

dár, and that the Collector had no right to open a quarry in, and take stone and sand from, the lands.

1875.

RA'VJI
NA'RA'YAN
MANDLIK
v.
DA'DA'JI BA'
PURI DESAI.

We reverse the decree of the District Judge, and remand this cause for a new trial on the merits by the District Judge. We refrain from expressing any opinion on the question as to the right of Government to introduce the Revenue Survey into the village of Nanej, or to attach the plaintiff's half of that village, or, in short, upon any point in the cause, except the question whether Act XXIII. of 1871 is applicable to this suit, the District Judge not having dealt with any other question. The objection founded on Act XXIII. of 1871 to the jurisdiction of the Civil Court was not made on behalf of the Mámlatdár in the Court of the Assistant Judge, and, as we think, ought never to have been made. We accordingly direct the defendant to pay to the plaintiff the costs of both appeals. The costs of the suit must be disposed of, as may be just, on the re-trial now ordered.

[APPELLATE CIVIL JURISDICTION.]

GURUSHIDGAVDA' BIN RUDRAGAVDA' (PLAINTIFF AND APPELLANT)
v. RUDRAGAVDA'TI KOM DYAMANGAVDA' AND OTHERS (DEFENDANTS AND RESPONDENTS*).

1877.
February 7.

Act No. XXIII. of 1871, Sections 3, 4 and 6—Suit for a declaration of plaintiff's right to officiate as patil.

A suit for a declaration of the plaintiff's eligibility to officiate as patil of a village is not prohibited by Act XXIII. of 1871. That Act should receive a strict construction, as being in derogation of the right of the subject to resort to the ordinary Civil Courts.

Babaji v. Rajaram (L. L. R. 1 Bom. 75) distinguished.

THIS was a special appeal from the decision of G. Druitt, Assistant Judge at Dharwar, reversing the decree of A. M. Cantem, 1st Class Subordinate Judge at the same place.

The plaintiff Gurushidgavdá brought this suit to obtain a declaration of his right to officiate by rotation as patil of the village of Lokur in the district of Dharwar. The defendants denied his

* Special Appeal No. 362 of 1876.

1877.

GURUSHID-
GAVDA' BIN
RUDRAGAVDA".
RUDRAGAV-
DA TI KOM
DYAMANGAV-
DA'.

right so to officiate. The Subordinate Judge on the evidence held the plaintiff's claim proved, and made a decree in his favour. In appeal the Assistant Judge reversed that decree, on a preliminary objection raised by himself, that the suit was not maintainable in a Civil Court. The following is an extract from his judgment :—

“Before hearing the case the Court raised the preliminary question,—whether the action was not barred by Act XXIII. of 1871? On this point I find that the claim is barred. Respondent's vakil argued that this suit was for a declaration of a right to officiate only. He admitted, however, that there was a money allowance attached to the office of patil. This being the case, there can be no doubt, I think, that this is a suit relating to a grant of money within the terms of Section 4 of the Act, or, as is explained in Section 3, ‘anything payable on the part of Government in respect of an office.’ The suit is, therefore, barred; see *Babaji v. Rajaram*.⁽¹⁾ I reverse the decree and dismiss the suit.”

The special appeal was heard by WESTROPP, C. J., and NA'NA'BHA'I HARIDA'S, J.

Ghanasham Nilkant Nadkarni for the appellant :—The Assistant Judge was wrong in applying the Pensions Act XXIII. of 1871 to the present case. The suits barred by Section 4 of that Act from the cognizance of Civil Court are suits “relating to any pension or grant of money or land revenue.” The present is a suit for a declaration of the plaintiff's right to officiate as patil, and such a suit can be entertained and tried by a Civil Court: *Ningangavda v. Satyangavda*.⁽²⁾ The case *Babaji v. Rajaram*,⁽³⁾ relied upon by the Assistant Judge, clearly shows, that although a suit against a co-sharer to establish plaintiff's right to a portion of any allowance paid by Government is barred under the Pensions Act, without the certificate required by Section 6, yet a suit for a share in land bestowed by Government and enjoyed free of assessment does not come under the provisions of that Act. This appears more clearly from *Ravji Narayan Mandlik v. The Mamlat-dar of Ratnagiri*.⁽⁴⁾

(1) I. L. R. 1 Bom. 75.

(3) I. L. R. 1 Bom. 75.

(2) 11 Bom. H. C. Rep. 232.

(4) *Supra* p. 523.

Shamrav Vithal for the respondent.

WESTROPP, C.J.:—The Assistant Judge has misunderstood the case of *Babaji Hari v. Rajaram Ballal*⁽¹⁾ to which he refers, and the nature of this suit. This suit does not seek to obtain “anything payable on the part of Government in respect of an office,” or even a declaration that the plaintiff is entitled to anything so payable, but seeks a declaration of the plaintiff’s eligibility to officiate as patil of Lokur. Such a suit is not prohibited by Act XXIII. of 1871, which, moreover, is an Act that should receive a strict construction as being in derogation of the right of the subject to resort to the ordinary Civil Courts: *Rávji Naráyan Mandlik v. The Mámlatdár of Ratnágiri*.⁽²⁾ It was only so far as the plaintiff in *Babaji Hari v. Rajaram Ballal*⁽³⁾ sought a declaration that he was entitled to a share in allowances paid from the Government Treasury, that the High Court held that his civil suit was affected by Act XXIII. of 1871. That suit was held to be sustainable so far as the *inam* lands were concerned. The right to officiate as an hereditary officer was not there in litigation. That case, therefore, is wholly inapplicable to the present case, in which the question of the plaintiff’s eligibility to officiate is alone in litigation,—a question which may be the subject of a civil suit: *Ningangavdá v. Satyangavdá*.⁽⁴⁾ See also the judgment of this Court in the matter of an application for review of judgment,⁽⁵⁾ and *Babaji v. Nana*.⁽⁶⁾

We reverse the decree of the Assistant Judge and remand the cause for retrial by the District Court on the merits. Costs of this special appeal to abide the result of the cause.

Note.—The following is the case referred to above as the matter of an application for review of judgment in Regular Appeal No. 72 of 1871* :—

The plaintiff, Nindangavdá, sued the defendants, Malangavdá and the Collector of Kaládgi, to have it declared that the plaintiff was entitled to a

* This case establishes, 1st, that an admitted ownership of a share in the lands appurtenant to a *patilki vatan* leads to a *prima facie* presumption of eligibility for the office of *patil*; and, 2nd, that the exercise by the Collector of his right, under Act XI. of 1843, to appoint one of several coparceners to officiate as *patil* is not a denial of the eligibility of the others, and does not, therefore, give to the one so appointed a possession adverse to his coparceners.

(1) I. L. R. 1 Bom. 75.

(2) *Supra*. p. 523.

(3) I. L. R. 1. Bom. 75.

(4) 11 Bom. H. C. Rep. 232.

(5) Regular Appeal No. 72 of 1871, decided 16th November 1874, Printed Judgments of 1874, p. 205. Reported in the note *infra*.

(6) *Infra* p. 535.

1877.

GURUSHID-
GAVDA' BIN
RUDRAGAVDA'
v.
RUDRAGAV-
DA'TI KOM
DYAMANGAV-
DA'.

1872.

NINDAN-
GAVDA'
v.
MALAN-
GAVDA'.

1872.

NINDAN-
GA DA'
v.
MALAN-
GAYDA'.

half share in a certain *patilki vatan* and to officiate as *patil* in rotation with the defendant Malangavdá. This defendant denied the plaintiff's title, and pleaded limitation, contending that Laxmangavdá, his predecessor in office, had been appointed by the Collector to act for life, that this appointment gave to Laxmangavdá a possession adverse to the plaintiff and his ancestors, and that Laxmangavdá had died and had been succeeded by Malangavdá more than 12 years before the institution of this suit by the plaintiff. The Assistant Judge, Mr. Baker, found that the plaintiff was a half sharer in the *patilki vatan*, but had lost his right to officiate in turn with the defendant by lapse of time. On appeal to the High Court, LLOYD and KEMBALL, JJ., amended the decree of the Lower Court on 17th June 1872, holding that the plaintiff's suit was not barred by limitation, and that he had a right to officiate as *patil* in rotation with the defendant Malangavdá. The latter applied for a review of judgment, and the application was disposed of as follows, by WESTROPP, C.J., and KEMBALL, J., on 14th September 1872:—

It is true that it is stated in the judgment of the 17th June 1872, that as it lay upon the defendant to prove that Laxmangavdá's death occurred within 12 years of the commencement of the suit, and he had not done so, this suit is not barred against either of the defendants. If the date of Laxmangavdá's death were material to show that the suit was brought within twelve years from that event, we think that it would lie upon the plaintiff, and not on the defendant, to give such proof. But we do not think that time under the Limitation Act did begin to run from that event, or that the plaintiff's cause of action accrued either then or in 1852, when Laxmangavdá was nominated by the Collector as *patil* for life. The plaintiff, it is admitted, is an owner of a moiety of the lands appurtenant to the *patilki vatan*, and *prima facie*, as such owner, we are inclined to think, would be entitled to officiate as *patil*, if his coparceners chose to nominate him to that office, or if, on the parceners differing as to which of them should officiate, the Collector thought fit to exercise his power of selection under Act XI. of 1843 in favour of the plaintiff, when the voters cannot agree—in other words, the plaintiff, as such owner of a moiety of the lands appendant to the *vatan*, would be eligible for the office of *patil*. That presumption of eligibility grows into proof when accompanied, as it is here, by satisfactory evidence of an actual enjoyment of the office of *patil* for five years by the plaintiff's brother Yellangavdá from 1847 to 1852. In 1852, Laxmangavdá, on the expiration of Yellangavdá's appointed term of five years, was, on the parceners being unable to agree as to who should be the next officiator, appointed, under Act XI. of 1843, by the Collector to officiate for life. It is true that Laxmangavdá seems then to have put forward an apparently fabulous story as to his having been forced by duress to sign the nomination of Yellangavdá in 1847; but the fact, that Laxmangavdá then said so, does not make the exercise by the Collector of his power of selection in 1854 an act adverse to the plaintiff or his family, nor did it give them any cause of action. If we were to hold such an exercise of his right to select one amongst several

parceners as a denial of the eligibility of all of those whom he passes over, we should be giving to Act XI. of 1843 an effect never contemplated by the Legislature. Not until 1869 has it been proved that anything took place which had the effect of rendering the officiator's possession adverse to the plaintiff. Then the Collector, at the instigation of the defendant, would appear to have removed the plaintiff's name from the Government books as a sharer in the patilship, where it had, up to that time, stood. The suit has been brought promptly after that occurrence and is within time. For these reasons, we discharge the rule *nisi* for review with costs.

1872.

NINDAN-
GAVDA'
v.
MALAN-
GAVDA'.

The following is the case of *Babaji v. Nana* referred to above † :—

Babaji sued Nana and others to have it declared that he was entitled to a one-fourth share in a certain *patilki vatan*, alleging that his name had been removed by the Revenue authorities from the Government books, and that he had been referred by them to a civil suit to establish his right. The Subordinate Judge dismissed the suit on the ground that the plaintiff had shown no cause of action. This decree was affirmed by the District Judge, Mr. Mactier, who held that the plaintiff's claim was barred both by limitation and by the decision of the Revenue authorities under Act XI. of 1843. The appeal against this last-mentioned decision was heard by WESTROPP, C.J. and WEST, J., on 21st February 1876, and the following was the judgment of the Court :—

1876.

BABAJI
v.
NANA.

The first question for consideration is, whether, when the plaint was filed, this suit would lie in a Civil Court. The learned District Judge, on the authority of *Abaji Sankroji Bhosle v. Niloji Balaji Bhosle*,⁽¹⁾ held that it would not lie. That case, however, was a suit seeking a declaration that the plaintiff was the *Vadil* amongst the holders of a *patilki vatan* and, as such, entitled to be appointed the officiating *patil* in preference to the others—his right to be a sharer not being disputed. That right of the plaintiff to be a sharer being admitted, this Court was, and is still, of opinion that there was not any jurisdiction on its part to declare him entitled to a preference over his co-sharers. There was not then any custom of succession to the patilship by primogeniture alleged or one confining the succession to a particular branch, and it, therefore, lay with the sharers to elect the officiator from amongst themselves, or, if they could not agree in such election, it lay with the Collector to nominate an officiator—Sec. 4, Act XI. of 1843. *Yesaji Apaji v. Yesaji Mhaloji*⁽²⁾ was a similar case. The present case differs from both of those cases, inasmuch as here the right of the plaintiff to the *vatan*, or any interest in it, is positively denied by the defendant Anandray in his written statement. What the plaintiff de-

† The point here decided was that though the Court has no jurisdiction to declare an admitted sharer in a *patilki vatan* entitled to a preference over his co-sharers in the enjoyment of the office of *patil*, yet where the plaintiff sues to establish a right, denied by the other co-sharers, to a share in the *vatan* and eligibility for the office of *patil*, the Civil Court has jurisdiction to adjudicate on the claim.

(1) 2 Bom. H. C. Rep. 342.

(2) 8 Bom. H. C. Rep. 35, A. C. J.

1876.

BABAJI
v.
NANA.

mands is not a declaration that he has a right preferable to that of the other sharers, but that he is a sharer, and eligible to fill the office of *patil*. In Regular Appeal 57 of 1871, decided on the 13th March 1871, where the Collector had turned the plaintiff out of the patilship, on the ground that the *Inamdar* had no right to appoint him to the office, the plaintiff's claim was that he was, as a sharer in the *vatan*, equally eligible with the first defendant to fill the office, and that the latter had not an exclusive right to officiate. This the Court declared, but declined to subject the Collector (the second defendant) to any stress to nominate the plaintiff to the office or the co-sharers to elect the plaintiff to it. And *Ningangavda v. Satyangavda* (1) affirms the same principle, viz., that a suit will lie for a declaration that the plaintiff is eligible as a co-sharer in an office for nomination to it, where his title to be so regarded is denied. We, therefore, do not concur in the view of the learned District Judge, that the suit will not lie.

The point next to be considered is, whether the suit is barred by lapse of time. The facts necessary for the determination of this issue are not before the Court. The plaintiff indeed says that since A.D. 1848 his father's name has been taken off, *i.e.*, omitted from the *patta*; but he does not say at what time since 1848 that happened, nor is there any finding by the Courts below at what time the name of the plaintiff's father was omitted from, or taken off, the Collector's books or register as a sharer in the *vatan* eligible for office as *patil*, or when such omission or removal became known to the plaintiff. The plaintiff states that "we," whereby we understand him to mean either his father or himself, officiated in 1846-47 as *patil*. Whether this is a fact has not been found by the Courts below. Nor has it been ascertained by these Courts in what manner the persons who did officiate were nominated to that duty. If they, or any of them, were elected by the sharers in the *vatan*, it ought to be ascertained whether the plaintiff voted or took part in such elections or any of them, and whether his right so to do was denied, and if so, when. We cannot agree with the contention of the defendant Anand-drav that the ground attributed to the Collector for denying the plaintiff's eligibility, viz., that the plaintiff or his father had not officiated within 2 years before the annexation of Satara by the British, is valid. The plaintiff alleges, as we understand his plaint, that he is in possession of a fourth share in the *vatan* and of the *manpan*. Whether this is true, has not been found by the Courts below; if true, it creates a presumption of eligibility to the office of *patil*, which may have, however, been repelled by evidence of exclusion from the patilship by adverse possession of his opponents.

We cannot agree in the contention of the plaintiff's pleader, that the case of *Kuria v. Gururav*, (2) as reported, governs this case. It does not appear on the face of that report whether there had been any alienation by the plaintiff's ancestor of the *vatan* lands or not. If there had been an alienation, and the alienor had lived, say, for 10 out of the 20 years during which the defendants

(1) 11 Bom. H. C. Rep. 232.

(2) 9 Bom. H. C. Rep. 282.

were in possession, we can well understand how the decision then made was arrived at ; but it would not, so far as we can at present perceive, be applicable to this case. No doubt if A, being the incumbent of a service *vatan*, have alienated it, his heir B, although more than 12 years may have elapsed between such alienation and the death of A, would be entitled to recover the *vatan*, inasmuch as A's alienation would, under Reg. XVI. of 1827, Section XX. Cl. 1 and 2, be invalid as against his heirs ; but under the interpretations of the Sadr Adalat of that Regulation on the 23rd February 1831 and the 5th December 1834, the prohibition against alienation in it did not extend to an alienation for any period not exceeding the lifetime of the *vatan*dar. No doubt, if a conveyance by an hereditary officer purported to give to the alienee a greater estate than one for the life of the alienor, the Court would, under the Regulation, have cut it down to an estate for his life. The heir's title to the land would not accrue until the death of A (the alienor), and the possession of the alienee would not be regarded as adverse to the heir, inasmuch as it would be a possession in no wise inconsistent with his title so long as the incumbent A lived. But, from the moment of A's death, the possession would be adverse to B, and, if B suffered 12 years from that event to elapse without bringing his suit to recover the land, we think not only B himself, but also B's heir, would be barred by the Limitation Law applicable to this case, Act XIV. of 1850. To hold otherwise would be to put an end to the law of limitation altogether as to *vatan*s appendent to hereditary offices,—a course which we do not see any valid ground for adopting. The incumbent of a service *vatan* restrained by Reg. XVI. of 1827, Section 20, from alienating the *vatan* as against his heirs, is in a position parallel to that of a Hindu widow, who, except for certain special purposes, cannot, as against the heirs of her husband, alienate his immovable property. Her alienation, except for such special purposes, is effective only to the extent of her own limited interest as widow, yet she completely represents the absolute estate in the immovable property, and, under certain circumstances, the law of limitation might, during her incumbency, run against the heirs to the property whoever they might be—*vide per* Sir R. Collier when giving the judgment of the Privy Council, in *Mussumat Bhagbutti Dace v. Chowdry Bolanath Thakoor* (1) and *per* Peel, C. J., in 2 Taylor and Bell Rep. 281, 282, and *Salchand v. Gambhai* (2).

We reverse the decree of the District Judge and remand this case for re-trial on the merits. The main questions for determination on such re-trial will be, 1st, Whether the plaintiff is a co-sharer in the *Patilli vatan*—2ndly, Whether this suit is barred by the law of limitation. In arriving at findings upon these questions, the re-trying Court will be assisted by a consideration of the points already indicated in this judgment. Costs throughout must abide the final result of the re-trial. The re-trying Court is to be at liberty to take such additional evidence as may be necessary and proper.

(1) L. R. 2 Ind. Ap. 256, *see* p. 261.

(2) 8 Bom. H. C. Rep. 140, O. C. J., *per* Westropp, C. J., pp. 155 to 157.