APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice.

AHIMKHAN VALAD HYDERKHAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* DADAMIYA VALAD HYDERKHAN AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1909. *August* 2.

Hereditary Offices Act (Bom. Act III of 1874), sections 25, 36(1)—Death of registered Vatandar—Representation—Eldest son or other nearest heir of the deceased—Suit for declaration—Jurisdiction.

Section 25 of the Hereditary Offices Act (Bom. Act III of 1874) imposes the duty upon the Collector of determining the custom of a Vatan and what person shall be recognized as representative Vatandar.

A suit for a declaration that the plaintiff is the nearest heir of a deceased representative Vatandar is maintainable under section 36 of the Act notwithstanding that it is manifest that the declaration is sought for the purpose of establishing a fact which would enable the plaintiff to have his name entered in the Vatan Register.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Násik, confirming the decree of Gulabdas Laldas, First Class Subordinate Judge.

The plaintiff sued for a declaration that he was the eldest son of Hyderkhan deceased, that the deceased who died about 2½ years before the institution of the suit was Vatandar Police Patil of Mouze Makhmalabad and owned an eight annas share in the Vatan and had his name entered in the Government books as such, that though the plaintiff was the eldest son, a dispute

* Second Appeal No. 10 of 1909.

(1) Sections 25 and 36 of the Hereditary Offices Act (Bom. Act III of 1874) run as follows :—

25. 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.

36. When any representative Vatandar dies, it shall be the duty of the Patil and village-accountant to report the fact to the Collector; and the Collector shall, if satisfied of the truth of the repor , register the name of the eldest son or other person appearing to be nearest heir of such Vatandar as representative Vatandar in place of the Vatandar so deceased. A certificate of heirship or a decree of a competent Court shall, until revoked or set aside, be conclusive proof of the facts stated or determined in such certificate or decree.

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having arisen as to seniority between him and his two brothers, defendants 1 and 2, the Assistant Collector ruled on the 11th October 1906 that defendant 1 was the senior of the three, that the Collector, on appeal by the plaintiff, confirmed the order of the Assistant Collector on the 10th September 1906, that the said orders of the Revenue Department had prejudiced the plaintiff's right of *vadilki* (eldership) and that the plaintiff's name could not be entered in the Vatan Register as Vatandar Patil unless and until he established his right as the eldest son and obtained a declaration to that effect from the Civil Court. It was further urged that though the Revenue Authorities were competent to appoint or select any one of the descendents of the Vatandar Police Patil's family for the office and enter the Vatan on his name, still that circumstance did not oust the jurisdiction of the Civil Court to determine which of the members of the Vatandar family was the senior and that the plaintiff was officiating as Vatandar at the time of the suit and was deputed to the office by Hyderkhan during his life-time. The suit was filed on the 20th February 1907.

The defendants answered that defendant 1 was Hyderkhan's eldest son and not the plaintiff, that the right to determine which member of a Vatandar's family was *vadil* or senior belonged to the Revenue Department only, that the claim was not cognizable by the Civil Court and that it was time-barred.

The Subordinate Judge found that the suit for the relief claimed was not cognizable by the Civil Court and that the plaintiff was not entitled to any relief. He, therefore, dismissed the suit relying on the decision in *Raoji* v. *Genu*[1].

On appeal by the plaintiff the District Judge confirmed the decree for the following reasons:—

The case appears to me to be exactly parallel with the case cited by the lower Court, *Raoji* v. *Genu*, I. L. R., 22 Bom. 344. In that case it appears that a Vatan Register had been framed and that the declaration of the Civil Court was sought merely to induce the Collector to enter the name of Raoji rather than of Genu as representative Vatandar in place of Genu's father deceased. This was held not to be admissible under section 25, Act III of 1874. The law being

(1) (1896) 22 Bom. 344.

that while it is permissible to sue to prove that I am Vatandar and not an outsider it is not permissible for me who am admittedly a Vatandar to sue that I be declared representative Vatandar.

At first sight it appears as if the legislature intended to exclude the Civil Courts only in the case of the original framing of the Vatan Register. This is what is referred to in section 25. The method in which the register is to be framed is laid down in sections 26 to 32. Sections 33 to 37 seem to refer to questions arising after the framing of the register owing to the death of persons entered in the register.

Under section 36 the Collector has no option as to the person he is to enter in place of Vatandar deceased. He must enter his eldest son or other nearest heir. Decrees and orders of Civil Courts are conclusive proof of the facts declared therein. Such decrees, however, are I suppose decrees in *bonâ fide* litigation about subjects other than the actual right of succession. It being intended to prevent the evils of litigation about succession to Vatans.

In any case the case quoted above seems to me to bind me as it is as far as I can see exactly on all fours with the present case.

The plaintiff preferred a second appeal.

N. A. Shiveshvarkar for the appellant (plaintiff):—Under section 11 of the Civil Procedure Code of 1882, the Civil Courts are bound to entertain any suit of a civil nature unless its cognizance is barred either expressly or by implication by any enactment. In the present case the plaintiff sued for a declaration that he is the eldest son. Such a suit is not barred by the Hereditary Offices Act. The lower Courts relying on the decision in *Raoji* v. *Genu*[1] held that the suit was not cognizable by a Civil Court. This is a wrong view. The decision referred to has reference to section 25 of the Act. By that section the duty of framing the Vatan Register is cast upon the Collector. The Register having been framed the plaintiff in that suit asked for a declaration that he was the representative Vatandar alleging that the defendant took advantage of the plaintiff's absence and got himself recognized as such by the Collector. That suit was dismissed on the ground that the declaration, if made, would in effect be a declaration of the plaintiff's status as representative Vatandar and this duty was cast upon the Collector by section 25 of the Act and not upon the Civil Court. See the definition of "Representative

(1) (1896) 22 Bom. 314.

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Vatandar" given in section 4 of the Act. Representative Vatandar is a Vatandar registered by the Collector under section 25. The registration had already been made and the plaintiff wanted to get the registration altered. Such a suit could not be entertained by the Civil Court and it was dismissed. In the present case we do not seek the alteration of the register. Under section 25 our father had been registered as the representative Vatandar and the father having died, we want a declaration by the Civil Court that we are the eldest son, so that, we can, on such declaration being made, apply to the Collector to have our name registered in the place of our deceased father and the declaration would be binding on the Collector: section 36 of the Act. In support of our contention we rely on the unreported decision in second appeal No. 298 of 1903 which is on all fours.

K. M. Taleyarkhan for the respondents (defendants):—We submit that a suit like the present is not cognizable by the Civil Court. The duty of conducting all investigations under the Hereditary Offices Act is cast upon the Collector. By section 72 of the Act the Collector acts as a judicial officer and he alone has jurisdiction to investigate the matter: *Khando Narayan* v. *Apaji Sadashiv*[1]. Besides, even if the Civil Court entertained the suit, its decision would not bind the Collector and he need not act upon it. The last paragraph of section 36 merely means that if at the time of the investigation one of the parties produces a certificate of heirship or a decree as mentioned in the section, the Collector need not hold further inquiry but must act upon the certificate or the decree. If such a certificate or decree is subsequently set aside then the Collector would proceed to inquire as to who is the eldest son or nearest heir.

In second appeal No. 298 of 1903 the contention of the plaintiff was that he and defandants 3 and 6 were the heirs and that defendant 1 was not the heir of the deceased Vatandar. Defendant 1's title was thus completely denied. Such a case would clearly be cognizable by a Civil Court. But when there is no

(1) (1877) 2 Bom. 370.

dispute as to who should officiate, then the matter is solely within the cognizance of the Collector.

SCOTT, C. J.:—The plaintiff sued for a declaration that he was the eldest son of a deceased Vatandar Police Patil who died two years and a half previously, stating that the cause of the suit was that in a dispute between him and the defendant the Collector had ruled that the defendant was the eldest son and that the plaintiff's name could not be entered as Vatandar Patil unless he established his right as eldest son by a decree of the Court.

It is contended on behalf of the defendant that this suit is not maintainable by reason of the provisions of the Bombay Hereditary Offices Act (Bombay Act III of 1874).

The defendant's contention commended itself to the learned District Judge because he considered himself bound by a decision of this Court in *Raoji* v. *Genu*[1] to decide that he had no jurisdiction. A reference to that decision will show that the *ratio decidendi* was that the case fell under section 25 of the Hereditary Offices Act under which the duty is imposed upon the Collector of determining the custon of a Vatan and what person shall be recognized as representative Vatandar, and that the relief asked for in the suit involved the determination by the Civil Court of a question which by the section was expressly reserved for the determination of the Collector.

Section 36 provides that the person who shall be entered as representative Vatandar after the death of a representative Vatandar is the eldest son or other person appearing to be the nearest heir of such Vatandar. The question who is the eldest son is a question of fact. If the fact be established, the Collector has no choice in the matter unless there appears to be a nearer heir. The conclusive determination of the question whether the statutary condition of eldership or heirship is satisfied becomes therefore a matter of importance to a person claiming to be the eldest son or nearest heir, and it is a question which is not by the words of the Act reserved for the exclusive determination of the Collector. This view of section 36 was taken by this Court in *Dalpat Jogidas* v. *Punja Zipa*[2] when upon review it was held

(1) (1896) 22 Bom. 344.

(2) S. A. No. 298 of 1903 (Unrep.)

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that a suit for a declaration that the plaintiff was the nearest heir of a deceased representative Vatandar was maintainable notwithstanding that it was manifest that the declaration was sought for the purpose of establishing a fact which would enable the plaintiff to have his name entered in the Vatan Register.

I, therefore, reverse the decree of the District Judge and remand the case to him for disposal on the merits.

Costs to be costs in the cause.

Decree reversed,

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1909.
August 9.

BAJABA *alias* BAJIRAO VISHVANATH OKE (ORIGINAL PLAINTIFF), APPELLANT, *v.* TRIMBAK VISHVANATH OKE AND TWO OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Partition—Certain family property allotted to one branch of the family—Subsequent purchase of the allotted property by a member of another branch with his own money—Exclusion by the purchaser of the other member of his branch—Self-acquisition.

Certain family property was allotted to a member of one branch of the family in virtue of a compromise. It was subsequently purchased by a member of the other branch with his own money which was not part of the joint family money. The purchaser did not intend by the purchase to merge the property in the joint family property and excluded his brother from it.

Subsequently the brother having brought a suit for partition claimed a share in the property purchased by the defendant along with a share in the other joint property,

Held, that the plaintiff was not entitled to claim a partition subject to the right of the defendant to retain an additional quarter share for himself, but that the property purchased by the defendant became his self-acquisition.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, confirming the decree of Gulabdas Laldas, First Class Subordinate Judge.

* Second Appeal No. 1033 of 1908.