1910.

EMPEROR v. RAJA BAHADUR SHIVLAL MOTILAL.

validly issued under section 377. That being so, the Magistrate was, I think, wrong in acquitting the accused on the sole ground that the premises did not appear to the Magistrate to be in such a condition as to justify the issue of a notice under the section. It is admitted before us now that the Municipal Commissioner's order has not been complied with. I am, therefore, of opinion that the acquittal should be set aside and that the respondent should be convicted under section 471 of the Act. But, in the circumstances of the case a nominal fine of one rupee will, I hope, be enough.

KNIGHT, J.—I concur.

*Appeal allowed.*

R. R.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Knight.*

SAKHARAM HARI AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* LAXMIPRIYA TIRTHA SWAMI (ORIGINAL PLAINTIFF), RESPONDENT.*

1910. *January* 20.

*Limitation Act (XV of 1877), Sch. II, Arts. 131, 62—Cash allowance—Tastik—Arrears of cash allowance, suit to recover.*

The plaintiff, the manager of the temple of Shri Laxmi Narayan Dev at Hulekal, sued to recover from the defendants, the managers of the temple of Shree Madhukeshwar at Banawási, a sum of Rs. 96 as arrears of a cash allowance (tastik) which the former was entitled to receive from the property of the latter. The defendants admitted the title of the plaintiff to the allowance but pleaded limitation as to the arrears for two out of the six years. The lower Courts applied Article 131 of the Limitation Act, 1877, and allowed the whole of the claim. On appeal.

*Held*, that the claim was properly allowed.

A cash allowance of the nature as in the present case is, according to Hindu law, *nibandha* or immoveable property; where it is annually payable, the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and which have become actually due.

* Second Appeal No. 595 of 1909.

1910.

SAKHARAM HARI v. LAXMIPRIYA TIRTHA SWAMI.

But where there are more than one person entitled to the payment as co-sharer and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, minus his share, on behalf of the rest as money had and received for their use, though as to him with reference to the aggregate of rights, it is *nibandha* or immoveable property, in the nature of a periodically recurring right.

The important question is who is the person sued and what is it that is sued for? If what is sued for is the establishment of a title to the right itself, then Article 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is the amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff, who has actually received payment from that person. Article 131 applies in that case to the person originally liable to pay and Article 62 applies to the co-sharer who has received the payment.

SECOND appeal from the decision of D. S. Sapre, First Class Subordinate Judge, A. P., at Kárwár, *confirming* the decree passed by R. R. Sane, Subordinate Judge of Sirsi.

Suit to recover arrears of a cash allowance called *tastik*.

The plaintiff was the manager of a temple called the Vyasraja Matha at Hulekal. The temple was in receipt of a cash allowance every year from the defendants who were the managers of the temple of Shree Madhukeshwar at Banawási.

The claim was for arrears which had accrued due during the six years preceding the suit.

The defendants admitted the plaintiff's right to receive the allowance; but they claimed that his right to two years out of the six was barred by limitation.

The Court of first instance held that Article 131 of the Limitation Act, 1877, applied to the case, and decreed the plaintiff's claim in full. His reasons were as follows:—

The plaintiff's right to receive this annual payment is acknowledged by the defendants to be an already established one, since time immemorial. It is therefore not at all necessary for the plaintiff to bring a suit for the establishment thereof. So, he can, in a suit like the present, recover arrears that fell due within twelve years before this suit (*vide Chhaganlal* v. *Bapubhai*, I. L. R. 5 Bom. 68, followed in I. L. R. 16 All. 180).

It is however contended by Mr. Jede for the defendants that this suit is governed by Article 62 of the Limitation Act. But I think that his contention cannot prevail. For, Article 62 applies to the case of a person, suing for his co-sharer who has received the whole amount from the person primarily bound to pay; whereas Article 131 applies to the case of a *hakdar* (*i.e.*, person entitled to some allowance) suing the person primarily bound to pay him the whole *hak* (*vide* Starling's Indian Limitation Act, 4th Edition, page 285). In the present case, it is not alleged by the defendants that they and the plaintiff are co-sharers and that as such, they have received the amount of plaintiff's share for plaintiff's use, from a third person primarily liable to pay. According to plaintiff's allegation in the plaint, the temple property being primarily liable for the payment, the managers of the temples for the time being are the persons primarily liable to pay the amount to him. These allegations were not traversed by the defendants although defendant No. 1, who is the principal manager, was examined on oath (exhibit 11).

Again, according to Article 62, the period of limitation is to be counted from the date when the money is *received* by the defendants for plaintiff's use. It is neither alleged nor proved by the defendants that the money payable to plaintiff was at any time received by them from some third person for the plaintiff's use. On the contrary they have distinctly stated in paragraph 3 of their written statement (exhibit 5) that in their account, the year is computed from the 1st of August to the 31st of July of the following year; and that the sum payable to plaintiff for any particular year falls due, after the close of that year. So according to them, the cause of action is to arise in the month of August of each year. This is quite inconsistent with the theory that Article 62 applies to this suit. I am therefore of opinion that this suit is governed by Article 131 of the Limitation Act.

On appeal, this decree was confirmed.

The defendants appealed to the High Court.

*K. H. Kelkar*, for the appellant.

The respondents did not appear.

CHANDAVARKAR, J.:—In the suit out of which this second appeal arises, the respondent before us as plaintiff sought, as manager of the temple of Shri Laxmi Narayan Dev at Hulekal, to recover the arrears for six years of a cash allowance (*tastik*) due to the temple from year to year from the temple of Shree Madhukeshvar at Banavási, of which the present appellants are managers.

The appellants admitted the title of the respondent to the allowance but pleaded limitation as to the arrears for two out of the six years.

1910.

SAKHARAM HARI v. LAXMIPRIYA TIRTHA SWAMI.

The Subordinate Judge, who heard the suit, held that the period of twelve years under Article 131 of the Limitation Act applied to the claim for arrears and allowed the whole of the claim. The Subordinate Judge, First Class, who heard the appeal from the original decree, has confirmed it.

On this second appeal it is argued, on the authority of *Chamanlal* v. *Bapubhai*[1], *Raoji* v. *Bala*[2], *Rathna Mudaliar* v. *Tiruvenkata Chariar*[3], that the claim to the arrears is as for money had and received, to which Article 62 of the Limitation Act XV of 1877 applies.

A cash allowance of the nature, such as we have in the present case, is, according to Hindu Law, *nibandha* or immoveable property. Where it is annually payable, the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and also those which have become actually due. But where there are more than one person entitled to the payment as co-sharers and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, minus his share, on behalf of the rest as money had and received for their use, though as to him with reference to the aggregate of rights, it is *nibandha* or immoveable property, in the nature of a periodically recurring right. This is the law clearly established by the decisions of this Court. In *Harmukhgauri* v. *Harisukhprasad*[4], it was held that Article 132 of Act IX of 1871 (which is the same as Article 131 of Act XV of 1877) applied to a suit brought by a *hakdar* against the person originally liable to pay the *hak* and not to a suit brought by a co-sharer in the *hak* against another co-sharer who has received from the person originally liable the whole amount. The same principle was adopted in *Desai Manekbai Amratlal* v. *Desai Shivlal Bhogilal*[5] and *Dulabh Fakuji* v. *Bansidharrai*[6]. In

(1) (1897) 22 Bom. 669.
(2) (1890) 15 Bom. 135 at p. 140.
(3) (1899) 22 Mad. 351.
(4) (1883) 7 Bom. 191.
(5) (1884) 8 Bom. 426.
(6) (1884) 9 Bom. 111.

*Raoji* v. *Bala*[1] it was held that a suit by one co-sharer to establish a title to a periodically recurring right as against another co-sharer fell, for the purposes of limitation, under Article 131 of Act XV of 1877, whereas a suit by the same co-sharer against the other for arrears of the amount received by the latter and payable, in virtue of his share to the former, fell under Article 62. The decision of this Court in *Chamanlal* v. *Bapubhai*[2] only reaffirms that principle. The important question in all these cases is who is the person sued and what is it that is sued for? If what is sued for is the establishment of a title to the right itself, then Article 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is an amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff, who has actually received payment from that person. Article 131 applies in that case to the person originally liable to pay and Article 62 applies to the co-sharer who has received the payment. The present suit is of the former character and has been rightly held by the lower Court to be governed by Article 131. The decree must, therefore, be confirmed.

*Decree confirmed.*

R. R.

(1) (1890) 15 Bom. 135.

(2) (1897) 22 Bom. 669.