If so, it was not by virtue of the decree which shows merely that Shivlingappa for some reason abandoned his attempt to recover possession. That brings us then to this position. There was neither a decree nor any consent of the revenue authorities to bar the Collector from taking action u/s 9, if in fact there was an alienation within the meaning of that section. In the present case that depended on the question whether there was or was not a grant of the lands to the plaintiffs before the introduction of the British Rule. The District Deputy Collector found that there was such a grant and that therefore the plaintiffs were watandars of the watan and there was no alienation. The trial Judge has taken the same view, and we, for reasons which I shall explain later, accept that finding. But the higher revenue authorities decided otherwise, and that gives rise to the very I difficult question, whether in the circumstances the final orders of the revenue authorities must be regarded as being unauthorized and without jurisdiction as the trial Judge has held.

15. With considerable hesitation, as I freely admit, we have come to the conclusion that this is the law. At first sight, it would certainly appear that as the Collector has power to set aside alienations in certain circumstances he must be intended to have jurisdiction to decide whether an alienation has in fact taken place. If so, the ruling in *Malkarjun v. Narhari* (1900) 25 Bom. 337 would presumably apply and he would have jurisdiction to decide wrong as well as right. But it is by no means clear that the Collector acting u/s 9 is in the same position as a Court in this respect or that he has any jurisdiction to determine finally the facts on which his jurisdiction depends. A long line of decisions on the Bombay Land Revenue Code [I need only mention *Surannanna v. Secretary of State* (1900) 24 Bom. 435 a judgment of Sir Lawrence Jenkins, C.J., in

Malkajeppa v. Secretary of State (1912) 36 Bom. 325 and Dhanji v. Secretary of State AIR 1921 Bom. 381] has in effect established this position that a Revenue Officer can exercise the prescribed powers if the conditions mentioned in the statute are satisfied but has no jurisdiction to determine finally whether those conditions are in fact satisfied. If he holds after inquiry that a land is Government land and deals with it accordingly, or if he holds that there has been a breach of the conditions of an occupancy and forfeits the holding, but the civil Court comes to the conclusion that the land was not Government land or that the conditions of the occupancy had not been broken, then the order will be treated as a nullity which does not require to be set aside. It is quite true that these cases were concerned with Article 14, Lim. Act. The orders in question were held to be not made in the Collector's official capacity within the meaning of that article. But I find it very difficult to see how these cases, the authority of which has not been questioned, can be distinguished in principle. For the same reasons it would appear that the orders of the Collector and the Commissioner in this case were the orders of officers not "duly authorised in that behalf" within the meaning of Clause (3), Section 4, Revenue Jurisdiction Act.

16. Nor is it necessary to rely merely on the analogy of these cases. In *Ramrao v. Secretary of State* (1896)PJ 666 it was held by Parsons and Ranade, JJ. that the determination of the status of being a watandar is one of the matters from which the jurisdiction of the Collector is excluded, and that no provision is made in the Watan Act for the determination by the Collector of what persons shall be held to be watandars, but only what persons shall be recognized as representative watandars. This case has been criticised in *Gujaappa v. Secretary of State*, First Appeal No. 213 of 1916 and *Sagunappa Shankarappa Nadgauda v. Bhau Annaji Patil*, First Appeal No. 269 of 1918 and I should hesitate to follow it if it stood alone. But there are observations of the same tenor in *Batty J.*'s judgment in 29 Bom. 480 where numerous authorities are referred to as showing "how carefully the Courts have avoided an implication of ouster of jurisdiction when legal rights are in question". Moreover in *Bhimangouda v. Secretary of State* First Appeal No. 47 of 1910 decided by Scott, C.J. and Batoheloor, J., this Court applied precisely the same principle in the case of the Watan Act as has been applied by Sir Lawrence Jenkins and many other learned Judges in the cases on the Bombay Land Revenue Code. There the Collector had decided that there had been an alienation, and had made an order u/s 11 with the result that the alienee was evicted. This Court after examining the evidence came to the conclusion that there had been no alienation and that therefore the order was ultra vires and the Revenue Jurisdiction Act was no bar.

17. In the course of the arguments in this case we have been referred to some rulings, for instance *Baslingappagouda Shivlingappagouda Vs. Secretary of State*, and *Gujappa v. Secretary of State* First Appeal No. 213 of 1916 which are not easy to reconcile with the decision in *Bhimangouda v. Secretary of State* First Appeal No. 47 of 1910. But, as far as I am aware, there is no case which definitely weakens its authority or which after facing the issue lays down the

proposition that the civil Courts are bound by the finding of the Collector on the question of fact whether there has or has not been an alienation. I am speaking of course with reference to Sections 9 and 11, Watan Act. In the case of Section 10 the language used indicates that the Collector is to be the judge. I think, therefore, we must hold that as there was a grant of these lands to the plaintiffs' predecessor before 1827, the revenue authorities had no power to set aside the alienation, for in fact there was no alienation within the meaning of the Act. The orders passed were not duly authorised and Clause (3), Revenue Jurisdiction Act is no bar to the suit.

18. In giving reasons for our finding on the merits I shall be quite brief as the evidence has been fully and fairly discussed in the judgment of the trial Judge. He has based his finding that plaintiffs are watandars by reason of a grant in 1811 mainly on evidence not produced before the revenue authorities, and he opines that the Collector and Commissioner were right in the view they took of the evidence produced before them. With that opinion I am unable to agree. I think the documents then produced were quite sufficient prima facie evidence of a pro-British grant, though the additional evidence no doubt makes the position a great deal stronger. Ex. 120 is a sanad of the year 1845 purporting to have been granted by Shivlingappa, grandfather of defendant 1, in favour of plaintiffs' grandfather in replacement of a former sanad granted by his father which had been lost. It was produced in the litigation of 1867 when Shivlingappa admitted it. It bears the seal of the Desai; and there is no good reason for doubting its authenticity. Practically all that is urged against it is that it does not mention the year of the original grant. But we know from Shivlingappa's statement (Ex. 126) before the Inam Commission in 1851, that his father had died 35 years before that year. So that any grant by him must have been in pre-British times. Ex. 60 is a statement of particulars of inam lands in Budikop furnished by Shivlingappa to the Inam Commission and signed by him. It shows that two-thirds of the lands bearing assessment of Rs. 50 out of a total of Rupees 75 were pot inam. There is no suggestion that any of these lands had been granted in pot inam to any person other than the plaintiffs. It seems perfectly legitimate to infer from these three documents alone that the previous grant referred to in Ex. 120 was the grant of the pot inam mentioned in Ex. 60, and as it was made by Shivlingappa's father, it must have been before 1827.

19. Coming to the additional documents produced in this suit, Ex. 131 is a yadi or list of all the Desai's inam lands with particulars thereof dated 1825. Lands in Budikop assessed at Rs. 40, which is two-thirds of the assessment as it then was, are shown as pot inam in the name of the plaintiffs' ancestor Tukopant. This is evidently the same pot inam as is referred to in the Inam Commission statement, Ex. 60. This document bears the Desai's seal, and was apparently sent with other documents by Shivlingappa to the Mahalkari in 1845: see Ex. 130. It is objected that it has not previously been produced in evidence. But it does not appear that there was any need or opportunity for its production till 1924, and it may not have been thought necessary then. The evidence actually

produced was enough to satisfy the District Deputy Collector.

20. Exhibits 122 and 124 are akarbands of 1841 and 1844 respectively, purporting to be signed by Shivlingappa, and refer to the same pot inam. The documents so far mentioned, which are all originals, afford ample justification for the finding of the District Deputy Collector and the trial Judge that the plaintiffs held the lands by a pre-British grant. I can see no good reason for supposing that any of them are forgeries. None of them, it is true, gives the exact date of the grant of the pot inam. But, as I have shown, they make it clear that it must have been before 1827. The date of the grant, 1811, is mentioned in Ex. 151 which is described in the heading as a register (takta) of information regarding the pargana watandars, prepared by the Assistant Collector under the directions given by the Collector under the orders of the Inam Committee. The date of the document is 1847. This is not an original. The copy which has been produced was obtained from the mamlatdar in September 1930. Mr. Coyajee contends that it is not a public document and cannot be proved by a certified copy, also that it is not relevant evidence. He relies on *Ram Chunder Sao v. Bunseedhur Naik* (1883) 9 Cal. 741 and *Dwarka Nath Misser v. Tarita Moyi Dabia* (1886) 14 Cal. 120. I think it comes within the definition of a public document in Section 74, being a record of the acts of a Public Officer, and I think it is relevant u/s 35 or at any rate Section 13, Evidence Act. Its value as evidence may be doubtful since we do not know the source of the information on which the statement was prepared. Taken along with the other evidence it is an important addition to the plaintiffs' case, but by no means indispensable to it. I do not propose to discuss the other documents. They are all copies. There is some doubt as to their admissibility, and the plaintiffs' title is sufficiently proved without them.

21. On the issue of limitation I need say nothing further. The cases already cited in connexion with the Revenue Jurisdiction Act show that Article 14 can have no application, the acts of the revenue authorities being without jurisdiction. As to the issue of *res judicata*, the trial Judge finds that Annaji and Tukadev were separate mainly on the strength of certain revenue registers in which they were shown as having separate denned shares in the Kulkarni watan of Budikop and Nugganhatti. I think this is reliable evidence. The suggestion that it may have been the result of a friendly arrangement between joint brothers is not at all convincing. Besides the very fact that Shivlingappa had to file a suit against Narso Tukadev in 1867, shows that the decree obtained against Annaji did not bind Narso. The plaintiffs are not barred by the decree against Annaji. There is much more to be said, I think, for the view that defendant 1 is bound by the decree of 1867 dismissing Shivlingappa's suit against Narso. I agree with Mr. Thakor that there are no tangible and sufficient grounds for holding that there was anything fraudulent or collusive about that decree. I think Shivlingappa consented to the dismissal of his suit because he knew he had no case, and that explains why no attempt was made to set aside the decree for more, than fifty years.

22. One other point must be mentioned. Mr. Thakor argued that as the grant to the plaintiffs was before the introduction of the British Rule, and as at that time there was no prohibition against the alienation of watans, the grantees acquired a right of suit to protect their property which could not be taken away by Section 4, Revenue Jurisdiction Act. He relies on *Damodar v. Secretary of State* AIR 1921 Bom. 367 and *Secretary of State v. Moment* (1913) 40 Cal. 391. The point was not taken in the trial Court. It has been rather sketched than fully developed in this Court. I doubt if there is anything in it in view of *Rachangauda v. Secretary of State* AIR 1920 Bom. 239 cited by Mr. Coyajee. But under the circumstances, and as it is not necessary for the determination of the case. I prefer not to express any definite opinion. For these reasons the appeal fails and must be dismissed. The appellants will pay the costs of respondents 1 to 8. The Secretary of State, respondent 9, has supported the appellants and will pay his own costs.

Tyabji, J.

23. I have come to the same conclusion. The difficulties in this case arise primarily from the points for decision depending on Acts of the Legislature, whose language has not been uniformly interpreted, and from the evidence having to be traced back to a century from now, without the guidance of any straightforward principle to indicate the side on which substantial justice lies, - except perhaps as a last resort, that long-standing, possession ought not to be lightly disturbed. Chronologically the first event we have to consider is whether at some time prior to 1816 there was a grant by the defendant's ancestors of a pot inam (i.e., a subsidiary grant out of an inam), in favour of the plaintiffs' ancestors. I agree generally with my learned brother with reference to the evidence in that connection. I have doubts however about the admissibility of Ex. 151, which purports to be a copy of a register of information in a tabular form, prepared in 1847 by the Assistant Collector under the directions of the Collector, under the orders of the inam Committee.

24. In that tabular statement it was stated that there was a pot inam in favour of the present vahivatdar." It was urged that that part of the statement cannot be considered to be a public record: *Ram Chunder Sao v. Bunseedhur Naik* (1883) 9 Cal. 741. The Indian Evidence Act makes the admissibility of a document depend ultimately on the weight to be attached to it. In practice it is not of much importance whether the Court holds that a document is admissible in evidence but must carry little weight, or whether it is not admitted at all. In this case I should prefer to say that the document was not admissible in evidence, rather than to admit it and say that it does not carry us much further. The reason seems to me that there is no basis for relying on or testing the truth of the information so far as the pot inam is concerned. No evidence has been adduced to connect the person referred to as "the present vahivatdar" with the plaintiffs. The source of the information does not appear. There is no guarantee for its truth - no means for judging whether it was of any consequence to the inam commission to have accurate information on the subject.

25. The public records, contemplated in Section 35, Evidence Act, are required to be kept for the purpose of action being taken on them by the Government. The guarantees for the accuracy of entries so made are that the public officers have to make the records in the discharge of their official duty, or in the performance of a duty specially enjoined by law, and that official action is ordinarily taken on the facts recorded. The public being interested in such action, it is unlikely that facts recorded with such a purpose should be inaccurately stated, or that inaccuracies should not be rectified on the application of persons whose rights would thereby be affected. The original of Ex. 151 at the most appears to be a statement prepared from the Collector's records. It is not part of the Collector's records themselves. The statement was prepared in circumstances and for purposes of which we have no evidence. We may no doubt presume that the Inam Commission did not ask for irrelevant information and that the information was asked for the performance of their duties. But it is too much to presume that the information supplied in such a comprehensive table was asked for or required for action being taken on every detail comprised within it: nor can the statement prepared in the stated circumstances be considered such an entry as Section 35 contemplates.

26. It seems to me very doubtful whether the admissibility of this document can be aided by Section 13. That section refers to cases where the existence of any right or custom is in question. Here we are concerned with the existence of a right,- whether the plaintiffs' ancestors were granted the rights they claim. In deciding that question, viz., whether any right that may be in question exists,- Section 13 makes in the first place any transaction by which the right in question was claimed, recognized or asserted, a relevant fact, i.e., such a transaction may be proved. Secondly, particular instances in which the right was claimed, recognized or exercised, or in which its exercise was asserted are made relevant. What is made relevant is the transaction in the first case and the instances in the second: *Rachangauda v. Secretary of State* AIR 1920 Bom. 239. The transaction or instance must be one by or in which the right in question has been asserted or denied. There is nothing to show what the transaction before the Inam Commission was, or that it referred to the existence or non-existence of the pot Inam. The tabular statement is neither such a transaction nor such an instance as Section 13 mentions, nor is it in itself evidence of either. The bare statement before the Inam Commission that the Collector's records contained reference to a subsidiary grant, cannot, it seems to me, be brought under the categories of the transactions and instances to which Section 13 refers. Putting aside Ex. 151 I agree that the evidence establishes that there was a subsidiary grant by the defendant's ancestors to the plaintiffs' ancestors prior to 1816.

27. I come next to the proceedings in 1862. In that year there was a suit by one Shivlingappa, an ancestor of the defendant, against a member of the plaintiffs' family. The defendant's ancestor claimed possession of the lands now in question. He obtained a decree. Execution proceedings were taken to enforce the decree so obtained. In accordance with Civil P.C. Act 8 of 1859, Section 229,

then in force, on the decree-holder being obstructed in obtaining possession under his decree, the execution proceedings were turned into a substantive suit. This suit was against a third person who had caused the obstruction. He was a nephew of the defendant to the main suit of 1862. This nephew claimed the property in his own right through a grant to his father by the defendant's ancestors. In this, the execution suit, Shivlingappa consented in 1867 to what has been called a compromise, but what really amounted to an admission that he had no claim against the ancestors of the plaintiffs, and that the decree in the suit of 1862 in his favour could not be executed against them. The result was that the possession of the members of the plaintiffs' family was not disturbed, and they remained till January 1926, in possession of the part of the inam property which the plaintiffs claim. No adequate reason appears for ignoring the proceedings in 1867. They cannot be assumed to be obtained by fraud any more than the suit of 1862. The year 1926 brings us to the events immediately preceding the present suit. Between 1924 and 1926 the revenue authorities, at the instance of defendant 1, entertained proceedings for the eviction of the plaintiffs from the watan lands and for putting defendant 1 in possession. This action was purported to be taken under the Watan Act (Bombay Hereditary Offices Act, 3 of 1874), Section 9. The question thus arises whether in view of the events that I have narrated, viz., the pot inam granted some time prior to 1816, and the legal proceedings in 1862 and 1867, there was any power in the revenue authorities u/s 9, Watan Act, to declare the grant of the pot inam to be null and void. This question has a double aspect. Its second aspect depends upon the jurisdiction of the Court to pronounce upon the powers of the revenue authorities. That aspect I shall consider later, with reference to the Revenue Jurisdiction Act, Section 4. The Watan Act, Section 9, is somewhat involved, but omitting immaterial alternatives it may be read as follows:

Whenever any watan has, before the date of this Act, passed otherwise than by virtue of, or in execution of, a decree or order of any British Court and without the consent of the Collector and transfer of ownership in the Revenue Records into the ownership or beneficial possession of any person not a watandar of the same watan, the Collector may declare such alienation to be null and void and order that such watan shall from the date of such order belong to the watandar previously entitled thereto.

28. The substantive provision of the section therefore is to give the Collector power to declare null and void what in the latter part of the section is called "such an alienation," and what is earlier referred to as a "passing of the watan into the ownership or beneficial possession of any person not a watandar of the same watan." The subsequent order is consequential on the declaration. The power to declare the alienation void is given to the Collector subject to four conditions being satisfied (though the fourth is implied in the explanation of the term "such an alienation"): that the alienation has taken place before the date of the Watan Act; that it has taken place otherwise than by virtue of or in execution of a decree or order of any British Court, that it has taken place

without the consent of the Collector and transfer of ownership in the Revenue Records, and that it has resulted in the transfer of the ownership or beneficial possession of the watan to a person not a watandar of the same watan.

29. All these four conditions must obviously be applicable to the same transfer. It cannot be though that was the substratum of some of the arguments—that the condition that the transfer must have been before the date of the Act, may refer to one transaction, that the condition that it must have been otherwise than by virtue of a decree may apply to another transaction, and that the condition that the transferee is not a watandar of the same watan, may be applicable to a third transaction. The transfer that is sought to be set aside must be an alienation that satisfies all the four conditions.

30. The plaintiffs say that the Collector at no time acquired the power of declaring the grant of the pot inam in their favour null and void. The plaintiffs' presentation of the relevant facts is, first, that the transfer in their favour was prior to 1816, so that the first condition is brought directly in operation in their favour; and the fourth condition indirectly, since by the grant they became watandars of the same watan u/s 4 of the Act. (That section includes in the definition of watandar a person holding watan property acquired by him before the introduction of the British Government into the locality of the watan, and a person holding such property from him by inheritance.) Secondly, the plaintiffs say that assuming that the grant of 1816 in their favour is not proved, then in 1867 there was a decree of the Court in their favour, and the second condition in Section 9 is unfulfilled. Thirdly, that the entries of their names in the Record of Rights enable them to take advantage of the third condition. Defendant 1's reply is full of contradictions. He denies the existence of the grant of 1816 when the fourth condition has to be faced, but he appeals to the grant of 1816 when the decree of 1867 is relied upon (second condition). Confronted with the decree of 1867, the defendant says that the watan did not in 1867 pass into the ownership or beneficial possession of the plaintiffs by virtue of the decree because the plaintiffs were already in possession by virtue of the grant in 1816; that there could not in 1867 be any passing into the ownership of the plaintiffs, inasmuch as long before—in 1816—the lands had passed into their ownership, and that there being no transfer at all in 1867 there could not be said to be a transfer by virtue of the decree. But this defence against the second condition is an abandonment of the defence to the fourth condition. No consistent view of the facts can be presented by the defendant and no single alienation can be put forward satisfying all the four requirements of Section 9. The plaintiffs must in any case be given the benefit of either the second or the fourth condition.

31. In our opinion there was a grant prior to the introduction of the British Government and the decree of 1867 was not obtained by fraud; whereas the decision of the revenue authorities was on the basis that there was no grant before the introduction of the British Government (which involves that the plaintiffs are not watandars); and, secondly, that the decree of 1867 was

obtained by fraud. On both these allegations we have come to contrary conclusions. The question then arises whether our view that the revenue authorities erred in respect of these two findings, is irrelevant and of no consequence; because, as argued for the appellants, the exercise of jurisdiction by the civil Courts with reference to the said two questions is barred by the Revenue Jurisdiction Act (10 of 1876), Section 4(a), and it is no part of the function of the civil Courts to pronounce whether the decisions of the revenue authorities with respect to these two facts is or is not erroneous. The argument takes two forms?first that the civil Courts have no jurisdiction to pronounce upon the existence or nonexistence of these facts because that would result in certain orders being set aside or avoided which the civil Courts have no jurisdiction to do, and, secondly, that even if we do pronounce upon these two facts we have no jurisdiction to pass any consequential orders. These two facts must for the purposes of this argument be brought into contact with the terms of the Revenue Jurisdiction Act, Section 4(a). In terms the sub-section prohibits the civil Courts from exercising jurisdiction as to certain matters. The plaintiff must determine in what respect the plaintiff seeks that the Court should exercise jurisdiction. The suit cannot be entertained in so far as the plaintiff claims reliefs involving the exercise of jurisdiction taken away from the Court. I will, therefore, refer to the parts of the plaintiff which are relevant in view of Section 4(a). The suit is against two defendants. Defendant 1 is the person in whose favour the plaintiffs were evicted by the revenue authorities and defendant 2 is the Secretary of State. The plaintiff narrates the grant of the pot inam by the ancestors of defendant 1 to the ancestor of the plaintiff; the uninterrupted possession of the lands by the plaintiffs' family; the orders of the revenue authorities "as per Watan Act"; and defendant 1 having unjustly taken possession of the lands in 1926. All the said orders of the revenue authorities are characterised as being illegal and null and void and not binding on the plaintiffs. The plaintiff proceeds:

This suit has been filed for declaring that under the Watan Act the plaintiffs are watandars, as the watan lands in suit and some other lands of this watan came to the family of the plaintiffs before the advent of British rule in Murgod Mahal. and for awarding into the possession of the plaintiffs as owners, the lands, in suit together with the appurtenances, and for declaring that the plaintiffs were the watandars at the time defendant 1 obtained possession, and that they are still the watandars.

32. The cause of action is said to arise (1) as against defendant 1, from the date of defendant 1's wrongfully obtaining possession, and (2) as against defendant 2, the cause of action in respect of declaration of right arose on the day when the Bombay Government gave their final decision, i.e., on 28th May 1927.

33. The notice required u/s 80, Civil P.C., seems to have stated that the plaintiffs intended to sue Government for a declaration that they (the plaintiffs) are watandars, and for possession of the lands of which they have been dispossessed by the revenue authorities (Ex. 52). The effective prayers are that: (1) It may be

declared that the plaintiffs were the watandars of the watan of defendant 1 at the time defendant 1 took possession of the lands in suit, and that they still are the watandars; and (2) that the lands in suit together with the appurtenances may be given into the possession of the plaintiffs as owners.

34. The written statements of defendants 1 and 2 are on the same lines. They both state that the suit is essentially one to set aside the orders of the revenue authorities under the Watan Act, Section 9, and is accordingly barred by the Revenue Jurisdiction Act. The assertions of the grant to the plaintiffs' ancestors by the defendant's ancestor and of the plaintiffs' being watandars of the defendant's watan are traversed, the validity, legality and binding effect of the orders of the revenue authorities are affirmed and their liability to be set aside denied. Therefore the question with reference to the jurisdiction of the Court in the light of the pleadings is, whether when an order evicting the plaintiffs from certain lands has been made by the revenue authorities, purporting to act under the Watan Act, Section 9, a suit seeking a declaration that the plaintiffs are watandars and seeking (on the basis of a grant prior to the introduction of the British Government) possession of the lands in question, is barred by the Revenue Jurisdiction Act, Section 4(a). The dismissal of the suit is invited on the ground that such a suit is in effect a suit for setting aside an order of the revenue authorities and that such suits are barred by the sub-section.

35. Omitting reference to exceptions that are not now relevant, Sub-section 4(a) provides that no civil Courts shall exercise jurisdiction as to certain stated matters, which so far as relevant for the present purposes are: (1) claims against Government relating to property appertaining to the office of any hereditary officer appointed or recognized in certain ways; (2) claims to perform the duties of such officers, or in respect of injury caused by exclusion from such office; (3) suits to set aside or avoid any order under the Watan Act, passed by Government, or any officer duly authorized in that behalf; (4) claims against Government relating to lands held under treaty or to lands granted or held in other specified ways. The clauses of Section 4(a) that can be relied upon in the present case are the 1st and 3rd. The first has not been referred to in the written statement. That clause can only be relied on if (a) the claim is against Government, (b) the claim relates to property, (c) the property to which it relates appertains to the office of a hereditary officer; (d) the said officer is appointed or recognized under the Watan Act. As an alternative to (c) and (d) the following may be substituted: "the property appertains to the office of any village officer or servant."

36. If it had been necessary to decide the point, I should have considered whether all the averments required by Clause 1 had been made and proved. As it is, it is not necessary to express an opinion whether a claim for a declaration that A (and not B) is entitled to certain property, is a claim against Government. Presumably the answer would depend upon whether Government has some right or interest that would be affected if A (and not B) were the owner. But the mere

fact that Government have been under the impression or have declared that B was the owner, would presumably not affect the question whether a claim to a declaration to the other effect is a claim against Government. Moreover for the purposes of Clause (1) the claim has not only to be a claim against Government; it must be a claim relating to property?and a claim that the plaintiffs are watandars has been held not to be such a claim?so that obtaining a declaratory decree against the Government of their (the plaintiffs") title was held not to be barred: *Ramrao v. Secretary of State* (1896)PJ 666 where many decisions are referred to including *Ramchandra Dabholkar v. Anant Sat Shenvi* (1884) 8 Bom. 25. The plaintiff may be entitled to have the Secretary of State before the Court in order to try his claim to title? *Surannanna v. Secretary of State* (1900)24 Bom. 435 without any direct claim being made against the Government relating to property. But, as I have said, it is not necessary to consider the bearing of Clause (1) of Section 4(a) on the present case, as no relief has been granted against the Government and the plaintiff has not raised any objection.

37. The question remains whether Clause 3 of Section 4(a) ousts the jurisdiction of the Court. Clause 3 refers to suits to set aside or avoid orders under the Watan Act. The expression "a suit to set aside" some transaction on the basis of which a right is claimed, has been characterized by the Privy Council?their Lordships were dealing with a suit to set aside an adoption?as not being quite precise: *Jagadamba Chowdhurani v. Dakhina Mohun* (1886) 13 Cal. 308 and *Malkarjun v. Narhari* (1900) 25 Bom. 337. In the light of those observations, the first step in an attempt to interpret Clause 3, must be to determine precisely the nature of the jurisdiction that civil Courts would normally possess. After this step has been taken that part of the normal jurisdiction, which the civil Courts are required not to exercise, must be renounced. The residuum of the normal jurisdiction may be exercised.

38. What then is the extent and character of the jurisdiction that the Courts normally possess?apart from Section 4(a)?with reference to an order passed under the Watan Act? The question, it would seem, must arise somewhat in this way. One of the parties to a suit (in the present case the defendants) would seek to rely on the order alleging the (allegation being denied by the other side) that the order created certain rights of a civil nature in their favour (Civil Procedure Code, Section 9). The Court would then require proof of the order?and would have to determine whether the order was an act of such a nature as the defendant claimed, viz., an act from which the law required that the rights claimed should flow. For this purpose the Court would have to consider the law tinder which the order was purported to be made: to determine whether the directions of the law had been observed, e.g., that the person in fact authorized to make the order had made it, whether he had followed the directions given by the law for making the order, whether the conditions precedent to the right to exercise the power arising had been fulfilled, and similar matters: all of which would be necessary for the preliminary purpose of deciding whether the act relied upon by the defendants was an act to which the law attributed the results

alleged to result from it. But after these preliminary matters have been determined, if the Court came to the conclusion that the order followed the requirements of the law, would there be any further jurisdiction in the Court over the order? Would the Court have jurisdiction to determine whether the officer clothed with the power to make the particular order had exercised that power wisely, or as the Court itself would have done ? ? and if dissatisfied with the manner in which the power had been exercised, would the Court have power to set aside the order? Apparently not. Unless some such revisional control were given to an external authority (such as the civil Courts), the power would *prim a facie* be uncontrolled and not subject to revision or appeal: *Meenakshi Naidoo v. Subramaniya Sastri* (1887) 11 Bom. 26 and *Rangoon Botatoung Co. v. The Collector, Rangoon* (1912) at p. 200. In any case whether there is any such jurisdiction to exercise a revisional control, would presumably depend upon the nature of the power given by the Legislature to the officer empowered. It may be a power granted with an express reservation that the person aggrieved by the order may bring a suit to modify or set aside the order: *Laloo Singh v. Purna Chandra Banerjee* (1896) 24 Cal. 149 or such a reservation may be implied in the terms of the power. On the other hand the right to bring such a suit may be expressly or impliedly excluded. If it is reserved, there may or may not be a short period of limitation within which the revisional control may be appealed to. Or finally the power may be of such a nature that even its purported exercise is required to be questioned (if at all) within a limited time; and if not questioned and if action is taken upon it, the action is entirely validated by the lapse of the time even though the exercise of the power may initially have been quite invalid; or in fact if it had never been exercised at all but action taken as though it had: *Jagadamba Chowdhurani v. Dakhina Mohun* (1886) 13 Cal. 308.

39. What is important, however, is to recognise that, assuming that there is a jurisdiction in the civil Court to set aside the order, this jurisdiction to set aside the order savours of an appeal; and that this jurisdiction must be clearly differentiated from the other preliminary function of the Court, under which in the course of the exercise of its normal jurisdiction over the civil rights of the parties, it has to determine whether it ought to take cognizance of the order; and for this latter purpose to determine whether what is put forward as an order of a particular kind conforms with the requirements of the law empowering such orders to be made: that what is put before it is what it purports to be? an order made by a person authorized to make it. The Court cannot treat something as an order u/s 9 merely because one of the parties asserts that it is so. It must determine this question for itself. This latter function is obviously one that can never be taken away from any Court whose duty it is to enforce the civil rights of the parties affected by the order: though of course the scope of this function must depend upon the nature of the power to make the order. Since the Court has to enforce those rights, and since the order affects those rights, the Court must take cognizance of the order and satisfy itself that it is what it is alleged to be or what it purports to be. This function is not revisional. It does not permit a

reconsideration of the order or allow it to be altered, still less set aside. The Court performing this preliminary function does not pronounce whether the power given by the law was exercised wisely or unwisely, but whether the occasion when it could be exercised arose at all, and whether it was exercised by the person in fact authorized to exercise it; and where the person is so authorized only subject to certain conditions being fulfilled, the Court in performing this preliminary function has also to pronounce whether those conditions are fulfilled. The preliminary function to examine and determine that there is an order, is entirely different from the jurisdiction to revise or sit in appeal over the order, and if thought proper to set it aside.

40. The expression "set aside or avoid an order" is appropriate only to the revisional jurisdiction. It is not appropriate to the preliminary function which forms a necessary part of the duty to take cognizance of the order and which is restricted to the determination of such questions as whether the authority to exercise the power in question had come into existence. The decisions in *Jagadamba Chowdhry v. Dakhina Mohun* (1886) 13 Cal. 308 and *Malkarjun v. Narhari* (1900) 25 Bom. 337 make this clear. Their Lordships distinguish setting aside an adoption from obtaining a declaration that an alleged adoption is invalid or never in fact took place. Their Lordships point out that in the case of an adoption, speaking to the Court setting it aside is misleading, as the Court can never set aside an adoption once made, i.e., validly made. All that the Court has to do is to exercise what I have called the preliminary function of determining whether the person who purported to make the adoption had authority to do so, whether the authority was exercised in the form required by law, and similar questions; but the Court cannot sit in appeal and determine whether the person authorized to adopt ought to have exercised the authority at all, or exercised it in respect of the person adopted or whether he ought to have selected another person. The case is different with a court-sale which the Court is authorized to set aside: *Malkarjun v. Narhari* (1900) 25 Bom. 337.

41. It would therefore seem that there is a want of precision, if it is assumed that the terms of Section 4(a), Clause (3), must necessarily be applicable to every order made under the Watan Act: for that is assuming that normally the civil Courts possess some revisional jurisdiction with respect to every such order, ? which normal jurisdiction the section takes away. It cannot be assumed that normally there exists a jurisdiction in the Court to revise or set aside or avoid an order made by an officer authorized to make it. The reservation or exclusion of such a revisional jurisdiction in the civil Court would prima facie depend upon the terms of the law authorizing the order to be made; upon the effect that the order is required to have; and upon whether the efficacy and force of the order is unconditional or subject to steps not being taken in the civil Courts to modify it or to set it aside or to avoid it. Such an assumption that Section 4(a) must apply to every order under the Watan Act?unwarranted though it be ? results in the tendency to begin with the premise that some jurisdiction has been taken away by Section 4(a), and from this unwarranted premise to draw the erroneous

conclusion (particularly in cases where the revisional jurisdiction has never been brought into existence) that what is taken away is that preliminary function, ? which must in reality always remain in the Court in order that it may enforce orders required by the Legislature to be enforced.

42. The tendency to which I have referred is intensified by the fact that in discharging what I have called the preliminary function, both the civil Court and the Collector have to cover the same ground. The Collector must necessarily perform this preliminary function because he must determine for himself whether the conditions on which he is empowered to act exist. Speaking with reference to the present case, before the Collector could proceed to consider whether or not to declare the alienation to be null and void, he had to determine for himself whether the pot inam had been granted to the plaintiffs' ancestors prior to the introduction of the British Government into the locality of the watan. But to make an order embodying his determination of this preliminary question is not the power granted to the Collector: the power granted to the Collector is to declare the alienation null and void. In the exercise of his power u/s 9 what he has to pronounce in the form of a declaration is that the alienation is null and void: the declaration is not to be an embodiment of his views with reference to the four conditions precedent; he is not empowered to declare that the alienation should be deemed to have been made after the date of the Act or that the alienee shall or shall not be deemed to be a watandar. The Collector is undoubtedly under the duty to determine whether the preliminary circumstances exist on which his authority depends. But this duty arises merely by implication from his being authorized to make the order in the stated circumstances: *Fenton v. Hampton* (1858) 11 Moor P.C. 347 where the maxim *quando lex aliquid conaedit, conaedere videtur et illud sine quo res ipsa esse non potest* is cited and explained by the Chief Justice (whose judgment was approved) in these terms (p. 360):

Whenever anything is authorized, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment; but its limitations are also pointed out, where the maxim comes to be applied adversely to the interests of others. The primary function imposed upon the Collector is to declare the alienation void. The Legislature may no doubt be assumed to have conceded that the Collector may be taken away from his ordinary duties for the comparatively short time that might be required for determining in a *prima facie* manner whether, the preliminary circumstances exist, whose existence gives rise to his primary function of making the declaration. But it does not seem to me to be reasonable to assume that the Legislature contemplated that the function of finally determining upon the existence of such preliminary circumstances should be performed not by the civil Courts whose duties and equipments are adapted to the determination of such questions, and who may be expected to deal expeditiously and surely with matters familiar to themselves; nor does it seem to

me to be reasonable to assume that the Legislature required that the Collector should be drawn away from his own legitimate and urgent duties to their detriment in order to perform unfamiliar functions extraneous to his usual avocations. When this distinction?between the preliminary function of determining that there is an order affecting civil rights, and the jurisdiction to set aside or otherwise interfere with the order?is borne in mind, it seems to me that an explanation for the conflict of decisions is to a great extent obtained and (with great respect) their correctness can be tested with some degree of confidence.

43. The failure to distinguish between the preliminary function to which I have referred and jurisdiction to set aside an order leads to conclusions ; that must be recognized to be beyond all the bounds that may reasonably be attributed to the Legislature, though "an Act diminishing a common right cannot safely be given, by judicial construction, an operation going beyond the plain intention of the Legislature"? *Sakharam Adhikari v. Collector of Ratnagiri* (1871) 8 Bom. H.C.R. 219, and such enactments are subject to strict construction: *Tribhovan v. Ahmedahad Municipality* (1902) 27 Bom. 221. Thus, it has been held that if the Collector has made an order on the basis of a certain person not being a watandar, the civil Courts have no jurisdiction to determine that question for themselves; that they cannot make a declaration that he is a watandar, since to do so would be refuting or avoiding or setting aside the Collector's order: *Sagunappa Shankarappa Nadgauda v. Bhau Annaji Patil*, First Appeal No. 269 of 1918. In testing the cogency of this reasoning it is to be observed that Section 4(a) is not restricted in its terms, as Section 11, Civil P.C., is. The prohibition in Section 4(a) to exercise jurisdiction is unlimited. It is not confined to fresh adjudication between the same parties. Nor is it subject to any other similar limitations. Once the Collector has made the order, the civil Court's jurisdiction?to the extent to which it is taken away?is taken away absolutely and for ever. And if the existence of the order deprives the civil Court of jurisdiction to decide facts on the basis of which the order is made, then the civil Court's jurisdiction to determine the pedigree or relations between the parties would be lost, not only as between the parties themselves but between all others; for otherwise the validity of the Collector's decision would be endangered?it might be refuted. Again once a Collector declares between A and B that the British Government was introduced in a certain locality on a certain date, that question would be withdrawn from the jurisdiction of the civil Court for all time, for all purposes and between all parties. These extravagant results follow from giving immunity not merely to the order of the Collector made where the conditions exist on which alone he is authorized to make the order, but to his opinions on other matters. But in fact the Collector's order has the efficacy given to it only after he enters the charmed circle. The circumference of that circle is rigidly defined by the section.

44. The reasoning on which I have proceeded seems to me to be supported by decisions of the Privy Council to which I have referred, and the judgments of Sir Lawrence Jenkins, C. J. and Parsons, J., in *Surannanna v. Secy, of State*. (1900)

24 Bom 435 As there is so much conflict of authority, I will refer more fully to *Malkarjun v. Narhari* (1900) 25 Bom 337 the more so as the sentence "a Court has jurisdiction to decide wrong as well as right" has been cited as supporting the view that the Collector had authority to decide wrong as well as right, and that therefore whether he had authority to decide at all cannot be questioned. A Court that has authority to decide a question has certainly authority to decide it wrongly, or in a manner that may appear wrong to another. But the question whether the decision (assuming it to be wrong) is liable to be corrected or to prevail uncorrected, is quite different and depends on entirely different considerations from the question whether the Court was ever called upon and authorized to pronounce the decision. The judgment of Lord Hobhouse is based on this distinction.

45. In *Malkarjun's* case (1900) 25 Bom 337 the question was whether the plaintiffs were bound by a sale in execution of a decree. The execution Court had held the sale with admitted irregularity ; but the question was whether it was necessary to set aside the Bale before the plaintiffs could have any relief. The plaintiffs argued that it was not necessary to set aside the sale, and they had refused and neglected (in spite of warnings) to pray that it be set aside. In the first part of their Lordships' judgment they considered in what circumstances the sale could be treated as a nullity, so that it need not be set aside at all. In doing so their Lordships performed the preliminary function of deciding whether there was, in the eye of the law, any sale at all. "If the sale is a reality at all, it is a reality defensible only in the way pointed out by law : *Malkarjun v. Narhari* (1900) 25 Bom 337. For the purpose of performing this preliminary function they considered whether the matter of the sale was properly before the Court, whether its powers as an executing Court came into play ; whether the position was such that to receive the application for execution which was made to it was part of the Court's jurisdiction. If these conditions were not satisfied, the purported sale was an absolute nullity; the Court which held the sale was never entitled to hold it: so that the plaintiffs were entitled to proceed as if the sale had never taken place : and the fact that the plaintiffs persisted in refusing to seek the remedy that the sale be set aside, would not have come in their way. The jurisdiction of the Court executing a decree does not depend upon the requirements of a single section being followed out, whereas the authority of the Collector to make an order u/s 9, Watan Act, does. The question before the Privy Council, therefore, whether there was a sale that required to be set aside, depended on many more and less easily determinable circumstances than the question whether the four conditions contained in the Watan Act, Section 9, are satisfied, and whether consequently there is or there is not an order u/s 9. But the Privy Council held in *Malkarjun's* case (1900) 25 Bom 337 that the events had taken place after which to receive the application for execution became part of the Court's jurisdiction : the determinative event giving jurisdiction being the establishment of the debtor's liability. The Court had jurisdiction (so their Lordships held) to receive the application and either to reject it as defective or to

order some further proceeding : it did not reject it, but (mistakenly) proceeded with it; in doing so it was exercising the jurisdiction with which it was already clothed.

46. What is significant for the present purpose is that the Privy Council did not reason that the suit was not for setting aside the sale, and that consequently the Court could not perform the preliminary function of deciding whether there was a sale at all?of deciding whether the jurisdiction to hold a sale had ever been acquired. Nor did they deem that a decision to the effect that the Court had erroneously conceived itself to be authorized to proceed with the sale would amount to setting aside the sale. They considered these preliminary questions to be entirely different from the questions involved in setting aside the sale. They accordingly distinguished *Baswantapa Shidappa v. Ranu* (1885) 9 Bom 86. where the Court had not established the debtor's liability and where consequently the preliminary conditions for acquiring jurisdiction to sell had not arisen.

47. Lord Hobhouse on p. 226 points out the distinction between the two cases : (1) that where the Court has jurisdiction to set aside the sale?to pronounce whether the jurisdiction or authority to sell has been rightly exercised ; and (2) where the Court is merely performing the preliminary function of determining whether the jurisdiction or power of ordering the sale which had been purported to be exercised ever came into existence. In the former case it is of little importance to distinguish whether the appellate Court interferes on the ground that the execution Court had no jurisdiction at all, or whether it had jurisdiction which it had exercised wrongly. But the distinction becomes important in the second case where the only jurisdiction possessed by the Court consists in its preliminary function : as happens in cases where the other appellate or revisional jurisdiction is barred by limitation, or by some such section as Section 4 (a) or by the terms of the authority conferred on the officer or on the Court exercising it, or as in *Malkarjuris* case (1900) 25 Bom 337 because the plaintiff refuses and neglects to pray that the Court should exercise its revisional jurisdiction.

48. I need only refer to one case out of the many conflicting decisions of this Court. In 24 Bom 43518 the judgments are care, fully reasoned out and seem to refer to all the relevant considerations. The question there arose out of an order by the Collector purported to be made under the Bom-bay Land Revenue Code (Bom. 5 of 1879, Section 37). The power under this section makes it

lawful for the Collector to dispose of all lands wherever situated which are not the property of individuals in such manner as he may deem fit, subject always to all rights of the public or of individuals legally subsisting.

49. The Collector made an order on the footing that the land was not the property of individuals. *Jenkins, C. J. and Parsons, J.* held that it was for, the Court to decide whether the land was not the property of individuals, because the authority of the Collector to dispose of the land arose with reference only to

lands that did not belong to individuals, and the preliminary function of the Court to decide whether the facts existed on the basis of which the Collector was authorized to dispose of the land was different from the jurisdiction of a revisional nature under which the Court is authorized on an application within a year of the order to set aside the order. The argument with which Jenkins, C. J., deals in the following passages has been put forward before us with reference to the absolute bar to jurisdiction imposed by Section 4 (a), p. 444: Sir Lawrence Jenkins said :

An individual, who asserts that a Collector has disposed of property which belongs to him, and consequently does not come within the operation of Section 37 is entitled to have his title to the property tried in ordinary Courts ; if he succeeds in establishing his claim, the disposition by the Collector would be so much waste paper, and it would be unnecessary to set it aside.

50. Then on p. 445 he says :

If I am right in this view, it would follow that Article 14 has nothing to do with the case. But then it has been argued that, if Article 14 does not apply to an order such as that of November 1895, there is no order under this section to which it could apply. This argument however appears to me to be fallacious; for it proceeds on the assumption, that it is for some reason necessary that there should be some order under this section on which Article. 14 would apply; as though Article 14 had the right to demand that there should be an order u/s 37, Land Revenue Code, on which it should operate. But if, for some reason which I cannot appreciate, Article 14 is entitled to demand a tribute from Section 37, I conceive there would be no difficulty in that section paying its dues. Even a Collector may so dispose of land, which by the section is declared to belong to Government, as to interfere with the rights of others, and in that case it would be proper to have this disposition set aside.

51. The real issue between Candy, J.'s judgment and. Sir Lawrence Jenkins's seems to be that on p. 449. Candy, J. seems (with all respect) to overlook both in this case and in *Nagu v. Balu* (1890) 15 Bom 424. that if however "formally," X puts B into possession of property belonging to A, and orders A to be dispossessed, A can sue B for his property on his title ; and B would have no defence against A's claim for possession, unless B could establish to the satisfaction of the Court that X had a right superior to that of A, by virtue of which X could put B into possession. For determining this question the Court must determine what powers X possessed. A could lose his right only by adverse possession or by superior title. Candy, J. does not distinguish between the preliminary function of the Court and the revisional or appellate jurisdiction to set aside, to which I have referred. In my opinion therefore though an order had "been made by the revenue authorities purporting to act under the Watan Act, Section 9, still a suit seeking a declaration that the plaintiffs are watandars and seeking possession of the lands from which the plaintiffs have been evicted in consequence of that order, is not barred by the Revenue Jurisdiction Act, Section

4 (a). The Revenue Jurisdiction Act saves only "any order under the same, viz., the Watan Act, by an officer duly authorized in this behalf": the Watan Act does not give authority to declare who shall be watan dar, but to declare certain alienations to be void ; the authority u/s 9 arises only on the four conditions mentioned therein being satisfied ; the civil Courts have no jurisdiction to pronounce whether such orders as the revenue authorities are authorized to make are rightly made ; but if in the course of determining the civil rights of the parties, the Court has to determine whether such rights have been affected by what is put forward as an order u/s 9, it becomes the duty of the Court to pronounce whether the order in question can be brought within the terms, "an order under the Watan Act made by an officer duly authorised in that behalf;" and the Court cannot hold it to be such an order unless at the time when the officer purports to make the order the officer was duly authorized in that behalf; and he would not be so authorised unless the four conditions existed which give rise to the authority of the officer. For these reasons I agree that it may be declared that the plaintiffs are watandars, that there was a grant of a potinam in their favour, that the Collector had in the circumstances no authority to make an order under the Watan Act, Section 9, and consequently that defendant 1 cannot resist the plaintiffs' claim for possession. The appeal must consequently be dismissed with costs.