

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.*

1920.  
August 17.

BHIMABAI KOM PADAPPA DESAI (ORIGINAL PLAINTIFF), APPELLANT v. SWAMIRAO SHRINIWAS PARWATI (ORIGINAL DEFENDANT), RESPONDENT\*.

*Adverse Possession—Inamdar—Decree against Inamdar—Court-sale—“Right, title and interest of Inamdar” purchased at the Court-sale—Suit by Inamdar to levy assessment—Indian Limitation Act (IX of 1908), Schedule I, Art. 131—Judi—Inamdar remiss in recovering assessment—No obligation on occupancy tenant to pay judi—Indian Contract Act (IX of 1872), section 69.*

In 1874, the defendant purchased at a Court sale the “right, title and interest” of the then Inamdar in the suit lands in execution of a money-decree against him. Since then the defendant remained in possession of the property and no attempt was made by the Inamdar or his successors to levy assessment or to recover possession until 1916 when the plaintiff as Inamdar sued to recover assessment from the defendant as an inferior holder, contending that it was a periodically recurring right under Article 131 of the Limitation Act, 1908.

*Held*, that Article 131 of the Limitation Act did not apply and that the suit was barred as the defendant had established his right to hold land free of assessment by adverse possession.

*Ganesh Vinayank v. Sitabai*<sup>(1)</sup>, distinguished.

PER MACLEOD, C. J. :—Under Article 131 of the Indian Limitation Act, 1908, the right to levy assessment is a recurring right and the time begins to run when there has been a demand and refusal, only in cases where the relationship of landlord and tenant or superior holder and occupant has ever existed. Once that relationship is established, then the mere non-payment of rent or assessment would not be sufficient to enable the tenant or occupant to begin to set up a title by adverse possession. There must be some overt act such as a refusal to pay the rent or assessment before time begins to run. But, where there is no such relationship and the Inamdar's rights are put up for sale the purchaser not being recognised as in any way liable to pay assessment, it cannot be said that there is any recurring right in the Inamdar to recover assessment from the purchaser.

\* Second Appeals Nos. 594 and 597 of 1919.

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The judi is payable in the lump sum by the Inamdar to Government and if the Inamdar is so remiss as to lose his right of getting the assessment from the occupancy tenants, it cannot be said that the obligation to pay judi for those lands for which the payment of assessment was lost falls upon the person in occupation of them; consequently, in such a case the Inamdar would not be entitled to recover the judi from the occupancy tenants under section 69 of the Indian Contract Act, 1872.

PER FAWCETT, J. :—Under Article 131, 3rd column, limitation does not run from the time when enjoyment of the right is first demanded and refused, but when the plaintiff is first refused the enjoyment of the right.

SECOND appeal against the decision of A. C. wild, District Judge of Bijapur, reversing the decree passed by V. V. Phadke, Subordinate Judge at Muddebihal.

Suit to recover assessment and local fund cess.

The lands in suit were Chavarat Inam lands held by one Bhujangrao who was Vatandar Desai. He died in 1847, leaving two widows Kalavva and Ramavva. Padappa, plaintiff's husband, was born to Ramavva as a posthumous son in 1848. On Bhujangrao's death, the Vatan of the Desai was attached by Revenue authorities but was restored in Kalavva's name in 1865 by a Sanad.

In 1873, defendant's father Shrinivas obtained two money decrees against Kalavva, and in execution of these decrees, the right, title and interest of Kalavva in the Vatan estate including the lands in suit was sold and purchased by Shrinivas in 1874.

Kalavva died in 1877. Padappa took no steps to recover the lands in suit on Kalavva's death. In 1887, Padappa filed a suit (No. 1007 of 1887) to recover two villages forming part of the Inam estate from Shrinivas on the ground that the alienation made by Kalavva by way of mortgage during her life-time, in 1865, was not binding on him after her death. He succeeded in the Subordinate Judge's Court and lost in the High

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Court, but on appeal to the Privy Council the decree of the Subordinate Judge's Court was restored: see *Padappa v. Swamirao*.<sup>(1)</sup> This was in 1900. In that suit the lands in the present suit were not included.

After the decision of the High Court, Shrinivas instituted several rent suits against the tenants in occupation and Padappa to recover possession of some of the lands in the present suit and it was then held by the Court that Shrinivas had become owner of the lands by adverse possession of twelve years against Padappa such adverse possession commencing after Kalavva's death in 1877.

In 1916, the plaintiff, Padappa's widow, brought the present suit as Inamdar to recover from the defendant as inferior holder Rs. 603 as assessment and Rs. 37-11-0 as local fund cess for the lands in dispute.

The defendant contended, *inter alia*, that the suit was barred by (1) *res judicata* and (2) adverse possession.

The Subordinate Judge held that the plaintiff's claim to levy assessment was barred by defendant's adverse possession but allowed the plaintiff to recover Rs. 140-10-9½ as judi and local fund cess for the lands in suit under section 69 of the Indian Contract Act.

The material portion of the Subordinate Judge's judgment on the question of adverse possession was as follows :—

Plaintiff's contention however is this: The lands are Inam lands and by the Sanad they are not transferable. Therefore no one outside the Inamdar's family can become owner of them as Inamdar: the result is, plaintiff argues, that defendant will have the right to retain possession of the lands by adverse possession but that he can do so only on payment of assessment to the Inamdars. In other words, plaintiff argues, that all that the defendant got by his adverse possession is that he became entitled to retain possession of the

(1) (1900) 24 Bom. 556.

land that plaintiff cannot oust him even if he refuses to pay the rent but that plaintiff can recover the rent from him every year, if not amicably through Court.

It is impossible to understand what the contention exactly means. What was sold at the auction was Kalavva's right, title and interest. That was the Inamdar's right, title and interest. At her death the sale was void and Padappa was entitled to get back the lands. He did not do so for twelve years and therefore, that which defendant's father Shrinivas obtained in 1874 and which was void in 1877 the year of Kalavva's death, became a perfectly good title in 1890 by twelve years' adverse possession. Mr. Hammantrao for plaintiff argues that this adverse possession could not convey the Inamdar's rights as those rights are inalienable by the Sanad. That was exactly the argument of the Advocate-General in the leading case on the point (*Radhabai v. Anantrao*, I. L. R. 9 Bom. 198, 210), and as regards this argument, the Chief Justice observed that the law prohibited alienation and alienation means some action, not the passive lying by. It was in that case ruled that an Inamdar's rights even in Service Inam lands could be lost by adverse possession for twelve years against one-holder of the lands and in the absence of fraud and collusion such loss by adverse possession and any decrees obtained against that holder would be binding on the successive holders. Now in the present case no fraud or collusion on the part of Padappa is or can possibly be alleged. He had been fighting strenuously against defendant and his father and took up one case even up to the Privy Council. The result, in my opinion, therefore, is that plaintiff's rights as Inamdar are gone by adverse possession.

On appeal, the District Judge dismissed the plaintiff's suit on the ground that it was barred by *res judicata* in consequence of the decision in the previous rent suits between the plaintiff's husband Padappa, and defendant's father Swamirao. The District Judge further held that under explanation IV to section 11 of the Civil Procedure Code the plaintiff was barred from setting forward her right to levy assessment inasmuch as this claim ought to have been made a ground of attack in the previous suits.

The plaintiff appealed to the High Court.

*Jayakar*, with *S. S. Patkar* and *V. D. Limaye*, for the appellant:—We submit that by the sale of 1873, which was with respect to the lands held by Kalavva as Inamdar, defendant only acquired a right to possess

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the land and by twelve years' adverse possession of the defendant the plaintiff lost the right to possession but not the right to recover assessment; because the right to possession of the Inam lands is a distinct right from the right to recover the assessment. The physical possession of the lands by the defendant adversely to the plaintiff for twelve years can create a title in the plaintiff for possession of the land while the right to recover the assessment stands on a different footing. The right to recover the assessment being a recurring right, the limitation applicable to it is that provided by Article 131 of the Indian Limitation Act; and the mere sleeping over by the plaintiff or not demanding the assessment for a number of years, will not debar him from recovering the same afterwards. The decision of the lower Court that the suit was barred by limitation is wrong: see *Ganesh Vinayak v. Sitabai*<sup>(a)</sup>.

Secondly, the Courts having held that Padappa was the legitimate heir of Bhunjangrao, the holding of the Vatan by Kalavva was only by way of trespass and on her death in 1877, the sale that took place in 1873 consequent on the execution proceedings in pursuance of the money decrees against her was null and void; Padappa was thus the rightful owner. After Kalavva's death the parties were relegated to the former position, viz., the plaintiff was the mortgagor and the defendant, the mortgagee. There can be no adverse possession as between the parties. As plaintiff's husband failed to appeal from the decision in suits of 1897 and 1898 and other possessory suits those decisions remained binding upon the plaintiff and his remedy with respect to those lands was barred. But with respect to Survey Nos. 109, 113, 104, 107, 108 and 300 of Nidgundi about which there were no suits for possession plaintiff is entitled to recover possession.

<sup>(a)</sup> (1916) 41 Bom. 159.

As to the payment made by the plaintiff of judi, it should be allowed to him as the defendant was in law bound to pay the same.

*Nadkarni*, with *A. G. Desai*, for the respondent:—The “right, title and interest” of Kalavva, the then Indamdar, was put up for sale by Court and purchased by defendant’s father in 1874. The purchaser thus became entitled by the sale certificate to all the Inamdar’s rights including the right to levy assessment. The Privy Council and the Courts in India have interpreted the expression “right, title and interest” of the judgment-debtor to mean and include every kind of interest to which the judgment-debtor was entitled. No distinction can, therefore, be drawn between the right to levy assessment on land and the right to the enjoyment of the land since both accrued in favour of Shrinivas simultaneously by the Court-sale. Since 1870, there has been bitter litigation between the family of Padappa and that of Shrinivas and the fact that Padappa did not venture to put forward the present claim shows conclusively not only that Shrinivas himself asserted that right but that Padappa all along knew that such right was being asserted against him. How is a purchaser of the “right, title and interest” of an Inamdar to assert his claim except by withholding and refusing to pay assessment? Plaintiff cannot shield himself under the expression “periodically recurring right” in Article 131 of the Indian Limitation Act. Article 144 of the Act covers every “interest” in immoveable property. The case of *Ganesh Vinayak v. Sitabai*<sup>(1)</sup> is clearly distinguishable. There the relationship between the plaintiff and the defendant was that of landlord and tenant and the tenant had not repudiated the title of the landlord. Here, however, the right of the Inamdar

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had become extinct. The case in point is *Madhavrao Hariharrao v. Anusuyabai*<sup>(1)</sup>: see the remarks of Scott C.J. at pp. 612, 613; see also *Radhabai and Ramchandra Konher v. Anantrav Bhagvant Deshpande*<sup>(2)</sup> and the remarks of West J. at p. 231. Besides, Article 131 (unlike Articles 88, 89 and 103) merely says "refused the enjoyment of the right". Clearly, Padappa was refused the enjoyment of the right when Shrinivas the purchaser claimed that right from 1874: see *Ramchandra v. Jaganmohana*<sup>(3)</sup>: "The statutory title corresponds in quality and quantity to the title which it has extinguished".

With regard to the second branch of the argument that Kalavva having died in 1877 and Padappa having become the rightful owner there was no adverse possession, I submit that time had already commenced to run in 1874 and the adverse possession was complete in 1886: see judgment of Jenkins C. J. in *Rama v. Shamrao*<sup>(4)</sup> at p. 137, wherein he points out relying on dicta of Lord Davey in *Padapa v. Swamirao*<sup>(5)</sup>, that a successive vatandar claims under his predecessor.

In any event, Padappa's claim to levy assessment was barred twelve years after 1877. He took active steps to assert all his Inam rights with respect to other lands right up to the Privy Council; but with regard to the present lands he did nothing. Thus, not only the right to possession of the lands was barred by twelve years' adverse possession but also the right to levy assessment *which arose in relation to the land and was inseparable from it*: see *Keval Kuber v. The Talukdari Settlement Officer*<sup>(6)</sup> and *Abhoy Churn Pal v. Kally Pershad Chattarjee*<sup>(7)</sup>.

(1) (1916) 40 Bom. 606.

(4) (1904) 7 Bom. L. R. 135.

(2) (1885) 9 Bom. 198.

(5) (1900) 24 Bom. 556.

(3) (1891) 15 Mad. 161.

(6) (1877) 1 Bom. 586.

(7) (1880) 5 Cal. 949.

Payment of judi was a voluntary and gratuitous act of Padappa. Section 69 of the Indian Contract Act has no application. Padappa was not bound to pay judi on lands lost by adverse possession. Government could have proceeded against the lands in Shrinivas' possession if judi was not paid.

MACLEOD, C. J. :—The plaintiff sued to recover from the defendant as inferior holder the assessment and local fund cess for 1912-13 of certain lands in five villages. The trial Court held that the plaintiff was not entitled to recover as Inamdar, but allowed the claim for judi and local fund cess for the lands in suit to the extent of Rs. 140-10-9½ under section 69 of the Indian Contract Act. The lower appellate Court dismissed the suit altogether. The learned Judge held that the plaintiff was barred from recovering the assessment for the suit lands by the principle of *res judicata*, because certain suits had been filed by the defendant to recover possession of the land and mesne profits from the tenants and the plaintiff's husband was a party to those suits. But I do not think that the question, which is now in issue whether plaintiff is entitled to levy assessment against the defendant, was in issue in these suits though Padappa was a party. The learned appellate Judge does not seem to have considered the question whether the defendant had acquired a right to the suit lands by adverse possession. But it is admitted that these lands were purchased by the defendant in execution of a decree obtained against Kalavva, the then Inamdar, in 1874. Therefore he purchased all the Inamdar's rights including the right to levy assessment on the suit lands. No doubt it was held in litigation regarding other lands belonging to the Inamdar that the defendant had not purchased anything beyond the rights of Kalavva,

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and that on her death Padappa was entitled to succeed. But as a consequence of succeeding in that suit Padappa took no steps either to levy assessment or to recover possession of the suit lands. It cannot be disputed that the present respondent has been in possession of the suit lands for more than twelve years adversely against the plaintiff. It was suggested that the right to levy assessment was a recurring right and the period of limitation should be as prescribed by Article 131 according to which time begins to run when there has been a demand and refusal. That may very well be if the relationship of landlord and tenant or superior holder and occupant has ever existed. Once that relationship is established, then the non-payment of rent or assessment would not be sufficient to enable the tenant or occupant to begin to set up a title by adverse possession. There must be some overt act such as a refusal to pay the rent or assessment before time begins to run. But here there was no relationship as regards the suit land between the Inamdar and the respondent. By the purchase at the sale at which the Inamdar's rights were put up for sale he was not recognized as in any way liable to pay assessment. Therefore it cannot be said that there was any recurring right in the appellant, who now occupies the position of Inamdar, to recover the assessment. The decision, therefore, in *Ganesh Vinayak v. Sitabai*<sup>(1)</sup> can be distinguished. In my opinion, therefore, the respondent has clearly established a right to hold this land against the Inamdar free of assessment by adverse possession.

As regards the claim of the plaintiff, which was allowed by the trial Court, to recover judi and local fund cess, I agree with the learned appellate Judge

(1) (1916) 41 Bom. 159.

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that it should be disallowed. The judi is payable in the lump sum by the Inamdar to Government, and if the Inamdar is so remiss as to lose his right of getting the assessment from the occupancy tenants, it cannot be said that the obligation to pay judi for those lands for which the payment of assessment was lost, falls upon the persons in occupation of them. Section 69 only applies when a person is interested in the payment of money which any other is bound by law to pay, and therefore, if he pays it, he is entitled to be re-imbursed by the other. Here it has not been proved that the defendant is bound by law to pay the judi. Therefore if the plaintiff pays it, it must be considered it has been paid in his own interest and he certainly cannot be entitled to recover it from the defendant under section 69.

Therefore the decision of the learned appellate Judge must be confirmed and the appeals dismissed with costs.

FAWCETT, J.:—I concur. Reliance was placed for the appellant on the view taken in some reported cases that under Article 131, in order that a recurring right of the kind specified in that Article should be time-barred, it is necessary for the defendant to show that there has been a definite demand and refusal. In my opinion, that view should be limited to cases where the circumstances are such that mere non-compliance with the right does not of itself amount to a refusal. I would point out that under Article 131, 3rd column, limitation does not run from the time when the enjoyment of the right is first demanded and refused, but when the plaintiff is first refused the enjoyment of the right. If we compare this Article with Articles 88, 89 and 103 where the words used are "demanded and refused," it will be seen that it is rather reading into the Article words, which are deliberately omitted from

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it, to say that under Article 131 there must be shown a definite demand, to which there was a refusal. In the present case the circumstances, in my opinion, are such that the non-payment of any rent or assessment by the defendant to the plaintiff necessarily constitute a refusal within the meaning of this Article. The defendant had acquired the right, title and interest of the Inamdar at the Court auction. There had been a lengthy litigation between the parties, and the defendant was admittedly in adverse possession of the lands for a period which absolutely barred the plaintiff's right to recover them, although the plaintiff was successful in the litigation which went to the Privy Council.

I think, therefore, that even supposing the case does fall under Article 131, the plaintiff was first refused the enjoyment of the right over twelve years before the institution of the present suit, and that his claim to levy any assessment is clearly barred.

On other points I agree with the learned Chief Justice.

*Decree confirmed.*

J. G. R.

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*Before Mr. Justice Shah and Mr. Justice Crump.*

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SONUBAI, WIDOW OF BABURAO BALVANTRAO GAIKWAD (ORIGINAL APPLICANT), APPLICANT v. SHIVAJIRAO KRISHNARAO GOPALRAO GAIKWAD (HEIR OF ORIGINAL OPPONENT), OPPONENT\*.

*Civil Procedure Code (Act V of 1908), section 151 and Order XLI, Rule 19—Indian Limitation Act (IX of 1908), section 6 and Article 163—Appeal dismissed default—Appellant, minor at the date of default—Application to re-admit the appeal by the minor on attaining majority—Court—Inherent powers—Practice and procedure.*

\* Civil Applications Nos. 302 and 303 of 1919.