

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knt., Chief Justice, Mr. Justice West,
and Mr. Justice Pinhey.

1877.
June 19.

MORU BIN PATLAJI (PLAINTIFF AND APPELLANT) v. GOPAL BIN
SATU (DEFENDANT AND RESPONDENT).*

Plea of limitation under Act XIV. of 1859—Civil Procedure Code (Act VIII. of 1859), Sections 26 and 32—Jurisdiction—Order of revenue officer—Cause of action.

A defence of limitation under Act XIV. of 1859 cannot be raised for the first time, after there has been a remand on special appeal from the decree of the court which has heard the cause on remand.

Munshi Buzl Ruheem v. Sreenath Bose (6 Calc. W. R. 178 Civ. Rul.) followed; *Kuria v. Gururao* (9 Bom. H. C. Rep. 282) distinguished.

Parker v. Elding (1 East 352) and *Lila v. Vasudev* (11 Bom. H. C. Rep. 283), distinguished.

Semble, per WESTROPP, C.J., doubting *Saluji v. Rajsanji* (2 Bom. H. C. Rep. 162, A. C. J.), and *Davlat v. Beru* (4 Bom. H. C. Rep. 197, A. C. J.), the court ought not, even upon a special appeal in a case in which there has not been any remand, so to raise such question.

Per MELVILL, J. :—Cl. 16 of s. 1 of Act XIV. of 1859 extends to all suits in which a declaratory decree, and nothing more, is sought.

Per NA'NA'BHAI HARIDA'S, J. :—That clause does not extend to a suit in which the declaration sought is of a right in immoveable property.

MORU BIN PATLAJI and his two brothers sued Gopal bin Satu and eight others in the court of the Subordinate Judge at Rahimutpur in the district of Satará, and prayed for a declaration that they were entitled to a half share in the *Pátiki vatan* of Kusbe Targáum. The plaint was filed on the 25th August 1871, and alleged that the plaintiffs enjoyed their half share in the *vatan* until their father's death in October 1864, and that, after that event, the Collector, by a letter dated the 30th June 1865, declared the plaintiffs to have only a fourth share in the *vatan*. The defendants only admitted the plaintiffs' claim to a fourth share. The Subordinate Judge held the plaintiffs' claim proved, and made a declaratory decree in their favour, as prayed for in the plaint. In appeal, the Assistant Judge of Satará amended the decree of the first court, and in special appeal, No. 269 of 1874, (which was preferred by the plaintiffs,) a Division Bench of the High Court (Kemball and Nánabhái Haridás, JJ.), on the 26th Jan-

* Appeal No. 1 of 1876, under Section 15 of the Letters Patent, 1865.

uary 1874, remanded the case for the trial by the Lower Appellate Court of the particular issue stated in the following judgment:—
 “The plaintiffs in this case asked for a decree declaring them to be half owners of a *Páttilki vatan*. The Subordinate Judge admitted the claim, but, on appeal, the Assistant Judge, distinguishing between the *vatan* and the property and rights which constitute a *vatan*, and finding that the plaintiffs had proved their claim to a moiety of certain property and privileges only, gave a declaratory decree to that extent, amending the decree of the court of first instance accordingly; but it is clear that, in doing this, the Assistant Judge has gone outside the prayer contained in the plaint, and that, therefore, his decree cannot stand. It is suggested to us on behalf of appellants that in dissecting the *vatan*, and dealing with the component parts of it separately, the Assistant Judge has fallen into an error, which has affected his judgment on the general question submitted for adjudication. This may be so; but, at all events, it is for the Assistant Judge to consider whether the plaintiff has established his right to be declared an eight-anna sharer of the *vatan*, as stated in the plaint, without regard to any one particular right forming a portion of it, except as evidence of the general right set up, and to decide aye or no, passing a fresh decree in accordance with his finding. Reversed and returned. Costs to follow judgment.”

On remand, the then Assistant Judge, Mr. Parsons, entirely confirmed the decree of the Subordinate Judge, and decided the case against the defendants. Thereupon the defendant Gopál bin Satu alone preferred a second special appeal, No. 207 of 1876. This appeal was heard on the 21st September 1876 by Melvill and Nánábhái Haridás, JJ. The principal points argued were, whether the defendant Gopál could be permitted to plead limitation for the first time in the second special appeal, No. 207 of 1876, and whether the period of limitation applicable to the case was twelve years under Section 1, Clause 12, or six years under Clause 16 of the same section, of Act XIV. of 1859.

Shántárám Náráyan (with him *Bhairavnáth Mangesh*) for the special appellant Gopál Satu.

V. N. Mandlik (with him *Shámráv Vithal*) for the special respondents.

1877.

 MORU BIN
 PATLAJI
 v.
 GOPÁL BIN
 SATU.

1877.

MORU BIN
PATLAJI
v.
GOPA'L BIN
SATU.

The arguments of the pleaders and the authorities cited by them in support of their contention are fully stated in the following judgments:—

MELVILL, J.:—In this case the plaintiffs ask for a declaration that they are entitled to a one-half share of a *Pátilli vatan*.

I understand that the plaintiffs are in possession of their half share of the land belonging to the *vatan*, and that their only grievance is that the defendants have induced the Collector to enter the plaintiffs' names as owners of only a one-quarter share of the *vatan*, the result of which is that they are allowed to appoint only one, instead of two, of the four officiating *Pátills*. The object of this suit, therefore, is to obtain a declaratory decree, which may induce the Collector to recognize the plaintiffs' right to officiate equally with the defendants, or to appoint the same number of nominees.

It appears to me that such a suit is for a declaratory decree, and nothing more. It is not a suit for the recovery of any interest in immoveable property. If by any fiction it can be regarded in that light, then the interest which the plaintiffs seek to recover, is the privilege of officiating more extensively than they have hitherto been allowed to officiate. If that be the meaning of the claim, then the answer to it is that the civil courts cannot entertain it. The civil courts may make a declaratory decree,—but any consequential relief must be sought elsewhere. It is for the revenue authorities to determine to what extent they will avail themselves of the services of the different *vatan*dars, in the event of the sharers in the *vatan* being unable to agree as to the appointment of representatives.

Regarding the suit, therefore, as a suit for a declaratory decree, we are asked to hold that it is barred by limitation. The plaintiffs state in their plaint that their cause of action arose on the 30th June 1865, and the suit was filed on the 25th August 1871. Upon the face of the plaint, therefore, the right of action is barred by lapse of time, unless the period of limitation applicable to the claim exceeds six years. I am of opinion that, as no other limitation is expressly provided by Act XIV. of 1859, a suit to obtain a declaratory decree, and nothing more, falls within the provisions

of Clause 16 of Section 1 of the Act, and that the period of limitation is six years. (1)

The claim being barred on the face of the plaint, we are, I think, bound to reject the claim, although the objection of limitation has never been taken or considered before. The law says that no suit shall be maintained unless instituted within the period of limitation applicable to the suit. When it is brought to our notice, at whatever stage of the proceedings, that the suit is, upon the face of the plaint, one which the law does not allow to be maintained, we have no choice but to reject it. As was said by Lord Kenyon in *Parker v. Elding*: (2) "Here is a general law, of which we are bound to take notice, which says that no action shall be brought. How, then, can we say that the plaintiff shall recover against the positive direction of the Act?" I may refer to the following cases, as bearing upon the duty of the court, to notice the law of limitation *ex mero motu*—*Saluji v. Rajsangji*, (3) *Payne v. Constable*. (4) And there are numerous cases which show that the point may be raised by the defendant at any time—see *Davlata v. Beru*. (5) I believe that this court has always held that it is never too late for a defendant to raise the plea of limitation, provided that its validity be patent on the face of the proceedings, and that no further inquiry is necessary to establish it.

It has been urged upon us that, if the objection had been taken at the earliest stage of the proceedings, the plaintiffs might have been able to amend their plaint, or otherwise to show that their claim is within time. If it could be shown to us that, by any amendment of the plaint, the plaintiffs' remedy might be secured, I would certainly, even at this stage, allow the amendment to be made. But the plaintiffs have distinctly stated that their cause of action against the defendants is that, by their opposition to the plaintiffs' rights, the defendants induced the Collector to come to a certain decision prejudicial to the plaintiffs on a certain date. It is now suggested that the plaintiffs appealed to the Revenue Commissioner against the Collector's order, and that the question

(1) *Bhikaji v. Jagannath*, 10 Bom. H. C. Rep. 351; *Mrinmoyee Dabee v. Bhoobunmoyee Dabee*, 15 Beng. L.R. 1.

(2) 1 East 352.

(3) 2 Bom. H. C. Rep. 162.

(4) 1 Beng. L. R. 49, O. C. J.

(5) 4 Bom. H. C. Rep. 197, A. C. J.

1877.

MORU BIN
PATLAJI
v.
GOPAL BIN
SATC.

1877.

MORU BIN
PATLAJI
v.
GOPA'L BIN
SATU.

was pending before the Revenue Commissioner until 1868. Assuming that this statement is correct, (though it is not supported by affidavit, or by any evidence), I do not see how the circumstance could operate to postpone the plaintiffs' cause of action against the defendants. The fact that the plaintiffs applied to the Revenue Commissioner to remedy the injury inflicted upon them, and that the Revenue Commissioner refused to do so, cannot alter the date on which the injury was inflicted.

For these reasons I have come unwillingly to the conclusion that we are bound to reject the claim, as barred by lapse of time. But as the defendants ought to have taken the objection at the earliest opportunity, and all the subsequent proceedings would then have been prevented, I am of opinion that they must bear the costs of those proceedings, and that the plaintiffs should be burdened with only so much of the costs as they would, in that event, have been liable to pay,—that is to say, the amount of the institution fee on the plaint.

NA'NA BHA'I HARIDA'S, J. :—I am unable to agree with my brother Melvill in his view of the case. I think we must confirm the concurrent decisions of the courts below, declaring that the plaintiffs are entitled to half the *Pátilki vatan* of Targáum.

The question of limitation was not raised in either of the lower courts, nor in this court when the case came up in special appeal and was remanded to the Assistant Judge on the 26th November 1874. It was not raised before the Assistant Judge when he re-heard the case on remand. The defendants, therefore, may fairly be considered to have waived any objection to the plaintiffs' claim on the ground of limitation, and ought not to be permitted to raise it now for the first time in this second special appeal to us. In a case, not quite so strong as the present one, the Calcutta High Court considered that the Lower Appellate Court had properly refused to allow the question of limitation to be raised for the first time after the case had been tried on the merits on remand;⁽¹⁾ and a Division Bench of this court (consisting of the Chief Justice and myself) has recently refused to allow it when it was passed

⁽¹⁾ *Moonshee Buzl Ruheem v. Huramath Acharjee*, 6 Calc. W. R. 178 Civ. Rul.; see also *Sreemutty Beedhoo v. Muddun Gopal*, Calc. W. R. 1864, 207 Civ. Rul.; and *Bechoo Misser v. Ramadheen Misser*, Id. 212.

1877.

 MORU BIN
 PATLAJI
 v.
 GOPAL BIN
 SATU.

over in the court below. (1) The rule we have generally observed on this side of the court is not to allow a point, not taken in the lower courts, to be taken for the first time in special appeal—see *Máhádáji v. Vyankáji*, (2) and *Ramábái v. Appá*. (3) In the case of *Máhádáji v. Vyankáji*, (4) the point raised for the special appellant was purely one of law, founded upon the respondent's own admission in his plaint, and yet was disallowed as being "too late." Any relaxation of this rule would cause much inconvenience; and I do not think the appellant in this case is entitled to any indulgence. Still, as the question of limitation has been argued before us, and as I am unable to agree with my brother Melvill, who considers this suit barred by limitation, I will shortly state my own opinion upon it.

The plaintiffs sue for a declaration that they are entitled to a half of the *Pátilki vatan* of the village of Tárghaum. They state how they are obliged to bring this suit in consequence of the defendants' denial of such their right before the Collector, and in consequence of the latter's action upon such denial. It is not disguised that their ultimate object, if they succeed in getting the declaration they seek now, is, by means of it, to obtain some redress at the hands of the revenue authorities; but with that object we have nothing to do. Upon the facts found by the lower courts the plaintiffs are clearly entitled to the declaration they seek, unless their claim is barred by the law of limitation; and I do not think that it is so barred.

It is urged for the appellant that, as this is a suit merely for a declaration of right and not for possession of any property, it is barred by Clause 16, Section 1, Act XIV. of 1859, the plaint having been filed more than six years after the 30th June 1865, when, according to the plaintiffs' own admission in their plaint, their cause of action arose; and in support of this contention we are referred to the case of *Mrinmoyee Dabea v. Bhoobunmoyee Dabea*. (5) But I do not think that case can govern this. It was a suit to obtain a declaration that a certain adoption was invalid, and not one, as the present is, to obtain a declaration that the plaintiff was entitled

(1) Special Appeal, No. 84 of 1876, *Khashaba v. Collector of Puna*, decided 13th September 1876, p. 207 of printed judgments, 1876, not reported.

(2) I. L. R. 1 Bom. 197.

(3) 12 Bom. H. C. Rep. 13.

(4) I. L. R. 1 Bom. 197.

(5) 15 Beng. L. R. 1.

1877.

MORU BIN
PATLAJI
v.
GOPA'L BIN
SATU.

to any share in immoveable property. The plaintiff's contention there was that, as it was "only a declaratory suit," and as there was "no provision in Act XIV. of 1859 for such a case," the Limitation Act did not affect it at all; and the court held that the Legislature intended to provide a limitation for every suit, and that the words of Clause 16, Section 1 of that Act were so general that it saw no ground "for saying that a declaratory suit such as this is, namely, to declare that there is no valid adoption, does not come within it." I do not understand that case as laying down the broad proposition of law the appellant here contends for, that for all declaratory suits the period of limitation is six years. The words above quoted from the judgment seem to me to show beyond a doubt that what the court had before its mind was only a suit to declare an adoption invalid, and that it did not mean to lay down any rule as to suits of a different description. I do not, therefore, think that that case has any application to the present one, in which the plaintiffs seek a declaration of their right to the *vatan* in dispute.

I have always understood twelve years, under Clause 12, Section 1 of Act XIV. of 1859, to be the limitation applicable to suits like the present. If Clause 12, Section 1, applies to such suits, the application of Clause 16 of that section is necessarily excluded by its very terms. The following cases will show that Clause 12 of that section has always been applied to such suits.

Krishnabhat v. Kapabhat ⁽¹⁾ was a suit in which the plaintiff sought to establish his right to the office of hereditary priest to a temple. The court held, reversing the decrees of both the lower courts, that the office was immoveable property, and that, therefore, the suit "should be held to be within Clause 12 of Section 9 of Act XIV. of 1859." Gibbs, J., in his judgment refers to a previous case, S. A. No. 425 of 1866, in which, he says, he and Mr. Justice Tucker had held the same, namely, that a claim "to establish a right" to the privileges and precedence attached to a hereditary office "came under Clause 12, Section 1 of the Limitation Act."

In *Balvantrav v. Purshotam* ⁽²⁾ a Full Bench, consisting of Westropp, C.J., and Gibbs, Lloyd, Melvill and Kembell, JJ.,

(1) 6 Bom. H. C. Rep. 137, A. C. J.

(2) 9 Bom. H. C. Rep. 99.

approved and followed the decision in *Krishnabhat v. Kapabhat*⁽¹⁾ holding "that Clause 12, and not Clause 16, of Section I of Act XIV. of 1859 is applicable to a suit to recover the fees of an hereditary office, such as a village *Joshi*." There the right to the office itself was in contest between the parties.⁽²⁾

The principle laid down in these cases has been approved by the Privy Council.⁽³⁾

Numerous other cases will be found laying down that for suits to declare the right to a *vatan* the limitation is twelve years under Clause 12, Section I of the Act; but it is unnecessary to refer to any more. It would appear that, even though no possession was asked for, where suits were brought to obtain mere declarations in respect of other kinds of immoveable property, twelve years' limitation has been applied.⁽⁴⁾

Suits to declare the right to hold lands free from Government assessment are governed by twelve years' limitation.⁽⁵⁾

For suits to establish a charge or lien on land the limitation is twelve years.⁽⁶⁾

Suits to declare unauthorized alienations of land void, are also held to be governed by the same limitation of twelve years: *Beer Pershad v. Doorga Pershad*;⁽⁷⁾ *Moonshee Syed Ameer Ali v. Mohendronath Bose*;⁽⁸⁾ *Jeonath v. Roopa*;⁽⁹⁾ *Rash Beharee Lall v. Burmessur Nauth*;⁽¹⁰⁾ *Bishonath Burmah v. Shreemutty Shushee Mookhee*.⁽¹¹⁾ I know of only one case, *Bhikaji v. Jagannath*,⁽¹²⁾ in which it would appear to have been laid down that "a suit by a reversioner, during a widow's lifetime, to obtain a declaration that a conveyance made by her is void, must be brought within six years from the date of the conveyance—Act XIV. of 1859, Section 1, Clause 16."⁽¹³⁾ The Calcutta cases above referred to do not appear to have been cited or considered by the learned Judges in that

1877.

MORU BIN
PATLAJI
v.
GOPAL BIN
SATU.

(1) 6 Bom. H. C. Rep. 137 A. C. J.

(2) 10 Bom. H. C. Rep. 287, note.

(3) In *Maharaja Fatesangji v. Desai Kallianrayoji*, 10 Bom. H. C. Rep. 281.

(4) 3 Calc. W. R. 6 Act X. Rul.; 17 *Ibid.* 281 Civ. Rul.; 18 *Ibid.* 21 Civ. Rul.; 19 *Ibid.* 33 Civ. Rul.; 21 *Ibid.* 178 (P. C.).

(5) 11 Bom. H. C. Rep. 1.

(6) See 8 Calc. W. R. 51 Civ. Rul.;

9 *Ibid.* 170, 318, 2 Mad. H. C.

Rep. 51, 307; 3 *Id.* 92; 3 *Id.* 364;

8 Bom. H. C. Rep. 61, A. C. J.;

9 *Id.* 53.

(7) Calc. W. R. 1864, 215 Civ. Rul.

(8) 2 Calc. W. R. 271, Civ. Rul.

(9) *Ibid.* 273, note.

(10) 10 *Id.* 30 Civ. Rul.

(11) 20 *Id.* 1 Civ. Rul.

(12) 10 Bom. H. C. Rep. 351.

(13) *Ibid.* 353.

1877.

MORU BIN
PATLAJI
v.
GOPAL BIN
SATU.

case, and, if the point arose before me, I should probably be disposed to take a different view of the law. The rule which, in my opinion, is fairly deducible from the above and other decided cases, is that Clause 16, Section 1, of Act XIV. of 1859, does not apply to all declaratory suits; that to suits in which a declaration of right to any immovable property is sought, the limitation prescribed in Clause 12 of that section applies; and that to all other declaratory suits, not otherwise provided for in the Act, the limitation in Clause 16 applies.

Such being my view of the law of limitation applicable to declaratory suits, I would confirm with costs the decrees of the lower courts, and declare that the plaintiffs are entitled to a moiety of the *Pátilki vatan*, whatever it consists of, such declaration not to interfere in any way with the Collector's authority to appoint whomsoever he chooses to officiate as *Pátil* under the existing law on that subject.

The Judges being thus divided in their opinion, the plaintiff Moru preferred the present appeal under the amended Letters Patent, 1865, Section 15.

Shámráv Vithal for the appellant.

Shántáráam Náráyan, who, with *Bhairavnáth Mangesh*, appeared for the respondent Gopál bin Satu (defendant), cited *Kuria v. Gururáv*⁽¹⁾ and *Lilá Morji v. Vásudev Moreshwar*⁽²⁾ in support of the argument that the defendant was not estopped from pleading limitation in the second special appeal, as the suit appeared to be barred on the face of the plaint, and, consequently, no remand was necessary.

The judgment of the Court was delivered by

WESTROPP, C. J. :—The plaint, which was presented upon the 25th August 1871, states that the cause of action accrued on the 30th day of June 1865. The defendant (who was the special appellant) contends that this is merely a suit for a declaratory decree, and, as such, falls within Clause 16, Section 1 of Act XIV. of 1859, and, not having been brought within six years of the alleged accruer of the cause of action, is barred, inasmuch as, he argues, that six and not twelve years is the period of limitation for

(1) 9 Bom. H. C. Rep. 282

(2) 11 Bom. H. C. Rep. 283,

1877.

 MORU BIN
 PATLAJI
 v.
 GOPAL BIN
 SATU.

declaratory suits, even though they should relate to immoveable property. The members of the Division Court differed in opinion—Mr. Justice Melvill holding that the plea of limitation was in time, and that Clause 16, Section 1 of Act XIV. of 1859 and not Clause 12, Section 1, was the enactment applicable to such a declaratory suit as the present suit, which, therefore, was barred. Mr. Justice Nánábhái Haridás held that the plea of limitation was too late, and, further, that, even if that were not so, the period of limitation was twelve and not six years, and hence the suit was not barred. Mr. Justice Melvill, being the senior Judge, the decree was made pursuant to his views, reversing the decree of the Assistant Judge, and rejecting the plaintiff's claim as barred by Act XIV. of 1859, Section 1, Clause 16.

The plaintiff has appealed under Section 15 of the High Court Charter of 1865. That appeal has been heard by my brothers, West and Pinhey, and myself.

None of the defendants in their written statements by way of defence raised the question of limitation, nor did they, or the Subordinate Judge who first tried the case, or Mr. Hosking, who heard the appeal from his decision, raise that question. Nor was it raised on the special appeal from Mr. Hosking's decree heard by Kemball and Nánábhái Haridás, JJ., sitting as a Division Bench of this court. They reversed Mr. Hosking's decree, and remanded the cause for the Assistant Judge to consider whether the plaintiff had established his right to be declared an eight-anna sharer in a *Pátilki vatan*, as stated in the plaint, "without regard to any one particular right forming a portion of it, except as evidence of the general right set up, and to decide aye or no—passing a fresh decree in accordance with his finding." No application for review of their decree, or appeal against it to Her Majesty in Council, has been made. That decree evidently limited within strict bounds the inquiry which the District Court, to which the cause stood remanded, was at liberty to institute on the new trial, and that court could not then have entertained the question of limitation. That being so, the circumstance, that Mr. Parsons, the Assistant Judge, who heard and decided that case on remand, did not raise or enter upon that question and decide it in favour of the defendants, does not constitute any valid objection to his decree on special appeal

1877.

MORU BIN
PATLAJI
v.
GOPAL BIN
SATU.

against it, and it was not, in our opinion, competent for the High Court on such special appeal to permit the defence of limitation to be raised. In *Munshi Buzl Ruheem v. Shreenath Bose* (1), Peacock, C.J., and Shumboonath Pandit, J., where a cause had been remanded by the District Court on a point affecting the merits, and the defendant, after that point had been determined against him by the Principal Sadr Amin, made a second appeal to the District Court, and then, for the first time, raised the defence of limitation, held that the last-mentioned court properly refused to enter upon that question. In *Kuria v. Gururáv* (2) the effect of a previous remand for the trial of a special issue in limiting the scope of this court's action, when the cause comes again before it on special appeal from the decree made by the lower court on remand, was not discussed, and that case, therefore, cannot be regarded as an authority on that point.

The Civil Procedure Code, Section 26, requires that the plaintiff should state the cause of action and when it accrued, and the 32nd Section enacts that "If upon the face of the plaintiff, or after questioning the plaintiff, it appear to the court that the subject matter of the plaintiff does not constitute a cause of action, or that the right of action is barred by lapse of time, the court shall reject the plaintiff: provided that the court may in any case allow the plaintiff to be amended if it appear proper to do so." As a matter of fact, the court of first instance did not reject the plaintiff when presented to it, and it is quite possible that the court refrained from so doing, notwithstanding the statement in it that the Collector's letter of the 30th June 1865 was the cause of action because the court perceived that no letter from the Collector or other revenue officer could constitute a cause of action against the defendants who were other persons, and that the real cause of action was the disturbance of the plaintiff in his share of the *Pátilki vatan*, the actual time of which disturbance does not appear upon the face of the plaintiff, although the dates of the various orders of the *Mámlatdár*, Collector, and Revenue Commissioner may do so. The actual disturbance would be the first time that the defendants appropriated to themselves any portion of the *vatan* which the plaintiff ought to have received. But

(1) 6 Calc. W. R. 178 Civ. Rul.

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

whether or not this was the reason which influenced the court of first instance in accepting the plaint without objection as to limitation, or requiring amendment, we, for the reason already stated, do not think that the defence of limitation can be raised for the first time after there has been a remand and on a special appeal from the decree of the court which has heard the cause on remand. If it do not appear to the court, either on the face of the plaint or from the plaintiff when questioned, that the suit is barred by limitation, there is nought in the Civil Procedure Code to show that the court of first instance, or other courts on appeal, should *ex mero motu*, without plea, raise the question of limitation. And, speaking for myself alone, I reserve the right to consider whether, even upon a special appeal, in a case in which there has not been any remand, I should follow *Saluji v. Rajsanji*⁽¹⁾ and *Davlata v. Beru*.⁽²⁾ There having, however, been a remand in this case, it was not, we think, competent for the Division Bench, to which there was a special appeal from the decree made on such remand, to permit the defence of limitation to be raised for the first time. To decide this case then upon that ground was virtually to review the decree of the Division Bench, which made the order of remand on the special question already mentioned. For, if the point of limitation were good, the Division Bench should have disposed of the case on that ground, and not have remanded the cause, as it did. One Division Bench has, we think, no authority thus to review the decree of another Division Bench. And it is clearly objectionable that, after the parties have been four times contesting the case on the merits, the defendant should, on the fifth occasion, treat all that had gone before as so much time wasted, and should raise the defence of limitation which naturally ranges itself under the category of preliminary objections to the suit, and, if not discovered and taken by the court at the first stage of the suit, as pointed out by Section 32 of the Civil Procedure Code, should be made by the defendant at the earliest opportunity afterwards, in order to prevent the waste of time and money which a different course would entail. I am now considering this matter with reference only to Act XIV. of 1859, as taken with Act VIII. of 1859, Sections 26 and 32, and not expressing any opinion upon the construction of Act IX. of 1871, Section 4.

(1) 2 Bom. H. C. Rep. 162, A.C.J.

(2) 4 Bom. H. C. Rep. 197, A.C.J.

1877.

MORU BIN
PATLAJI
v.
GOPA'L BIN
SATU.

1877.

MORU BIN
PATLAJI
v.
GOPA'L BIN
SATU.

Parker v. Elding,⁽¹⁾ which has been mentioned, was a case of jurisdiction not limitation, and the objection of want of jurisdiction appeared on the record. In *Lild Moroji v. Vāsudev Moreshwar*⁽²⁾ not only does the order of remand appear to have been for a new trial on the merits at large, but the ground on which the High Court dismissed the suit, when the decree made on remand was specially appealed against, was that there was no cause of action whatever—the right to redeem not having accrued when the suit was instituted—a very different ground from limitation. Under such circumstances it would have been impossible to have made a decree for the plaintiff there.

In *Gopálráv v. Bhavánráv*⁽³⁾ a party who had failed to dispute the jurisdiction in the court of first instance, the District Court, and on special appeal to this court, was held estopped from denying the jurisdiction when the cause subsequently came before this court on a fresh special appeal. See also *Ex parte Manohar Bhiv-ráv*⁽⁴⁾ and *Trilochun Doss v. Gugun Chunder Dey*.⁽⁵⁾ In the Palitana case (*Ladkuverbái v. Ghoel Shri Sarsangji Pratabsangji*)⁽⁶⁾ the defendant had, throughout the proceedings, disputed the jurisdiction—a circumstance which completely distinguishes that from the other cases now mentioned.

We, for the foregoing reasons, reverse the decree of the Division Bench of the 21st September 1876, and restore that of the Assistant Judge, Mr. Parsons, of the 18th January 1876, and direct the respondent (defendant) Gopál bin Satu to pay the costs of his special appeal (207 of 1876), which for the first time raised the defence of limitation, and the costs of this appeal from the decree of the Division Bench on that special appeal.

Decree of the Division Bench reversed, and that of the Assistant Judge restored.

(1) 1 East 352.

(2) 11 Bom. H. C. Rep. 283.

(3) Special Appeal No. 373 of 1873, decided by West and Nánábhái Hari-dás, JJ., 18th November 1874, p. 279 of printed judgments for 1874, not reported.

(4) 2 Bom. H. C. Rep. 374.

(5) 24 Calc. W. R. 413., Civ. Rul.

(6) 7 Bom. H.C. Rep. 150, 164, O.C.J.