APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

GANESH VINAYAK JOSHI (ORIGINAL DEFENDANT), APPELLANT *v.* SITABAI WIDOW OF NARAYAN BAHIRAO JOSHI (ORIGINAL PLAINTIFF), RESPONDENT. [a]

1916. *September* 14.

Inamdar—Suit to recover assessment from tenant—Tenant's liability to pay customary rent—Judi—Limitation Act (IX of 1908), Schedule I, Article 131—Recurring right—Limitation—Demand and refusal.

Lands situated in Inam villages not being in the actual possession of Inamdars themselves and falling under the calculation of Government Judi are liable in turn to pay customary rent, assuming that there has been no survey and assessment or contractual rent agreed upon to the Inamdars who are directly liable to Government for the Judi.

The payment of assessment is a recurring right falling within the contemplation and language of Article 131 of the first schedule of the Limitation Act (IX of 1908). In order that such a recurring right should be time-barred, it is necessary for the defendant to show that there has been a definite demand and refusal. Mere omission on the part of the person having such right to exercise it will not start a period of adverse possession under the Article.

SECOND appeal from the decision of J. A. Saldanha, Assistant Judge at Thana, confirming the decree passed by M. H. Wagle, Subordinate Judge at Panvel.

Suit to recover arrears of assessment.

The land in question in respect of which the arrears of assessment were claimed was situated in the village of Pasari, which had been granted in Inam to an ancestor of the plaintiff and the defendant. The defendant had assigned his Inam rights to his son and was holding the land as a tenant.

In 1905, the plaintiff served a notice on the defendant calling upon him to pay assessment on the land; but the demand was not complied with. The plaintiff

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sued in 1913 to recover arrears of assessment for the years 1911 to 1913.

The defendant contended *inter alia* that he was not a tenant; that the plaint land was never assessed; and that the suit was time-barred.

The Subordinate Judge raised an issue: "Whether the plaintiff cannot claim assessment of the plaint property as contended by the defendant?" and found that it was not proved that the plaintiff could not claim the assessment. The claim was therefore decreed.

On appeal the Assistant Judge held that the first Court rightly threw the *onus probandi* on the defendant, and confirmed the decree.

The defendant appealed to the High Court.

S. Y. Abhyankar, for *S. R. Bakhle*, for the appellant:—The defendant is not a tenant but is one of the Inamdars. The plaintiff cannot demand payment of assessment until a partition takes place between the Inamdars. The claim is barred by time, no assessment having been levied for nearly 30 years.

P. B. Shingne, for the respondent:—The defendant having assigned his Inam rights is a tenant and is liable to pay customary rent: *Rajya* v. *Balkrishna Gangadhar*.[1] The land in question is liable to pay Judi. Mere non-payment of rent is not sufficient to prove adverse possession; the payment of rent is a recurring right governed by Article 131 of the first schedule to the Limitation Act, 1908.

BEAMAN, J.:—This case has occasioned us much difficulty, partly because the pleadings in themselves are very far from precise, partly because on a first view the issues seem to throw the onus upon the

[1] (1905) 29 Bom. 415.

wrong party and partly because both the learned Judges, who have dealt with the case, being versed in matters of this kind, particularly Mr. Saldanha who has exceptional knowledge and experience of Inam and Khoti cases, have apparently felt no doubt or difficulty whatever in deciding in favour of the plaintiff. It is true that the trial Judge, in order to elucidate the pleadings, felt obliged to examine both the plaintiff and the defendant, and we understand the process of his reasoning upon that additional material to have been something of this kind. The plaintiff is admittedly one of two Inamdars of the village in which the land is situated. The land in suit is admittedly land upon which the Government Judi has been calculated, and it appears to be virtually an admitted principle, or if not admitted, then well established by legal decision, that all lands in such villages not being in the actual possession of Inamdars themselves and falling under the calculation of Government Judi are liable in turn to pay customary rent, assuming that there has been no survey and assessment or contractual rent agreed upon, to the Inamdars who are directly liable to Government for the Judi. Having arrived at that position, the learned trial Judge, perhaps rightly, though on this we express no confident opinion, framed an issue throwing the whole burden of proof upon the defendant. He called upon the defendant to show that on the facts admitted the land in suit was exempt from the payment of customary rent to the plaintiff. Now the defendant being thus put to his defence and aware of the form of the issue, it became specially incumbent upon him, if he really relied upon any such plea, to give the Court ample information. He, however, never more appeared to conduct his defence. The result is that the record is confined to the statements of the plaintiff and defendant taken before the issue was framed. Yet neither the learned trial Judge nor the

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learned Judge of first appeal appear to have entertained the very least doubt but that upon the facts so disclosed this land was liable to the plaintiff, as one of two Inamdars, who had paid the Judi to Government for half the customary rent, and in the circumstances we have stated, particularly in the absence of all evidence led by the defendant, we do not feel we are in a position to disturb findings so confidently reached.

The only point upon which we have felt some doubt at a later stage of the case was whether, on the plaintiff's admission that no *dhara* or assessment or customary rent, whichever term be preferred, had been levied for the last thirty-five years, the present suit was within time. Here, again, the learned Judge of first appeal seems to have felt no doubt and the reason is, we think, that this must be treated as a recurring right falling within the contemplation and language of Article 131. In order that such a recurring right should be time-barred, it is necessary for the defendant to show, as we held in a recent case, that there has been a definite demand and refusal. Mere omission on the part of the person having such right to exercise it will not start a period of adverse possession under Article 131. It is exactly on all fours with an ordinary suit for rent where the landlord has for many years made no demand. In all such cases, unless there has been an express repudiation of the landlord's title and an open declaration that the lessee holds adversely in interest to his original lessor, I am not aware that a suit for rent has ever been held time-barred, merely because rent has not been paid over a long period.

That being our view upon the special point of limitation, we think that the suit is within time, and we must now hold that the appeal fails and must be dismissed with all costs.

HEATON, J. :—I agree to the order proposed and entirely concur with the views expressed by my learned Colleague generally and especially on the point of limitation. I think it probable that had I been the Judge of first instance, I should have framed the issues which the defendant asked for. But I confess I do not feel that I can say with confidence that the Judge was indubitably wrong in refusing to frame them, and whatever may be the error in the decision arrived at, if there is an error, is undoubtedly due to the negligence of the defendant in declining to produce whatever evidence he had and to put his case fully before the Court.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt., Ag. Chief Justice and Mr. Justice Shah.

RAGHAVENDRA RAOJI KATHAWATE (ORIGINAL DEFENDANT), APPLICANT *v.* YALGURAD RAMCHANDRA PADKI AND CO. (ORIGINAL PLAINTIFFS), OPPONENTS.*

1916. *September* 15.

Civil Procedure Code (Act V of 1908), Order VIII, Rule 6—Set-off—Plaintiffs' claim based upon an account of goods supplied—Defendant pleaded by way of set-off amount of wages due—Claims based upon a money demand—Capacities of parties not varied—Set-off can be allowed.

The plaintiffs' claim was based upon an account of goods supplied to the defendant. The defendant admitted the claim but urged by way of set-off the amount of pay due to him by the plaintiff. The Subordinate Judge allowed the set-off and found that the plaintiffs' claim was satisfied. The District Judge was of opinion that it was not open to the defendant to urge by way of set-off the claim which he did urge. On application by the defendant to the High Court,

* Application No. 126 of 1916 under extra-ordinary jurisdiction.