APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Seshagiri Ayyar.

1914, December, 2, 3 and 4.

ARUNACHELLA AMBALAM AND OTHERS (DEFENDANTS), APPELLANTS,

v.

R. G. ORR AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Limitation Act (XV of 1877), sec. 22—Assignment of original plaintiff's rights—Addition of assignee as plaintiff—Section 22, inapplicable—Jungle or forest lands in zamindari—Presumption of ownership of kudivaram in the zamindar—Onus of proving contrary, on ryots.

The presumption, as regards waste land, jungle or forest land in a *zamindari*, is that the *zamindar* is the owner not only of the *melvaram* but also of the *kudivaram* and the *onus* is on the ryots to show that the *kudivaram* right is vested in them.

Section 22 of the Limitation Act (XV of 1877) does not apply to a case where a plaintiff is added in the course of a suit, in consequence of assignment of rights from the original plaintiff, but is confined to cases where the new plaintiff is added or substituted in his own right so that he may himself be considered to be instituting a suit to enable him to litigate a right for himself independently of the rights of the original plaintiff.

APPEAL against the decree of C. KRISHNASWAMI RAO the temporary Subordinate Judge of Madura, in Original Suit No. 2 of 1908.

The fourth plaintiff in the suit is the zamindar of Sivaganga. Plaintiffs Nos. 1 to 3 are lessees from him of the *zamindari*. This suit was brought for the recovery of certain land from the defendants as on trespass and for demolition of certain houses built thereon by the defendants. The defendants pleaded that the lands were not included in the lease of the plaintiffs, that they were let to them by a previous *zamindar* long prior to the plaintiffs' lease and that the plaintiffs were by their conduct estopped from demolishing the houses. The Lower Court held that the lands belonged to the plaintiffs, that they were entitled to recover the same, that they were mostly jungle and forest lands, that they were trespassed upon by the defendants in 1893, that the houses were built on them by the defendants with the knowledge of the plaintiffs and that plaintiffs must pay compensation before demolishing the houses. During the course of the suit, plaintiffs Nos. 1 to 3 sold their right to the fifth plaintiff and

* Appeal No. 77 of 1909.

he was added on 4th April 1908 as a supplemental plaintiff. But the Lower Court gave a decree only in favour of plaintiffs Nos. 1 to 4 holding that fifth plaintiff who was added as a party more than twelve years after the trespass, was barred by limitation. The defendants preferred this appeal, and plaintiffs Nos. 1 to 5 preferred a memorandum of cross-objections.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for appellants Nos. 1, 2, 4 and 8.

C. S. Venkatachariyar for appellants Nos. 1, 2, 4 to 34.

T. Rangachariyar for respondents Nos. 4 and 5.

C. V. Anantakrishna Ayyar for the sixth respondent.

R. Narayanaswami Ayyar for the sixteenth respondent.

WALLIS, C.J.—We have already given judgment as to the boundary question which arose between the villages of Karakudi and Sekkalakottai and have now to deal with so much of the appeal as relates to the claim of the Kottaiyur ryots to the *kudivaram* rights in the Sekkalakottai village in which, we have decided, the suit lands are situated. WALLIS, C.J.

It is admitted that the suit village is one of the villages of the Sivaganga *zamindari* and, as such, the *zamindar* is entitled to the *melvaram* rights in the village and it is not now suggested that he has been dispossessed of these *melvaram* rights. It is said, however, that the *onus* is on him to show that he was in possession of the *kudivaram* rights within twelve years of suit. Now, as will abundantly appear from the exhibits to which it will be necessary to refer, the suit land was waste land or jungle and mostly forest; and with regard to land of this character in a *zamindari*, the presumption is that the *zamindar* owns the *kudivaram* as well as the *melvaram* rights, and, therefore, the *onus* is on the ryots of the village to show, if they can, that the *kudivaram* right is vested in them.

* * *

On the whole, we have come to the conclusion that, on the evidence in this suit, as regards the suit lands, the Kottaiyur ryots have not shown that they were possessed of the *kudivaram* rights.

It is perfectly true that we find assertions by such ryots of the *kudivaram* rights from time to time since 1877—assertions which they endeavoured to give effect to by the conveyances which I have mentioned. As I have already said, the suit lands

ARUNACHELLA AMBALAM v. ORR.

WALLIS, C.J.

were very eligible sites for the extension of the Karaikudi village and for building houses by the Chettis and it is very natural that the Kottaiyur ryots should be anxious to establish their claim to valuable pieces of property.

But we are satisfied that the possession both of the *melvaram* and the *kudivaram* rights of what was originally jungle land, was originally in the *zamindar*. We are not satisfied that he was ever effectively dispossessed of them by the Kottaiyur ryots, although they no doubt made claims to the *kudivaram* from time to time. In the result we agree with the conclusion of the Subordinate Judge and dismiss this appeal with costs.

As regards the question raised by Mr. T. Rangachariyar that the fifth plaintiff to whom an assignment was made by the other plaintiffs in the course of this suit, ought to have been given a decree, I am unable to accept the appellants' contention that the suit though instituted in time, is barred under section 22 of the Limitation Act as against the fifth plaintiff, the assignee from the other plaintiffs of their cause of action, who was allowed to continue the suit under section 372, Civil Procedure Code, because the period of twelve years had expired when he was brought on the record. The Limitation Act deals with the institution of suits and section 22 should, in my opinion, be confined to cases in which the new plaintiff is added or substituted in his own right so that he may be considered to be instituting a suit, and not to cases in which a suit properly instituted is allowed to be continued by an assignee under section 372, Civil Procedure Code. That section was not like section 32, made subject to the provisions of the Limitation Act, and to hold it to be so subject is, in my opinion, to defeat its object and bring about the undesirable situation which it was enacted to avoid. Both sections must be read consistently, if possible, and I think section 22 may properly receive the restricted construction, I have mentioned. The authorities in this Court which will be referred to by my learned brother do not preclude us from so holding.

As regards the memorandum of objections the Subordinate Judge has found that the *zamindar* and his lessees are not entitled to recover possession of the buildings on the suit lands without compensation on the ground that they encouraged the owners to build there. As I have mentioned already, the effect

of the evidence is that in 1891 objection was taken and when those who claimed under Ulagappa Chetti's grant built the buildings, but they were not further interfered with. In these circumstances, we are not prepared to differ from the conclusion at which the Subordinate Judge has arrived.

WALLIS, C.J.

For the reasons given, the decree will be amended by giving the fifth plaintiff a decree and otherwise the appeal will be dismissed with costs. The memorandum of objections will be dismissed without costs.

SESHAGIRI AYYAR, J.—I agree that the appeal should be dismissed. I would add a few words on the question of law argued by Mr. T. Rangachariyar.

SESHAGIRI AYYAR, J.

He asks us under Order XLI, rule 33 of the Code of Civil Procedure, to amend the decree of the Subordinate Judge by giving a decree to the fifth plaintiff for possession along with plaintiffs Nos. 1 to 4. Plaintiffs Nos. 1 to 4 assigned their rights to the fifth plaintiff in June 1908, when the suit was pending. The decree was passed in December 1908; and as the new Limitation Act of 1908 came into force only in January 1909, this question has to be decided under the Act of 1877. Mr. C. S. Venkatachariyar contends that, under section 22 of that Act, the claim of the fifth plaintiff was barred by limitation, as he was added as plaintiff in the suit more than twelve years after the accrual of the cause of action in 1893. The language of the section on the face of it covers all cases of addition and substitution of parties. But as contended by Mr. T. Rangachariyar, the proviso to the section shows the classes of cases contemplated by it. I think he is right in his contention that the application of the section should be restricted only to cases where the substituted or added plaintiff asks that his own right should be adjudicated upon in the suit, and to cases where the original plaintiffs were not entitled to the reliefs claimed in the plaint in their own rights. This view is strengthened by the amendment of the Act which places the assignee in the same position as the legal representative of the plaintiff. To hold otherwise would be practically to ignore section 372 of the old Code of Civil Procedure. That section enables the Court to permit an assignee of the rights of the original plaintiff to continue the suit. It would be anomalous to hold that the assignee who has the right to continue the litigation is not

ARUNACHELLA AMBALAM v. ORR.

SESHAGIRI AYYAR, J.

entitled to obtain a decree in his favour. I am of opinion that section 22 of the Limitation Act applies only to cases where the added or substituted plaintiff wants to litigate a right for himself independently of the rights of the original plaintiff. Mr. C. S. Venkatachariyar relied very strongly upon the Full Bench decision of the Calcutta High Court in *Abdul Rahman* v. *Amir Ali*(1). In that case, the referring Judges and Mr. Justice HARRINGTON were of opinion that the bar of section 22 will apply only to the substitution of a plaintiff and not to the addition; and the only question referred for the opinion of the Full Bench was, whether a case of substitution came within the mischief of section 22. I am unable to see how the case of addition can stand on a different footing from that of substitution. I must respectfully dissent from the Full Bench ruling in so far as it lays down that where a new plaintiff is substituted under section 372, he will be affected by a period of limitation different from that which is applicable to the original plaintiffs. The view of the learned Judges in *Rai Charan* v. *Biswa Nath*(2) lends support to the view I have taken. Mr. Justice WILSON in *Subodini Debi* v. *Cumar Ganoda Kant Roy Bahadur*(3) came to the same conclusion. *Chunni Lal* v. *Abdul Ali Khan*(4) is another authority for the same position. The decision in *Fatmabai* v. *Pirbhai Virji*(5) is not opposed to this view. Mr. Justice MILLER in *Subbaraya Iyer* v. *Vaithinatha Iyer*(6), expresses a doubt regarding the correctness of the view taken by Mr. Justice WILSON in *Subodini Debi* v. *Cumar Ganoda Kant Roy Bahadur*(3). Mr. Justice SANKARAN NAYAR who took part in that case apparently does not share this doubt. On principle, I am of opinion the right view is to hold that where a plaintiff is added in consequence of the assignments of rights from the original plaintiffs, his right to a decree is not affected by section 22 of the Limitation Act. The decree should be amended by giving the fifth plaintiff a decree for possession along with plaintiffs Nos. 1 to 4.

N.R.

(1) (1907) I.L.R., 34 Calc., 612 (F.B.).
(2) (1915) 20 C.L.J., 107 at p. 109.
(3) (1887) I.L.R., 14 Calc., 400.
(4) (1901) I.L.R., 23 All., 331.
(5) (1897) I.L.R., 21 Bom., 580.
(6) (1910) I.L.R., 33 Mad., 115.