APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

CHINAVA AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS, *v.* BHIMANGAUDA (ORIGINAL PLAINTIFF), RESPONDENT.* 1896. *February* 24.

Vatandár, who is a—Person having an hereditary interest—Hereditary interest, what is—Hereditary Offices Act (Bom. Act III of 1874), Secs. 4 and 5(1) *—Amending Act (Bom. Act V of 1886), Sec. 2*(2).

Giriapa by his will devised all his property, which was vatan property, to Venkangauda, a distant cousin. The plaintiff as the nearest heir of Giriapa

* Second Appeal, No. 157 of 1893.

(1) Sections 4 and 5 of the Bombay Hereditary Offices Act (Bombay Act III of 1874) :—

4. "Hereditary office" means every office held hereditarily for the performance of duties connected with the administration or collection of the public revenue, or with the village-police, or with the settlement of boundaries or other matters of civil administration ;

the expression includes such office even where the services originally appertaining to it have ceased to be demanded ;

the vatan property if any and the hereditary office and the rights and privileges attached to them together constitute the vatan.

"Vatandár" means a person having an hereditary interest in a vatan ; it includes a person holding vatan property acquired by him before the introduction of the British Government into the locality of the vatan, or legally acquired subsequent to such introduction, and a person holding such property from him by inheritance ; it includes a person adopted by an owner of a vatan or part of a vatan, subject to the conditions specified in sections 33 to 35.

5. (1) Without the sanction of Government it shall not be competent :

(*a*) to a vatandár to mortgage, charge, alienate or lease, for a period beyond the term of his natural life, any vatan or any part thereof, or any interest therein, to or for the benefit of any person who is not a vatandár of the same vatan ;

(*b*) to a representative vatandar, to mortgage, charge, lease or alienate any right with which he is invested, as such, under this Act.

(2) In the case of any vatan in respect of which a service commutation settlement has been effected, either under section 15 or before that section came into force, clause (*a*) of this section shall apply to such vatan, unless the right of alienating the vatan without the sanction of Government is conferred upon the vatandárs by the terms of such settlement or has been acquired by them under the said terms.

(2) Section 2, Bombay Act V of 1886 :—

2. Every female member of a vatan family other than the widows of the last male owner, and every person claiming through a female, shall be postponed, in the order o

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claimed the property, contending that Venkangauda had not an "hereditary interest" in the vatan within the meaning of section 4 of the Bombay Hereditary Offices Act (III of 1874), that he was not a "vatandar" capable of taking under the will of Giriapa within the meaning of section 5, and that the will of Giriapa was, therefore, inoperative.

Held, that Venkangauda had not "an hereditary interest" in the vatan, and that the devise to him was, therefore, inoperative. The expression in section 4, "persons having an hereditary interest in a vatan," means persons having a present interest of an hereditary character in the vatan and does not include persons who may have a *spes successionis* however remote. "Hereditary interest" means an interest acquired by inheritance as distinguished from an interest acquired by purchase, gift or other modes of acquisition.

SECOND appeal from the decision of J. L. Johnston, District Judge of Dhárwár.

The plaintiff, who claimed to be the heir of one Giriapa, the deceased husband of the first defendant (Chinava), sued for a declaration that the second defendant had been invalidly adopted by the first defendant (Chinava), she having no authority to make the adoption. The parties were Jains.

The defendants pleaded *(inter alia)* that plaintiff was not the heir of Giriapa, but that in any case he could not succeed, as the property was vatan property and he had forfeited his portion of the vatan, thereby ceasing to be a vatandár qualified to inherit.

At the hearing it was proved that Giriapa had left a will whereby he had devised all his property to one of his relations named Venkangauda, and had forbidden his widow (defendant No. 1) to adopt without Venkangauda's consent. The plaintiff contended that as to vatan property at all events the will was invalid.

The Subordinate Judge found that the adoption of the second defendant having been prohibited by Giriapa was invalid. He held also that the plaintiff having forfeited his share of the vatan property was no longer a vatandár, and was, therefore, not entitled to succeed to Giriapa's vatan property.

succession to any vatan, or part thereof, or interest therein, devolving by inheritance after the date when this Act comes into force, to every male member of the family qualified to inherit such vatan, or part thereof, or interest therein.

The interest of a widow in any vatan or part thereof shall be for the term of her life or until her marriage only.

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As, however, Giriapa had left other property (not vatan) to which the plaintiff might succeed after the death of the widow (defendant No. 1) the Subordinate Judge passed a decree declaring the adoption of defendant No. 2 null and void as against the plaintiff.

The District Judge confirmed the decree.

The defendants filed a second appeal in the High Court.

The High Court (Sargent, C. J., and Fulton, J.) held that, unless it was found that the plaintiff was entitled to some of the property left by Giriapa, the Court ought not (as there was no other special reason for making it) to make any declaration as to the validity or otherwise of the adoption of the second defendant. As to the plaintiff's claim to the property, Giriapa had left all his property to Venkangauda. As to such part of it as was not vatan, no question could arise between the parties to the suit. As to such part as was vatan, the validity of the devise would depend on whether Venkangauda was a vatandár at the time of the testator's death. If he was not, then the devise would be invalid, and the plaintiff would be entitled, unless he had ceased to be a vatandár at the time of the testator's death. The High Court, therefore, sent back issues on both these points. The following was the interlocutory judgment:—

"It has been argued before us on this second appeal that a suit would lie for a declaratory decree setting aside the alleged adoption of the defendant No. 2 quite independently of any claim by the plaintiff to property. The case of *Kalova* v. *Padapa*(1) has been relied on by the plaintiff. There the son sought to impeach the adoption, and the Court held that he was entitled to do so, as it would enable him, if successful, to obtain an injunction against any intervention by the alleged adopted son in the performance of the *Shrádh* and other ceremonies. However, amongst Jains, to which caste the parties belong, there are no *Shrádh* or other religious ceremonies of any description, and as no other special reason has been assigned for seeking the declaration in the present suit, we do not think that in the absence of any property the Court in the exercise of its discretion ought to make a declaration.

"As the testator gave all his property by his will to Venkangauda, no question could arise between the parties, at any rate in regard to property other than vatan property. As to the latter, the validity of the alienation by will to

(1) I. L. R., 1 Bom., 248.

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Venkangauda would depend under the Vatandár Act on his being a vatandár at the time of Giriapa's death.

"Assuming that such devise would not pass the property to Venkangauda, there still remains the question whether the plaintiff would inherit such property in view of the defendants' contention that the plaintiff had forfeited his right of inheritance. We do not think that either of these questions has been satisfactorily dealt with by the Court below, and, therefore, it will be necessary to send down issues for that purpose.

"As to the validity of defendant No. 2's adoption, assuming that plaintiff can impugn it by this suit, we think the decision of the District Court is correct. The law is well settled, as laid down by Sir M. Westropp in *Bayabai* v. *Bala*(1), that if the implied authority of the widow to adopt is rebutted by an express refusal on the part of the husband to allow his widow to adopt, the adoption by her is rendered invalid. In this case Giriapa by his will distinctly forbids his widow to adopt without the consent of Venkangauda, which has never been obtained. We must, therefore, send down the following issues :—

"1. Whether Venkangauda was not a vatandár of the vatan at the time of Giriapa's death?

"2. If that is answered in plaintiff's favour, then, whether the plaintiff was precluded by the forfeiture of his share in 1834 or otherwise from inheriting the vatan from Giriapa?

"The *onus* of proving that he was not a vatandár to lie on the plaintiff.

"The *onus* of proving the second issue to be on the defendants.

"If the findings on these issues determine that the plaintiff had a *locus standi* in respect of the vatan, then the decree should be confirmed; if not, the decree must be reversed, and the plaint stand dismissed with costs throughout on plaintiff. Fresh evidence may be taken."

On the first issue the District Judge found in plaintiff's favour, *viz.*, that Venkangauda was not a vatandár, and on the second issue he found that the plaintiff was not precluded by forfeiture from inheriting the vatan property.

The defendants again appealed to the High Court, which again remanded the case to the District Court for a finding on the first of the issues, directing him to "consider whether Venkangauda is a member of this vatan family or not, and whether if he be, he has 'an hereditary interest in the vatan.' so as to constitute him a vatandár within the meaning of the Act."

(1) 7 Bom. H. C. Rep., Appendix I.

The District Judge found that Venkangauda was not a vatandár of the vatan at the time of Giriapa's death within the meaning of section 4 of Bom. Act III of 1874.

The defendants appealed to the High Court.

Scott (with *Shivram V. Bhandarkar*) for the appellants (defendants) :—The Judge was wrong in holding that Venkangauda was not a vatandár under section 4 of the Vatan Act. No doubt his relationship was distant, but we contend that any member of the vatan family who might, possibly at any future time, inherit a share of the vatan has an hereditary interest in the vatan and is, therefore, a vatandár within the meaning of section 4. The term hereditary merely implies the death of a prior owner. It does not necessarily imply lineal descent. Collaterals can come in. The circumstance that Venkangauda's ancestor's share in the vatan was confiscated, would not debar him from inheriting Giriapagauda's share either under his will or independently of it. Section 56 of the Vatan Act is applicable to the present case.

Inverarity (with *Narayan G. Chandavarkar*), for the respondent (plaintiff) :—It is only a person with a present interest in the property who can be regarded as having an "hereditary interest" in it, such as sons, grandsons, lineal descendants, &c. The meaning which the appellants seek to attach to the expression is too vague and broad, and it is not warranted having regard to the object with which the Vatan Act was passed.

FARRAN, C. J. :—As we substantially agree with the District Judge in regard to the meaning to be ascribed to the expression "vatandár" as used in the "Bombay Hereditary Offices Act" (III of 1874) the question raised by Mr. Inverarity as to Venkangauda not being entitled to succeed to the vatan under the will of Giriapa being *res judicata* will not arise.

Section 5 of the Act prohibits a vatandár without the sanction of Government from selling, mortgaging, or otherwise alienating, or assigning any "vatan or part thereof or interest therein" to any person not a vatandár of the same vatan. The will of Giriapa in favour of Venkangauda will, therefore, be inoperative in so far as the vatan property is concerned, unless Venkangauda

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is a vatandár of Giriapa's vátan within the meaning of the Act; and the plaintiff, as the nearest heir of Giriapa, will in that case succeed upon the death of Giriapa's widow. "Vatandár" by section 4 is defined to mean "a person having an hereditary interest in a vatan." It has not been contended before us that this definition does not apply to the alienee vatandár mentioned in the 5th section, or that a devise by will of the whole vatan does not fall within its scope. So the question for determination is, whether Venkangauda, who is now found to be a distant cousin of the late Giriapa, being descended in the male line from the same common ancestor Giriapa, (see Exhibit 87) had when the will of Giriapa came into force by reason of his consanguinity to the deceased and his descent from a common ancestor "an hereditary interest" in Giriapa's vatan.

For the appellants it is argued that any one who is in the direct line of heirship to the original vatandár ancestor or can possibly be an heir to the last vatandár has an "hereditary interest"—an interest by way of heirship in the vatan. Hereditary interest according to this contention is equivalent to a *spes successionis* however remote. It would embrace heirs in the female as well as in the male line. This interpretation in our opinion gives far too wide a meaning to the expression, and one which, we think, the words do not legitimately bear. It is not correct either under English or Hindu law to speak of the remote expectation which a collateral kinsman has of succeeding to an estate as an interest in the estate. A collateral relation has no interest in the vatan of the present holder. Besides, although there is no preamble to the Act, it is impossible to read its several sections without seeing that one of its main objects is to keep the vatan property intact in the same family, an object which would be readily frustrated if alienation in favour of a person ...female line of heirship were permitted. A field mortgaged in the ...o the son of a daughter passes as completely out of the ...or sold ...ily as if it were alienated in favour of a complete vatan fa... The same grammatical objection and, though in a stranger. ...he same argument founded upon the object of the lesser degree, ...t extending the expression to all members of the Act, exist against ...hich (section 2) includes each of the branches vatan "family"

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of the family descended from an original vatandár. If, too, "hereditary interest" is read as equivalent to "hope of succession" there would be no warrant for limiting its operation to the members of the vatan family.

The ordinary grammatical meaning of the phrase "persons having an hereditary interest in a vatan" is, we think, best observed, and the object of the Act is certainly advanced by confining it to persons having a present interest of an hereditary character in the vatan. In this sense it would include all the co-sharers for the time being in the vatan estate and probably also the sons of co-sharers, who, according to the principles of Hindu law, by birth acquire an interest in their fathers' ancestral property. "Hereditary interest" will, thus interpreted, mean an "interest acquired by inheritance" as distinguished from an interest acquired by purchase, gift, or other modes of acquisition. In this sense, subject to the qualifications and explanations contained in the fifth clause of the fourth section, we are of opinion that it is used in the Act.

The result of these protracted proceedings will thus be to establish the title of the plaintiff in the event of his surviving the widow of Giriapa to succeed to the vatan in preference to the defendant. We confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

PANDU LAKSHMAN MASUREKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* ANPURNA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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Mortgage—Redemption—Mortgagee purchasing equity of redemption from one without title to it—Adverse possession of mortgagee against true owner of equity of redemption—Limitation Act (XV of 1877), Art. 148.

In the absence of any act showing that the mortgagee is asserting himself against the owner of the equity of redemption, his possession is not adverse against the latter as regards limitation. The mere assertion of his claim by the mortgagee would not affect the right of the real owner of the equity of

* Second Appeal, No. 486 of 1895.