1885.

PADMÁKAR VINÁYAK JOSHI v. MAHÁDEV KRISHNA JOSHI.

In *Mayárám Sevárám* v. *Jayvantráv Pándurang*(1) and *Náráyan* v. *Pándurang*(2), which are cited in the judgment in the above case, there were special circumstances which were relied on by the Court as affording ground for holding that the plaintiff had been efficiently represented by the manager. Without expressing any decided opinion as to the soundness of the doctrine enunciated in *Gan Sávant* v. *Náráyan Dhond Sávant*,(3) we think that in this case the Courts below were right in holding that the plaintiffs, who were minors at the time, were not efficiently represented in their brothers' suit, there being no evidence to show that they assumed to act on behalf of the family, or that either of them was *de facto* manager of the family property.

We think, however, that the documents which appellant by his application, exhibit 44, wished to give in evidence, ought to have been admitted. The appellant had mentioned them, on 4th March 1880, as being documents in another suit which he wished to give in evidence, and would produce on 20th October, the day to which the hearing was adjourned, and produced them.

We must, therefore, reverse the decrees, and send down the case for retrial. Costs of appeal to abide the result.

Decree reversed and case remanded.

(1) Printed Judgments for 1874, p. 41. (2) I. L. R., 5 Bom., 685.
(3) I. L. R., 7 Bom., 467.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1885. *February* 24.

NILO RA'MCHANDRA, (ORIGINAL DEFENDANT), APPELLANT, *v.* GOVIND BALLA'L AND OTHERS, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Res judicata—Suit on a family arrangement—Second suit for the same subject matter as co-sharers—Causes of action—Limitation Acts XIV of 1859 *and IX of* 1871.

The defendant's great-grandfather was uncle of one Báláji Hari, who was the great-grandfather of the plaintiffs, and they (*i. e.*, the defendant's great-grandfather and his nephew Báláji) were entitled in equal half shares to a certain *vatan* property. The defendant and his brothers now represented the former,

* Second Appeal, No. 31 of 1883.

and were entitled to his half share, and the plaintiffs represented the latter, and were entitled to his half share. The plaintiffs' father, Báláji Rudra, lived with the defendant and the defendant's brothers, Mahádáji and Krishnáji, as members of an undivided family up to the year 1845, in which year the plaintiffs' father (Báláji) being then absent from the village, the defendant's brothers, Mahádáji and Krishnáji, executed a deed of partition whereby they divided the ancestral property into two equal shares, one-half of which the plaintiffs' father was to receive—the other half going to the defendant and his brothers. The deed, among other recitals, contained a clause to the effect that the plaintiffs' father being then absent from the village, the defendant's brothers would manage his share during his absence, and on his return hand the same over to him on his paying the expenses incurred by them in such management.

In 1873 the plaintiffs' undivided brother brought a suit against the defendant and others on an agreement alleged to have been executed between him (plaintiffs' brother) and the defendant and his brothers, by which the said brothers had bound themselves to return one-third share to him (the plaintiffs' brother). This suit was dismissed as against the defendant, as he had not been a party to that agreement, and plaintiffs' brother was referred to a separate suit for partition against the defendant.

The plaintiffs, therefore, now brought the present suit, claiming their share in the *vatan* estate. The defendant *(inter alia)* contended that the suit was barred as *res judicata* by the former suit, that neither the plaintiffs nor their forefathers had enjoyed the property during the previous 150 years, and that the claim was barred by limitation. Both the lower Courts allowed the plaintiffs' claim. The defendant preferred a second appeal to the High Court.

Held, confirming the decree of the lower Court, that the former suit having been brought on an alleged agreement, it did not bar the present suit, which was based on the plaintiffs' hereditary right to sue as members of the family.

Held, also, that the suit was not barred by limitation, as the possession of the share in question by the defendants since 1845 had not been a possession of it as their own property to the exclusion of the plaintiffs or their father.

THIS was a second appeal from the decision of C. E. G. Crawford, Assistant Judge of Ratnágiri.

The defendant's great-grandfather was uncle of one Báláji Hari, who was the great-grandfather of the plaintiffs, and they (*i. e.*, the defendant's great-grandfather and his nephew Báláji) were entitled in equal half shares to a certain *vatan* property. The defendant and his brothers now represented the former, and were entitled to his half share, and the plaintiffs represented the latter, and were entitled to his half share. The plaintiffs' father, Báláji Rudra, lived with the defendant and the defendant's brothers, Mahádáji and Krishnáji, as members of an undivided family

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NILO RÁMCHANDRA v. GOVIND BALLÁL AND OTHERS.

up to the year 1845, in which year the plaintiffs' father (Báláji) being then absent from the village, the defendant's brothers, Mahádáji and Krishnáji, executed a deed of partition whereby they divided the ancestral property into two equal shares, one-half of which the plaintiffs' father was to receive—the other half going to the defendant and his brothers. The deed, among other recitals, contained a clause to the effect that the plaintiffs' father being then absent from the village, the defendant's brothers would manage his share during his absence, and hand the same over to him on his return, on his paying the expenses incurred by them in such management.

In 1873 the plaintiffs' undivided brother brought a suit against the defendant and others on an agreement alleged to have been executed between him (the plaintiffs' brother) and the defendant and his brothers, by which the said brothers had bound themselves to return one-third share to him (the plaintiffs' brother). This suit was dismissed as against the defendant, as he had not been a party to that agreement, and plaintiffs' brother was referred to a separate suit for partition against the defendant.

The plaintiffs, therefore, now brought the present suit, claiming their share in the *vatan* estate. The defendant *(inter alia)* contended that the suit was barred as *res judicata* by the former suit, that neither the plaintiffs nor their forefathers had enjoyed the property during the previous 150 years, and that the claim was barred by limitation. Both the lower Courts allowed the plaintiffs' claim. The defendant preferred a second appeal to the High Court.

Shántárám Náráyan for the appellant.

K. T. Telang (*Yashvant Vásudev Athlye* with him) for the respondents.

SARGENT, C. J.—It is not in dispute between the parties that in 1845, during the absence of Báláji Rudra, the plaintiffs' father, from the village, who was entitled to a one-half share in the property in question, the defendant's brothers, Mahádáji Rámchandra and Krishnáji, who were between them entitled to the other half, executed a deed of partition of the family property between themselves in equal shares. This deed concluded with the follow-

ing words:—"He (meaning Báláji Rudra) is absent from the village; should he ask for his share after returning to the village, then we are to hand over to him the management of his half share, which we two are carrying on at present, on his paying the expenses incurred by us by mutual arrangement." In 1873, the third plaintiff brought a suit against the defendant and others on an alleged agreement to return the share on payment of a certain sum for expenses incurred in the management, and which was admitted by all the defendants, except the defendant in the present suit. The consent of the present defendant to the alleged agreement not having been proved, the plaintiffs' claim was, by decree of 2nd August 1878, disallowed as against him.

The plaintiffs now sue the defendant on their title as members of the family to a share in the estate. It was contended by the defendant that the former decree operated as *res judicata*. Both the Courts below held, and, we think, rightly, that the former suit having been brought on an alleged agreement, it did not bar the present suit, which is based on the plaintiffs' hereditary right to sue as members of the family. The circumstances of the present case are certainly stronger than those which were held by the majority of the Full Bench in *Girdhar Manordás* v. *Dáyábhái Kálábhái*[1] to prevent the bar of *res judicata*. As to the bar by the Statute of Limitations, it was admitted that the plaintiffs had been out of possession for more than 35 years; but the concluding words of the deed of partition suffice, in our opinion, to show that the possession and enjoyment of the share in question by the other members of the family since 1845 has not been as their own property to the exclusion of plaintiffs and their father, which, according to the ruling in *Govindan Pillai* v. *Chidambara Pillai*[2], followed by this Court in *Shidhojiráv* v. *Náikojiráv*[3], is necessary in order to constitute the bar under Act XIV of 1859. The plaintiffs' claim was, therefore, not barred, in our opinion, before the Limitation Act of 1871, and the present suit was brought in 1879. The decree must, therefore, be confirmed, with costs.

Decree confirmed.

(1) I. L. R., 8 Bom., 174.

(2) 3 Mad. H. C. Rep. p. 99.

(3) 10 Bom. H. C. Rep., p. 228.