APPELLATE CIVIL.

Before Mr. Justice Baker.

HAIDAR SAHEB WALAD MIR GULAM HUSSEIN PIRJADE (ORIGINAL PLAINTIFF), APPELLANT *v.* SAYAD MUNIRODDIN WALAD SAYAD CHHITEMIR PIRJADE (ORIGINAL DEFENDANT), RESPONDENT.*

1930
July 21.

Pensions Act (XXIII of 1871), section 6†—Cash allowance—Suit to have one's own name entered in the Collector's register—Maintainability of.

A suit to obtain a declaration that the plaintiff is entitled to have his name entered in the register of cash allowances kept by the Collector in preference to the defendants whose name had already been entered in such register is not maintainable in view of section 6 of the Pensions Act.

Cases under the Watan Act distinguished.

SECOND Appeal No. 303 of 1928 from the decision of R. T. F. Kirk, District Judge at Nadiad, in Civil Appeal No. 110 of 1926.

Suit for a declaration.

The material facts are stated in the judgment.

R. W. Desai, for the appellant.

G. K. Rege, with *V. B. Karnik*, for the respondent.

BAKER, J. :—The plaintiff sued for a declaration that he was entitled to get his name entered in place of the deceased Abas Ali and to do the work as the chief sharer in his place in connection with the moveables belonging to and the allowance available to the Darga of Peer Sayyad Sadamsha Hussaini and for an injunction restraining the defendant from obstructing him in doing the work and getting his name entered in place of Abas Ali. The First Court, the Joint Subordinate Judge of Nasik, granted plaintiff the declaration he sought, but on appeal by the defendant the District Judge of Nasik

*Second Appeal No. 303 of 1928.

†Section 6 of the Pensions Act runs as follows :—

"A Civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner or other officer authorized in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."

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set aside the decree on the ground that the Court had no jurisdiction to grant the declaration asked for. This is a case under the Pensions Act in which there does not appear to be any reported authority. The facts are that there is a Darga at Nasik which owns certain property and receives a cash allowance from Government. The last holder was one Abas Ali who died in 1919. He had two brothers Chhotemir who died in 1908, and the present plaintiff. Chhotemir left three sons, and the plaintiff also has two sons. Before the death of Abas Ali by a deed of gift he conveyed his property to his nephews the sons of plaintiff and Chhotemir, but he did not make any reference to the cash allowance. In addition to Abas Ali there are four other sharers, the allowance being divided amongst five sharers. It is admitted that the plaintiff being a brother of the deceased, is entitled under Mahomedan law to succeed in preference to the nephews, or rather that he is a nearer heir than the nephews. And the present suit is brought because the name of the eldest nephew has been entered in the Collector's books and the cash allowance is paid to him. The learned District Judge was of opinion that no such suit would lie in view of section 6 of the Pensions Act XXIII of 1871, which says :—

"A *Civil Court, otherwise competent to try the same, shall take cognizance* of any such claim upon receiving a certificate from such Collector, Deputy Commissioner or other officer authorized in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."

The learned District Judge states in his judgment that he is unable to assume that anybody has a right to have his name entered in the Government records for this pension or allowance, still less that such a right is heritable.

"The parties have both excluded all evidence as to custom, so it is not as a customary right that we are to consider it. It was stated in the hearing of the appeal on the preliminary point of jurisdiction and the Collector's certificate that the right of management depended on getting one's name entered in Government records. If the question agitated in this suit is about a 'right' claimed both by plaintiff and defendant, to what liability does that right correspond? The plaintiff sues for a declaration of right to get his name entered: the corresponding liability is on the part of the Collector to enter the name. It is the action of the Collector in refusing to enter it that has given rise to the suit. Nobody else can enter names, but the Collector."

He goes on to say:

"But the dispute is as to whose name ought Government to enter as a recipient as one of the five to whom the money is paid. By entering the name, Government announces the intention of paying that person. If Government is liable to pay by entering the name, the liability to that person would be created, so far as Government is concerned. A suit to enforce that would be barred by section 6. If there were no liability, there would be no suit possible."

The learned Advocate for the appellant has referred to various cases of this Court under the Watan Act, the latest case on the point being *Hanmant* v. *Secretary of State*,[1] which lays down, *inter alia*, that a suit brought under section 36, proviso (3) of the Bombay Hereditary Offices Act, 1874, for a declaration that the plaintiff is the nearest heir of the deceased last holder of a Watan is maintainable against the defendant who has been recognized by Government as the representative Watandar. He further relies on *Rahimkhan* v. *Dadamiya*[2] and *Shankar Babaji* v. *Dattatraya Bhiwaji*,[3] in both of which the case in *Raoji* v. *Genu*[4] is distinguished. The distinction between these two cases depends on the difference between section 25 and section 36 of the Bombay Hereditary Offices Act, III of 1874. In *Raoji* v. *Genu*[4] the plaintiff sued for a declaration that the branch of the Gavda family which he represented was elder than that represented by one of the defendants. The object which he desired to obtain by a declaration in that form

[1] (1929) 54 Bom. 125.
[2] (1909) 34 Bom. 101.
[3] (1915) 40 Bom. 55.
[4] (1896) 22 Bom. 344.

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was to influence the Collector in determining whether he should be recognized as the representative Watandar in respect of the four annas share which the Gavda family possessed in a patelki watan. It was held that the Civil Court had no jurisdiction to entertain the suit, since the declaration sought, if made, would in effect be a declaration of plaintiff's status as representative watandar, which was a duty imposed by section 25 of the Act upon the Collector and not upon the Civil Court. Section 25 provides:

"It shall be the duty of the Collector to determine, as hereinafter provided, the custom of the watan as to service and what persons shall be recognized as representative watandars for the purpose of this Act, and to register their names."

Under section 36 it is the duty of the Collector to register the name of the person appearing to be the nearest heir of the deceased watandar as representative watandar in his place, but sub-section (3) of that section provides:—

"If at any time any person shall by production of a certificate of heirship, or of a decree or order of a competent Court, satisfy the Collector that he is entitled to have his name registered as the nearest heir of such deceased watandar in preference to the person whose name the Collector has ordered to be registered, the Collector may, subject to the foregoing provisoes, cause the entry in the register to be amended accordingly."

Section 36 thus, therefore, distinctly provides for the production of an order of a Court by which the Collector would be guided in the registering of the name, and this is what is laid down in *Rahimkhan* v. *Dadamiya*,[1] which was a case prior to the amendment of the Watan Act, and in *Shankar Babaji* v. *Dattatraya Bhiwaji*,[2] where it was held that a suit for a declaration that the plaintiff is the nearest heir of a deceased representative watandar is within the jurisdiction of a Civil Court although a declaration that the plaintiff is entitled to have his name entered in Watan Register is a matter beyond the jurisdiction of the Court. Even under the

[1] (1909) 34 Bom. 101. [2] (1915) 40 Bom. 55.

Watan Act, therefore, it would not be open for any Court to give a declaration that the plaintiff is entitled to have his name entered in the Watan Register, although the Court has authority to declare that the plaintiff is the nearest heir of the deceased representative watandar. There are no similar provisions in the Pensions Act, and all that the Act says is that the Court shall not make any order or decree in any suit under the Act by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly. The analogy of the Watan Act, therefore, which under section 36 specially provides for the jurisdiction of the Court in declaring who is the nearest heir of a representative watandar, does not apply to the Pensions Act, but even if this was a case under the Watan Act it would not be open to the Court to give a declaration that the plaintiff was entitled to have his name entered as the person to whom the cash allowance should be paid, which is really what the suit is for, as has been stated by the Courts below. The prayer in the plaint, which has been translated, is:

"It should be declared that the plaintiff is entitled to work, in place of his deceased brother Abas Ali as a principal sharer among the five principal sharers in the immoveable property. . . . and to have his name entered as such in place of Abas Ali."

This amounts to a suit for a declaration that he is entitled to have his name entered in the Register kept by the Collector in preference to the nephews of Abas Ali. Such a declaration would not be admissible even if the suit were under the Watan Act, as has already been laid down in the cases quoted, and as I have already said, under the Pensions Act there is no such provision as section 36, clause (3), of the Watan Act. Moreover, if any such declaration were made, it would under section 6 of the Pensions Act affect directly or indirectly the liability of Government to pay any such

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pension or grant inasmuch as the entry of the name of the plaintiff in the register would entail the liability of Government to pay to him and not to any one of the other sharers. The present case is not one in which the right to share in the allowance as such is contested amongst the sharers, which would be a different matter altogether. What the plaintiff wants is to have his name entered in the Register in preference to the other sharers, which is admittedly what the expression "doing the work" in the plaint means. Although there is no decided case on this point, I think on a comparison of the Pensions Act with the Watan Act and on a consideration of the cases which have been quoted by the learned advocate for the appellant, that there is little doubt that the view taken by the lower appellate Court is correct, and consequently the appeal must fail, and is dismissed with costs.

Decree confirmed.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Barlee.

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July 22.

THE GREAT EASTERN LIFE ASSURANCE CO., LTD., HAVING ITS OFFICE AT BOMBAY (ORIGINAL DEFENDANTS), APPELLANTS *v.* BAI HIRA, WIDOW OF NANDLAL SHIVLAL SATYAWADI (ORIGINAL PLAINTIFF), RESPONDENT.*

Life Assurance—Untrue answer to question in proposal form—Proposal made the basis of contract—Warranty—Condition.

One N. S. applied for a life assurance policy of the appellant Company. The application form expressly provided that the answers given by the applicant were full and true and that the declaration with the answers to be given by the applicant to the medical examiner of the company should be the basis of the policy. The policy when issued also provided that the assurance was granted in consideration of the representations, statements and agreements contained in the application for the policy and which was made a part of the contract.

Held, (1) that the recital in the policy that the representations, statements and agreements in the application should be the basis of the contract made the truth of the statements contained in the proposal a condition of the liability of the insurers;

*Letters Patent Appeal No. 29 of 1928.