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turbing the convictions in the case of prisoners Nos. 1, 2 and 4. As, however, we have come to the conclusion that a *farigh-khat* was actually executed, and as the persons concerned probably believed that it was valid, we think that a lighter sentence than that inflicted by the Session Judge will satisfy the ends of justice; and we, accordingly, reduce the sentences on prisoners Nos. 1, 2 and 4 to two months' rigorous imprisonment; and, as the sentence has been undergone, we direct the prisoners to be discharged.

## APPELLATE CIVIL.

*Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.*

1881
*August* 31.

VASUDEV VITHAL SAMANT (ORIGINAL DEFENDANT), APPLICANT, *v.* RAMCHANDRA GOPAL SAMANT, DECEASED, AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*The Hereditary Officers' Act (Bombay) No. III of* 1874, *Secs.* 24 *and* 25—*Act X of* 1876, *Sec.* 4, *Cl.* a, *para.* 2—*Civil Courts.*

Under Bombay Act III of 1874 the Civil Courts cannot entertain a suit which seeks to recover damages against the defendant for wrongly continuing in office as patel, instead of resigning in favour of the plaintiff, in obedience to a family custom which entitled the plaintiff to serve as patel every fourth year, whereby the plaintiff lost the emoluments of office.

*Quære*—whether the claims excluded by Act X of 1876 as amended by Act XVI of 1877, sec. 1, are limited to claims against Government.

THIS was an application, under the extraordinary jurisdiction of the High Court, against the decision of J. W. Walker, Assistant Judge at Ratnagiri, affirming the decree of P. B. Joshi, Second Class Subordinate Judge at Vengurla.

The facts of the case are fully stated in the judgment of the High Court.

The Assistant Judge, in affirming the decree of the first Court on appeal, observed: "It is said that no suit lies, as the Collector had the right of appointing. The case alleged, and found proved, is that, by the village custom, certain families have the right of acting as *kabulayatdars* of the village in rotation, and that each outgoing *kabulayatdar* has to give his assent to the Collector for the appointment of his successor, and that, when plaintiff's

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turn came round, defendant wrongfully withheld his assent, and so remained in the management himself. Plaintiffs are, therefore, clearly entitled to sue. Next, it is said that the suit is barred by the Hereditary Officers' Act and by a previous suit brought by plaintiffs for partition. The Vatan Act and the previous suit, referred to in the defendant's reply, have nothing whatever to do with the claim. The right in question appears to be that of a farmer of the land revenue appointed by the Collector. The former suit cannot possibly bar this claim, as this is a suit for damages; and the partition suit could not include the right in dispute, as the right cannot admit of partition."

On the 20th January, 1881, on the application of *Ghanasham Nilkanth Nadkarni* on behalf of the defendant, the High Court (Nanabhai Haridas and Birdwood, JJ.,) granted a *rule nisi*, calling upon the plaintiffs to show cause why the decrees of the lower Courts should not be set aside. The rule was argued before Westropp, C. J., and Pinhey, J., on the 31st August 1881.

*Ghanasham Nilkanth Nadkarni* appeared for the applicant.

*Pandurang Balibhadra* appeared for the respondents.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—This is an application to reverse the decree of the Subordinate Judge of Vengurla awarding Rs. 24 to the plaintiff as damages, and also to reverse the decree of the Assistant Judge which affirmed that of the Subordinate Judge. The plaintiff claims to be a member of a family in which is vested the hereditary office of patel of the village of Parula, and alleges that it is the custom of the family that the co-parceners should act as patel in rotation, each patel holding office for a year, and that the turn of the plaintiff occurs every fourth year, and that, according to his family custom, the defendant was bound to give his written consent to the plaintiff's *kabulayat* being accepted by the revenue authorities for the official year 1875-76; but states that, notwithstanding this, the defendant, in order to cause him damage, refused to give his written consent as aforesaid, and himself gave the *kabulayat* for that year, in consequence of which the Mahalkari declined to take the plaintiff's *kabulayat* and that thereupon the plaintiff applied to the Assistant Collector of Ratnagiri to direct that the plaintiff's *kabulayat*

should be taken, and inquiry into that application having continued until the end of the year, an order was passed by the Assistant Collector to the effect that, the year having expired, nothing remained to be done; the plaintiff thereupon applied that his *kabulayat* to serve as patel should be taken for the next year, but an order was passed rejecting that application on the ground that the official year 1876-77 was not the plaintiff's turn, and that the defendant refused to assent to the acceptance of the plaintiff's *kabulayat*. For these reasons the plaintiff claimed Rs. 98 damages, whereof, as already stated, the Local Courts awarded to him Rs. 24.

The suit of the plaintiff is then, when more concisely stated, an action to recover damages against the defendant for wrongly continuing in office as patel instead of resigning in favour of the plaintiff, in obedience to a family custom which entitled the plaintiff to serve as patel every fourth year, whereby the plaintiff lost the emoluments of office.

The learned pleader for the defendant refers to two enactments as excluding the jurisdiction of the Civil Courts to entertain any such claim as that put forth in the present suit, viz., Act X of 1876, sec. 4, cl. *a*, para. 2, which prohibits Civil Courts exercising jurisdiction over "claims to perform the duties of any such officer or servant (*i. e.*, hereditary officers appointed or recognized under Bombay Act III of 1874, or any other law in force or any other village officer or servant) or in respect of any injury caused by exclusion from such office or service." That Act has, however, been amended by Act XVI of 1877, sec. 1, which restores to the Civil Courts of certain districts, amongst which Ratnagiri is one, such jurisdiction as, according to the terms of any law in force on the 28th March, 1876, they could exercise over claims against Government relating to property appertaining to any hereditary officer appointed or recognised under Bombay Act III of 1874, &c., or of any other village officer, &c. And, independently of that and of whatever may be its effect, there may be a question whether the claims excluded, as above, by Act X of 1876 are limited to claims against Government—a point on which we do not deem it necessary at present to express any opinion, inasmuch as we think that the other enactment, relied upon by the defendant as

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excluding the jurisdiction of the Civil Courts, is fatal to any such jurisdiction. That enactment is the Hereditary Officers' Act. (Bombay) III of 1874. Its 24th section enacts that the duties appertaining to any hereditary office shall be performed by the representative vatandars or by deputies or substitutes as hereinafter provided, and by no other persons." The 25th section then enacts that "it shall be the duty of the Collector to determine, as hereinafter provided, *the custom of the vatan as to service*, and what persons shall be recognized as representative vatandars for the purpose of this Act, and to register their names." Subsequent sections point out the mode in which the Collector is to inquire into and determine who are representative *vatandars*, and what is the custom of the *vatan* as to service. Notwithstanding this legislation, which expressly assigns to the Collector the ascertainment and determination of the family custom, the Local Courts have taken upon themselves the function which belongs exclusively to the Collector, and have determined the family custom as to service in relation to the patelship of Parula, and have given damages to the plaintiff for a breach by the defendant of that custom in not resigning the office of patel at the end of the official year 1874-75 in favour of the plaintiff. They have, in fact, held that the defendant was bound by that custom not only to resign office, but to assent, in writing, to the nomination of the plaintiff as his successor. If this be not entertaining a suit for what is substantially the establishment of the right of a particular person to officiate as hereditary officer, we do not know what it is; and there are, at least, three reported decisions that, since the Hereditary Officers' Act came into force, such an action cannot be entertained by a Civil Court—*Khando Narayan Kulkarni* v. *Apaji Sadashiv Kulkarni*[1] and *Chinto Abaji Kulkarni* v. *Lakshmibai kom Sakharam Antaji*[2]; and see *Gopal Hanmant* v. *Sakharam Govind*[3], *Ganpatrav* v. *Rangrav*[4] and *Gavdapa* v. *Shivbasangavda*[5].

We are at some difficulty to understand how the Assistant Judge considered himself justified in saying that the Hereditary Officers' Act has "nothing whatever to do with the claim".

(1) I. L. R., 2 Bom. 370.
(2) I. L. R., 2 Bom., 375.
(3) I. L. R., 4 Bom., 254.
(4) See note (1) *infra*, p. 133.

See note (2) *infra*, p. 133

For these reasons we hold that the Local Courts had not any jurisdiction to entertain this suit; and we, therefore, reverse the decrees therein, respectively, of the Assistant Judge and of the Subordinate Judge, with costs throughout, including the costs of this application.

*Decree reversed.*

NOTE (1).—*Ganpatrav* v. *Rangrav* (Second Appeal No. 263 of 1879) was decided by Melvill and Pinhey, JJ., on the 30th September, 1879. The following are their judgments:—

MELVILL, J.—The only injury which the plaintiff alleges in his plaint is that the defendants have prevented the recognition, by the Collector, of his right to officiate as patel. This is an injury of which the Civil Courts can no longer take cognizance—*Khando Narayan Kulkarni* v. *Apaji Sadashiv Kulkarni* and *Chinto Abaji Kulkarni* v. *Lakshmibai kom Sakharam Antaji*(1). If the plaintiff had alleged that he had been interfered with in the enjoyment of the estate or emoluments attached to the *patelki vatan*, it might have been competent to the Civil Courts to make a decree declaratory of his right to enjoy or participate in such estate or emoluments; but no such interference is alleged, and, in the absence of an allegation of any cause of action, the Courts cannot make any declaration of the plaintiff's right to share in the *vatan* property.

PINHEY, J.—The Mukhtyar of the plaintiff was examined, and distinctly admitted that there had been no interference with the vatan property; and the wording of the plaint distinctly shows that the only thing of which the plaintiff has to complain is the refusal of the Assistant Collector to appoint the plaintiff to officiate as patel on the representation of the defendants. The case, therefore, clearly falls within the rulings in *Khando Narayan Kulkarni* v. *Apaji Sadashiv Kulkarni* (2) and *Chinto Abaji Kulkarni* v. *Lakshmibai kom Sakharam Antaji*(3).

The decree of the District Court must be confirmed with costs.

NOTE (2).—*Gavdapa* v. *Shivbasangavda* (Second Appeal 317 of 1877) was decided by Westropp, C. J., and Kemball, J., on the 18th February, 1878. The following is the judgment:—

WESTROPP, C. J.—This suit was instituted upon the 1st of March, 1876,—that is to say, since Bombay Act III of 1874 came into operation, which, it has been already decided, excludes the jurisdiction of Civil Courts to declare that persons are eligible to serve as hereditary officers of such a kind as are dealt with by that Act. The reasons for this ruling are fully given in *Chinto Abaji Kulkarni* v. *Lakshmibai* (Second Appeal 270 of 1877), Printed Judgments of 1878, p. 5. We must on this ground reverse the decree of the District Judge, and restore that of the Subordinate Judge. The plaintiff must pay to the defendant the costs of the suit and both appeals. We express no opinion on the merits of the plaintiff's case. The precedent—Special Appeal 40 of 1877 (Printed Judgments of 1877, p. 98)—referred to by the District Judge, is not in point. It did not relate to an office, but to land.

(1) I. L. R., 2 Bom., 370 and 375. (2) I. L. R., 2 Bom., 370.

(3) *Ibid.* 375.