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Again in Fazul's letter, which is set out in the answer to Fazul's suit of 1862, Fazul admits that the property in Hubibbhoy's hands was self-acquired, except so much as had been vested in him as trustee of the settlement of 1850. Lastly, throughout the correspondence between the parties during the many years preceding this litigation [548] and when they were on bad terms, there is not to be found a hint that the property in defendant's hand was ancestral. Upon the whole of the evidence bearing on this part of the case, we think that, although it makes it possible that Hubibbhoy inherited some property from his father, it must be regarded as falling short of such proof as the plaintiff ought to have given, under all the circumstances of the case, that it contributed materially to the funds which Hubibbhoy employed in the business. We must, therefore, reverse the decree, with costs throughout on the plaintiff.

Attorneys for the plaintiff (respondent) :—Messrs. *Ardesir, Hormasji and Dinsha.*

Attorneys for the first defendant (appellant) :—Messrs. *Jefferson, Bhaishankar, Dinsha and Kanga.*

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13 B. 548.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

LIMBA BIN KRISHNA AND OTHERS (*Original Plaintiffs*), *Appellants v.* RAMA BIN PIMPLU AND ANOTHER (*Original Defendants*), *Respondents.** [3rd September, 1888.]

Suit for a declaration of plaintiffs' right to officiate as priests and receive offerings—Jurisdiction of Civil Courts—Declaratory decree—Specific Relief Act, s. 42—Practice—Amendment.

A suit will lie in a Civil Court for a declaration of the plaintiffs' right to officiate, in alternate years, as priests in a temple and receive the offerings to the idol.

A suit should not be dismissed by an appellate Court on the ground of its being one asking merely for a declaratory decree and no consequential relief, where that objection has never been taken by the defendants to the suit. The plaintiffs should in such a case be allowed an opportunity of amending their plaint.

[F., 14 M. 46 (48); R., 15 M. 15 (18); 5 Bom. L.R. 329 (330); 12 C.L.J. 74 (78) = 14 C.W.N. 1057 = 6 Ind. Cas. 864; 11 Ind. Cas. 231 = 96 P.R. 1911 = 216 P.L.R. 1911 = 143 P.W.R. 1911; 14 Ind. Cas. 776 = 23 P. R. 1912 = 93 P.W.R. 1912; U.B. R. (1897—1901) 231; D., 19 A. 429; 26 C. 845 (850); 15 M. 255 (257).]

SECOND appeal from the decision of G. Jacob, Assistant Judge of Satara, in appeal No. 326 of 1884 of the District File.

The plaintiffs sued to have their right declared to officiate as priests in a certain temple, and receive the offerings in alternate years, alleging that the defendants had obstructed them in the exercise of their right in *Shake* year 1802 (1880 A. D.), and had [549] also dispossessed them of a certain portion of the temple lands. They also prayed for possession of this land.

The defendant No. 1 denied the plaintiffs' right, and contended that he alone had the right of conducting the worship and taking the offerings in the temple; that the land in dispute had been in his possession for

* Second Appeal, No. 356 of 1886.

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many years, and that the claim was time-barred. Defendant No. 2 admitted the claim.

The Subordinate Judge held that the plaintiffs and defendant No. 1 had an equal right of worshipping and taking the offerings in the temple, and that the plaintiffs were entitled to recover possession of the land in dispute. He, therefore, passed a decree in plaintiffs' favour.

On appeal the Assistant Judge was of opinion that a suit would not lie for a mere declaration of a right to worship and receive offerings, though a suit would lie to recover fees or emoluments taken by a rival claimant. He, therefore, held that the Civil Courts had no jurisdiction to entertain the plaintiffs' suit for a mere declaratory decree.

He was further of opinion that, under s. 42 of the Specific Relief Act, a declaratory decree could not be granted, as the plaintiffs had not asked for any further relief in the shape of compensation for the fees wrongfully taken by the defendants or for an injunction restraining defendants from interfering with their exercise of the right to worship in the future.

As to the land in dispute, the Assistant Judge held that the plaintiffs' title was not established. He, therefore, reversed the Subordinate Judge's decree, and rejected the plaintiffs' claim *in toto*.

Against this decision the plaintiffs preferred a second appeal to the High Court.

Vasudev R. Joglekar, for appellants, contended that the Civil Court had jurisdiction to entertain the suit He referred to the following cases :—*Pranshankar* v. *Prannath Mahanand* (1); *Debendronath Mullick* v. *Odit Churn Mullick* (2).

[550] *G. R. Kirloskar*, for respondents,—The offerings to the idol are gratuitous, and no suit lies for a declaration of the plaintiffs' right to receive such offerings—*Sangapa* v. *Gangapa* (3); *Rama* v. *Shivram* (4); *Narayan Vithe Parab* v. *Krishnaji Sadashiv* (5).

JUDGMENT.

The judgment of the Court was delivered by

BIRDWOOD, J.—The plaintiffs seek a declaration of their right to officiate, in alternate years, as priests in a certain temple and to receive, in those years, the offerings of worshippers in the temple. They seek also to be awarded certain temple lands belonging to their share. The Subordinate Judge awarded the claim; but his decision has been reversed by the Assistant Judge on the following grounds:—(1) that the Civil Courts have no jurisdiction to entertain the first part of the claim; (2) that the grant of a declaratory decree would be opposed to s. 42 of the Specific Relief Act, as certain further relief was not asked for, and (3) because the Subordinate Judge had mistaken the nature of the claim to the land, the suit not having been one for partition, and the evidence being insufficient to establish the plaintiffs' title. As to the first objection taken by the Assistant Judge to the Subordinate Judge's decision, we observe that, in *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry* (6), Couch, C. J., described the right of a plaintiff to perform the worship of an idol as "property" subject to partition, the joint owners being entitled to perform the worship in turn; and in *Debendronath Mullick* v. *Odit Churn*

(1) 1 B.H.C.R. 12. (2) 3 C. 390. (3) 2 B. 476.
(4) 6 B. 116. (5) 10 B. 233. (6) 14 B.L. R. 166.

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Mullick (1), it was held by the Calcutta High Court that a refusal to deliver up an idol, so as to prevent the priest from performing his turn of worship, gave the aggrieved party the right to sue for damages. In *Pranshankar* v. *Prannath Mahanand* (2), it was held that an action would lie to obtain a binding declaration of a person's right to perform the duties of a *pujari* and to receive the proceeds of the *mandir*. This last decision, we think, governs the present case, in which there is no question as to the right of either the plaintiffs or the defendants to recover the offerings from the [551] worshippers, it being apparently admitted that the person performing the service has the right to the fees. The case is not one, therefore, to which the decision in *Shankara* v. *Hanma* (3) could be applied. Nor is the decision in *Narayan Vithe Parab* v. *Krishnaji Sadashiv* (4) applicable, for it cannot be said that the office in question is a mere dignity unconnected with any emoluments.

The second objection taken by the Assistant Judge was not suggested by defendant No. 1, either in the original suit or the appeal. If the claim was really open to the objection, the plaintiffs ought to have been allowed the opportunity of amending their plaint when presented, and should now be allowed that opportunity, if necessary.

As to the third objection, we think that the Subordinate Judge's decision as to the land is not open to the comment that it is based on "theoretical considerations" or on "inferences raised as to the most scientific boundary," and that it ought not to have been reversed on that ground. The plaintiffs' title to a specific portion, amounting to a half of the temple lands, is admitted. The real question is as to the actual boundary between the plaintiffs' land and the defendants' land. That question is one of evidence, and should be so dealt with.

We reverse the decision of the lower appellate Court, and remand the case for a re-hearing of the appeal on the merits. Costs to abide the result.

Decree reversed, and case remanded.

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13 B. 552.

[552] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

KASAM SAHEB VALAD SHA AHMED SAHEB AND ANOTHER (*Applicants*) *v.* MARUTI BIN RAMBHAJI (*Opponent*).* [10th September, 1888.]

Mamlatdars' Courts—Procedure applicable to such Courts—Bombay Act III of 1876, *ss.* 17 *and* 18—*Civil Procedure Code not applicable.*

Where a person is dispossessed in execution of a Mamlatdar's decree against a third party, his proper remedy is by a suit, and not by a miscellaneous application.

Though the Mamlatdars' Courts, as constituted under Bombay Act III of 1876, are Civil Courts, subject to the revisional jurisdiction of the High Court, it does not follow that the provisions of the Code of Civil Procedure are generally applicable to those Courts.

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* Application under Extraordinary Jurisdiction No. 76 of 1888.

(1) 3 C. 390. (2) 1 B. H. C. R. 12.
(3) 2 B. 470. (4) 10 B. 233.