

(1909) 07 BOM CK 0023
In the Bombay High Court

Narsinha Krishnaji and Others

APPELLANT

Vs

Vaman Vankatesh Deshpande and Others

RESPONDENT

Date of Decision : 27-07-1909

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, 31

Citation : 4 Ind. Cas. 249

Hon'ble Judges : Basil Scott, C.J;Batchelor, J

Bench : Division Bench

Judgement

1. The plaintiffs who are the sons of one Vankatrao sued the first three defendants for possession of certain vatan land which they alleged had been leased by, their father by a lease, dated 1872, which was operative only for the period of his life. The plaintiffs were, at the date of the suit, joint with their cousins the sons of Dashrath, Venkatrao's brother, who with Venkatrao had been a joint vatandar of the Deshpande vatan to which the property in suit was attached.

2. The first three defendants contended that the lease of 1872 was merely a formal recognition of a perpetual tenancy which had been in existence prior to the date of the Vatan Regulation of 1827 and that, therefore, they were entitled to remain in possession as permanent tenants.

3. This argument rested on an allegation of fact which was held by the lower appellate Court to be not proved. This is sufficient in Special Appeal to dispose of the argument.

4. We will now discuss the points of law which have been urged. In the original Court the plaintiffs obtained a decree for a moiety only of the property in suit, on the footing that that was all they were entitled to as representing the branch of Venkatrao.

5. An appeal was preferred against that decision in which the 4th and 5th defendants, sons of Dashrath, joined with the plaintiffs in urging that the decree

should have been passed against the first three defendants for the whole of the property in suit. The fourth ground of appeal was that the lower Court should have awarded the half of the lands that it refused to restore to the plaintiffs at least to defendants Nos. 4 and 5. This contention was successful in appeal. The lower appellate Court in delivering judgment said: "The lower Court assumes that the claim of defendants Nos. 4 and 5 is time-barred, and it is urged in appeal that the claim is barred as it was not brought within twelve years of the death of the father of defendants Nos. 4 and 5. This view is erroneous, plaintiffs and defendants Nos. 4 and 5 were undivided until recently and their parents were undivided; that having been so, defendants Nos. 4 and 5 could not, until effecting a partition say that certain lands belonged to themselves exclusively. The father of plaintiffs was the head of the undivided family and alienations made by him were to be respected till his death or till separation of defendants Nos. 4 and 5. The suit was brought within time from the death of the father (plaintiffs") and hence it is in time. Defendants Nos. 4 and 5 have been parties all along, so that it is not a case of adding parties." For these reasons the decree of the lower Court was amended by a direction that the defendants Nos. 4 and 5 should recover their moiety of the property from the defendants Nos. 1 to 3.

6. It has been argued on behalf of the defendants Nos. 1 to 3 that this suit is altogether barred because time ran against the plaintiffs and the 4th and 5th defendants from the date of the lease by Venkatrao to the defendants Nos. 1 to 3. This, however, is not the law because the property in suit is vatan property which was the subject of the Gordon Settlement of 1864, and it has been laid down by this Court in the case of Appaji Bapuji v. Keshav Shamrav 15 B. 13 that "the Gordon Settlement of 1864 was not intended by either party to those settlements to convert the vatan lands into the private property of the vatandar with the necessary incident of alienability, but to leave them attached to the hereditary offices which, although freed from the performance of services, remained in tact, as shown by the definition of "hereditary office in the declaratory Act III of 1874." The fact that vatan land is attached to the office, deprives it of some of the incidents which would attach to it if it were ordinary land in the possession of a Hindu family. Thus it results from its attachment to the office according to the decisions of this Court which are recognised in Section 5 of the Vatan Act and the vatandar is entitled to alienate the land for the term of his natural life and his children although not separate in interest from him have no right to object to such alienation until after his death.

7. In the present case the lease was effected with the consent of Dashrath indicated by his signature as an attesting witness, and time would not run against the sons either of Venkatrao or of Dashrath until the expiry of the lives of those two persons. Therefore, time, for the purposes of this suit, will run from the date of the death of Venkatrao, the survivor of the two vatandars. That took place on the 26th of April 1893, and the suit was filed within the period of twelve years, time being allowed for the expiry of the summer vacation of the Court which was in progress on the 25th April 1905.

8. Then it is said that at least the 4th and 5th defendants are not entitled to any relief in this suit. They have not joined the plaintiffs in suing for possession of the property. They have in fact put forward a case that the persons entitled to the property are the plaintiffs and not themselves. They were not entitled, in appeal to come forward with a different case and to ask for a moiety of the property, that they had not asked for in the first instance.

9. Now the case for the 4th and 5th defendants in the first Court was that there had been a partition between them and the plaintiffs and that at that partition the plaintiffs on the ground of the eldership of their father Venkatrao had been awarded the whole of this vatan property.

10. The first Court held that the documents relating to this partition not being forthcoming this allegation of the assignment to the plaintiffs by way of eldership was not substantiated, and accordingly allowed to the plaintiffs only a moiety of the property.

11. We do not think that the Judge of the appellate Court was in error in allowing the 4th and 5th defendants, after the failure of proof of their case with regard to partition, to fall back upon the necessary alternative that there having been no partition they were entitled to a moiety in right of their father Dashrath, and the only question which could arise, if that point of procedure were decided in their favour, would be whether their claim was barred by the law of limitation.

12. We have already held that time only began to run from the death of Venkatrao in 1893, and there can be no question that the 4th and 5th defendants were upon the record of this suit as defendants at the date of its institution. Is there then anything in the law of limitation which prevents them from obtaining relief in respect of their share of the property? Section 28 of the Indian Limitation Act provides that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property, shall be extinguished." It is necessary in order to give effect to this section to supply certain implied conditions; for instance, it would be a condition that the section would operate if the person did not bring a suit within the period prescribed. But would his right be extinguished if he were a party to a suit instituted by another within the prescribed period in which his right to the property could be effectually determined? The section does not say so, and we do not think that we ought to construe it as implying that this would be the case. Here the defendants were parties to the suit instituted within twelve years in which their rights to a share in this vatan property could be effectually determined as against the defendants Nos. 1 to 3, and the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually brought before it by the institution of the suit, see Section 31 of the CPC of 1884 and Order I, Rule 9 of the Code of 1908. There can be no doubt that if the defendants had been plaintiffs in the first instance no such argument as we have been discussing could have been put forward. But it appears from the judgment of the learned, Judge of the appellate Court that he, for the purposes

of the suit, treated them as co-plaintiffs although he did not amend the record by placing them among the plaintiffs and striking them out from among the defendants.

13. It has been held in Calcutta in the case of *Nogendrabala Debya v. Tarapada Acharjee* 35 C. 1065; 13 O. W.N. 186; 5 M.L.T. 91; 8 C.L.J. 286; 4 Ind. Cas. 369 (Infra.) that a party transferred to the side of the plaintiff from the side of the defendant is not a new plaintiff to whom the provisions of Section 22 of the Limitation Act apply. In that conclusion we concur. We think that we should exercise our powers of amendment by putting the plaint in the shape in which the learned Judge of the lower appellate Court intended it to be at the time he delivered his judgment.

14. We direct that the 4th and 5th defendants be entered in the plaint and the decree in the lower appellate Court as co-plaintiffs instead of defendants, this being consented to by their pleader. In other respects we affirm the decree of the lower Court and dismiss this appeal with costs.