

APPELLATE CIVIL.

Before Mr. Justice Batchelor.

1908.
March 31.

SHIDAPA BIN RYAWAPA (ORIGINAL PLAINTIFF 1), APPELLANT, v.
VENKAJI KRISHNA AND OTHERS (ORIGINAL DEPENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 335—Limitation Act (XV of 1877), Schedule II, Article 11—Purchasers at Court-sale—Obstruction to delivery of possession—Obstructor manager of joint family consisting of minors—Partition between obstructor and minors—Allotment of the property to the share of minors—Withdrawal of the obstructor by default without notice to minors—Design on the part of the obstructor—Order awarding possession to purchasers—Suit by minors to recover possession—Limitation.

Certain purchasers of lands at a Court-sale applied to be put in possession of the property but the delivery of possession was obstructed by one V. who was the manager of a joint family consisting of himself and his two minor step-brothers. While the obstruction proceedings were pending a *farukhat* or settlement on partition had been arrived at between the obstructor and his two minor step-brothers and the lands had fallen to the share of the minors. V. thereupon designedly withdrew from the obstruction proceedings by allowing them to be dismissed for default, without giving notice of his abandonment to the minors and an order was passed awarding possession to the purchasers in the absence of any appearance by V. The order was passed on the 6th August 1898. The *farukhat* or settlement on partition, which for its validity required the sanction of the Court, had never received that sanction and it was subsequently set aside at the instance of the plaintiffs. In the year 1903 the plaintiffs, that is, the step-brothers of V. to whom the lands had been allotted, brought a suit to recover possession of the lands. Both the lower Courts held the suit to be barred under Article 11, Schedule II, of the Limitation Act (XV of 1877).

Held, on second appeal by plaintiff 1, that the suit was not time-barred under Article 11, Schedule II, of the Limitation Act (XV of 1877) as the minors were not "efficiently represented."

Padmakar Vinayak Joshi v. Mahadev Krishna Joshi⁽¹⁾ followed.

The withdrawal of V. by default from the obstruction proceedings was designed by him (as appeared from the circumstances) in order to deprive the minors of an opportunity of being heard. The minors had no opportunity of protecting their interest which V. had abandoned without notice to them or to any one on their behalf.

* Second Appeal No. 706 of 1907.

(1) (1885) 10 Bom. 21.

SECOND APPEAL from the decision of Vishvanath V. Wagh, First Class Subordinate Judge of Bijápur with appellate powers, confirming the decree of D. A. Idgunji, Second Class Subordinate Judge of Bágalkot.

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The lands in dispute originally belonged to one Venkaji Krishna who had mortgaged them to Mahalingapa and Kudlepa in 1888. Subsequently he sold the equity of redemption to one Virupaksha who was the manager of the undivided family consisting of himself and his two minor step-brothers Shidapa and Basapa. Under the purchase Virupaksha had agreed to redeem the mortgage of Mahalingapa and Kudlepa, but he having failed to do so a decree was passed on the mortgage for the recovery of the debt by the sale of the lands. In execution of the decree the lands were sold and they were purchased by Dyawapa and Hanmapa. The purchasers sought to recover possession of the lands and they were obstructed by Virupaksha on the 20th January 1898. Thereupon the purchasers applied for the removal of the obstruction, and while the proceedings under their application were going on, a partition was effected between Virupaksha and his two minor step-brothers on the 6th June 1898 and the lands in suit fell to the share of the minors under a *farakat*, that is, deed of settlement. Owing to the partition Virupaksha withdrew from the said proceedings by remaining absent, but he did not give notice of the withdrawal to the minors. He had received a letter from his pleader to the following effect :—

“Steps are taken to get your obstruction removed, but it is unnecessary for you to oppose them. The lands are allotted to the shares of others and there is nothing which you ought to do in connection with them; as I did not know all this I had asked for a *vakilpatra* and your written statement. . . . I have not filed the *vakilpatra*. Orders will be passed to put the purchasers in possession. Those to whom the lands are allotted may, if they choose, offer obstruction hereafter. If we now inform their names to the Court, notices will be issued to them. They will come on that day and contend that the *farakat* is false. If that contention goes on here it is not proper.”

On the 6th August 1898 the Court passed an order awarding possession to the purchasers under section 335 of the Civil Procedure Code (Act XIV of 1882) in the absence of any appearance by Virupaksha.

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The partition evidenced by the *farakat* of the 6th June 1898 proved abortive, it having been impugned by Virupaksha's step-brother Shidapa and it did not receive the sanction of the Court.

On the 11th November 1903 Shidapa, who had in the meanwhile attained majority, and his minor brother Basapa brought the present suit for the recovery of the lands against Venkaji Krishna, the original owner, as defendant 1, Mahalingapa and Kudlepa's widow Fakirawa, the mortgagees, as defendants 2 and 3, and Dyawapa and Hanmapa, the auction purchasers, as defendants 4 and 5.

The defence common to all the defendants was that as Virupaksha had failed in his attempt to cause obstruction to the delivery of possession to defendants 4 and 5, he had put up the plaintiffs to bring the suit, that the plaintiffs were bound by the order against Virupaksha who was the manager of the family, and that the suit was time-barred under Article 11, Schedule II, of the Limitation Act (XV of 1877), as it was not brought within one year from the date of the Court's order removing Virupaksha's obstruction.

The Subordinate Judge found that the plaintiffs were bound by the *ex parte* order against Virupaksha and that the suit was time-barred. He therefore dismissed the suit. The minor Basapa died while the suit was pending in the Subordinate Judge's Court.

Shidapa having appealed the Judge confirmed the decree.

Shidapa preferred a second appeal.

K. H. Kulkar for the appellant (plaintiff 1).

G. S. Mulgaumkar for respondents 1, 2 and 3 (defendants 1, 2 and 3).

V. V. Ranade for respondents 4 and 5 (defendants 4 and 5).

BACHELOR, J.:—The facts necessary for the determination of this appeal lie in small compass, and are not open to ambiguity. In both Courts below the plaintiffs' suit has been dismissed as barred under Article 11 of the Limitation Act inasmuch as it was instituted more than a year after an order passed under section 335, Civil Procedure Code, against the plaintiffs' step-brother

Virupakshapa. That order was made in favour of the defendants 4 and 5, to whose possession Virupakshapa had offered obstruction. Both lower Courts have held that the plaintiffs are bound by the order under section 335 on the ground that they were represented by Virupakshapa in the miscellaneous proceeding which resulted in that order. The only question in appeal is whether the plaintiffs are so bound or not. It appears to me that they are not bound.

The question must turn upon the circumstances in which the order was made, and I must therefore refer briefly to those circumstances. In January 1898 the Court-sale purchasers, defendants 4 and 5, applied to be put in possession of the property, but delivery of possession was obstructed by Virupakshapa on 20th January 1898. At this time Virupakshapa was in possession as manager of the joint family which included his minor step-brothers, the present plaintiffs. On 6th August 1898 the order under section 335 was made awarding possession to the purchasers in the absence of any appearance by Virupakshapa: in other words, Virupakshapa, who was responsible by his obstruction for the beginning of these proceedings, afterwards withdrew from them and allowed an order to be made against him. It is perfectly plain why he did so. On 6th June 1898, that is, during the pendency of the proceedings, a *farzhat* or settlement on partition had been arrived at between the members of the family, and the lands in question had fallen to the share of the plaintiffs, then minors. In these circumstances, Virupakshapa, acting upon his pleader's advice, took no further part in the miscellaneous proceedings. The pleader's letter to Virupakshapa is quoted in the judgment of the learned Subordinate Judge, and certain passages may be repeated here. "Steps are taken," writes the pleader, "to get your obstruction removed, but it is unnecessary for you to oppose them; the lands are allotted to the shares of others, and there is nothing which you ought to do in connection with them Orders will be passed to put the purchasers in possession. Those to whom the lands are allotted may, if they choose, offer obstruction hereafter. If we now inform their names to the Court, notices will be issued to them. They will come on that day and

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contend that the *farkhat* is false." It is clear therefore that Virupakshapa withdrew from the miscellaneous proceedings in reliance on the *farkhat* as severing his interests from those of the other members of the family. It should be added that this *farkhat* of 1898, which required for its validity the sanction of the Court, never received that sanction. It was impugned by the plaintiffs who after a great deal of litigation eventually succeeded in getting it set aside. Finally another compromise was effected and received the sanction of the Court in 1902.

Now the question is whether Virupakshapa represented his step-brothers when the order under section 335 was made. In support of the affirmative view it is urged that unquestionably he represented them when the proceedings were begun, and that he must be held to have continued to represent them inasmuch as their interests were never severed, the *farkhat* of 1898 never having become operative. Even if he himself made a mistake as to the effect of the *farkhat*, that mistake, it is argued, cannot alter the legal position, which was that the family remained joint, and he remained the manager. That, no doubt, is true, so far as it goes; but in my opinion it does not go far enough. For, granted that the family remained in law joint under the management of Virupakshapa, the question still remains whether the minors were "efficiently represented" to use the language of Sir Charles Sargent, C. J., in *Padmakar Vinayak Joshi v. Mahadev Krishna Joshi*⁽¹⁾. And to that question I think there can be but one answer. Not only did Virupakshapa not assume to act on behalf of the minors but he deliberately withdrew from the proceedings and refused to act at all. Nor does the case rest there, for it is clear from his pleader's letter that his withdrawal was designed in order to deprive the minors of an opportunity of being heard. This design was apparently accomplished, for it is nowhere suggested that the minors had any opportunity of protecting their interest, which Virupakshapa had abandoned without notice to them or to anyone on their behalf. Indeed it seems a clear inference that Virupakshapa's only object was the establishment of the *farkhat*, which the Courts afterwards set aside; and to this end

(1) (1885) 10 Bom. 21.

he was working in his own interests and against the interests of the minors. His withdrawal from the miscellaneous proceedings was part of his general scheme, and I am of opinion that that withdrawal cannot be held to have bound the plaintiffs under Article 11 of the Limitation Act. Even if the miscellaneous proceedings had been contested to the end by Virupakshapa, that fact by itself would not necessarily prove that the minors were adequately represented; and here the abandonment of the proceedings and the proved circumstances in which that abandonment occurred show that the minors were not represented when the order under section 335 of the Civil Procedure Code was made.

As this is the only point on which the decree of the Court below is based, I must reverse that decree and remand the suit for trial on the other issues. Costs to abide the result.

Decree reversed and suit remanded.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

JANGLUBAI KOM SHIVAPPA TELANGI (ORIGINAL PLAINTIFF),
APPELLANT, v. JETHA APPAJI MARWADI AND OTHERS (ORIGINAL
DEPENDANTS), RESPONDENTS.*

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April 15.

*Hindu Law—Mitākshara—Succession—Stridhan—Maiden's stridhan—
Priority between maternal grandmother and father's mother's sister.*

Under the Mitākshara, the father's mother's sister is entitled to succeed to the stridhan of a maiden in preference to her maternal grandmother.

SECOND appeal from the decision of C. A. Kincaid, District Judge of Poona, reversing the decree passed by Gulabdas Laldas, First Class Subordinate Judge at Poona.

Suit for declaration of heirship.