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ANANT GOVIND v. TUKARAM KUSHABA

Murphy J.

Appellants to have their costs, both in this and in the District Court, from respondent who will bear his own in both these Courts.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Baker.

1929
January 23

RAYEGAVDA, ADOPTIVE FATHER HAMMANTRAYA, MINOR, BY HIS NEXT FRIEND DEFENDANT No. 7 BHINANGOWDA, APPELLANT No. 2 AND ANOTHER (ORIGINAL DEFENDANTS NOS. 5 AND 7), APPELLANTS *v.* RAMLINGAPPA SHIDGOVDAPPA AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 6), RESPONDENTS.*

Indian Limitation Act (IX of 1908), Schedule I, Article 141—Reversioners—Suit for possession against alienee from widow—Other reversioners added as defendants—Written statement of defendants—Reversioners claiming their share on partition—Written statement filed more than twelve years after widow's death—Claim not barred.

The plaintiff, as purchaser of the rights of three out of five reversionary heirs of one A, sued to recover possession of his three-fifths share by partition from the alienee from the widow of A who was in possession of the property. The reversioners as regards the remaining two-fifths share were added as parties to the suit, and by their written statement claimed possession of their shares. The trial Court passed a decree in the plaintiff's favour for possession by partition of his three-fifths share but rejected the claim of the other reversioners under Article 141 of the Indian Limitation Act on the ground that the written statement had been filed, and the claim therefore preferred, more than twelve years from the death of the widow of A. An appeal to the District Court was unsuccessful. The defendants Nos. 5 and 7 having appealed to the High Court :—

Held, that the claim of defendants reversioners was not barred by limitation inasmuch as they were parties to a suit, instituted by the plaintiff within the prescribed period, in which their right to the property could be effectively determined.

Narsinh v. *Vaman Venkatrao*,[1] followed.

SECOND Appeal against the decision of A. S. R. Macklin, District Judge at Bijapur, confirming the decree passed by N. D. Uppani, Subordinate Judge at Bijapur.

Suit to recover possession.

The property in suit originally belonged to one Amagowda. On his death his widow Mahalingawa

*Second Appeal No. 300 of 1927.

[1] (1909) 34 Bom. 91.

became the owner of the suit property. In September 1905 she sold the property to defendant No. 6. She died on November 28, 1911. Defendants Nos. 1 to 5 were the reversionary heirs of Amagowda. Defendants Nos. 1 to 3 sold their three-fifths rights in the property to plaintiff; and defendant No. 4 sold his right to defendant No. 7.

On November 17, 1923, the plaintiff filed a suit to recover possession of a three-fifths share by partition by metes and bounds, alleging that the widow had no authority to sell the property and the sale to defendant No. 6 was void.

Defendant No. 6 contended that he was in possession under the sale deed in his favour and the sale was for legal necessity and was not hollow.

Defendants Nos. 5 and 7 in their written statement filed on June 9, 1924, contended *inter alia* that in case the plaintiff's suit is awarded, they should be given separate possession of their 2/3rd share.

The Subordinate Judge held that the sale by Mahalingawa to defendant No. 6 was not for legal necessity and was not binding on the plaintiff and defendants Nos. 5 and 7; that the plaintiff's suit was within time under Article 141 of the Indian Limitation Act, but the claim of the defendants Nos. 5 and 7 made for the first time on June 9, 1924—more than twelve years after Mahalingwa's death on November 28, 1911—was barred under the same article of the Indian Limitation Act.

On appeal, the District Judge agreeing with the view taken by the trial Court, confirmed the decree.

Defendants Nos. 5 and 7 appealed to the High Court.

R. A. Jahagirdar, for the appellants.

H. B. Gumaste, for the respondents.

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BAKER, J. :—The facts of this case are that the plaintiff as purchaser of the rights of three out of the five reversioners of Amagowda sued to recover possession of his three-fifths share by partition from defendant No. 6 who was an alienee from Mahalingawa, the widow of Amagowda, and defendants Nos. 5 and 7 who are the reversioners as regards the remaining two-fifths share were added. The defendant No. 6 pleaded legal necessity for the sale. That was found against him. It was also found that he and not defendants Nos. 5 and 7 were in possession of the plaint property, and the first Court passed a decree in plaintiff's favour for possession by partition of his three-fifths share. Defendants Nos. 5 and 7 asked in their written statement that they might be given their two-thirds share in the property. It was held their share was two-fifths, but their claim was rejected on the ground that it was preferred for the first time more than 12 years from the death of the widow Mahalingawa, and, therefore, it was barred under Article 141 of the Indian Limitation Act. Defendant No. 6 did not appeal, and we are not concerned with the question of legal necessity. Defendants Nos. 5 and 7 appealed, and the District Judge held that as defendants Nos. 5 and 7 were reversioners and not coparceners, they must sue for possession within 12 years of the widow's death, and that their claim was put forward in their written statement, and that statement was filed more than 12 years later, and that the claim for partition was therefore barred. The defendants Nos. 5 and 7 make this second appeal. The learned Pleader for the appellants has relied on the case in *Narsinh* v. *Vaman Venkatrao*,[1] in which this point was directly in issue. In that case certain watan lands belonging jointly to two brothers were let under a perpetual lease. After the death of the last owner

[1] (1909) 34 Bom. 91.

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his representatives brought a suit for the recovery of the lands let by him. The suit was against the heirs of the mortgagee of the lessee, the heirs of the lessee, and defendants Nos. 4 and 5 as the heirs of one of the two brothers to whom the property belonged. Defendants Nos. 4 and 5 did not contest the plaintiffs' claim. The plaintiffs in this case were the representatives of one of two joint owners having a half share in the property, and the defendants Nos. 4 and 5 were the heirs of the other joint owner. The first Court allowed the plaintiffs' claim to the extent of their share, viz., a moiety, on the ground that their claim to this extent was not time-barred. Against this decree both the plaintiffs and defendants Nos. 4 and 5 appealed, the latter of whom in appeal claimed their share, viz., the other moiety, which was awarded to them. The heirs of the mortgagee appealed contending that the claim of defendants Nos. 4 and 5 was time-barred. The High Court held that the claim of defendants Nos. 4 and 5, which was put forward for the first time in appeal, was within time, because they being parties to the suit instituted within the 12 years during which their right to share in the watan property could be determined, the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually before it by the institution of the suit, and it was further held that a party transferred from the side of the defendant to the side of the plaintiff was not a new plaintiff to whom the provisions of section 22 of the Indian Limitation Act would apply, following *Nagendrabala Debya* v. *Tarapada Acharjee*.[1]. This case, which does not appear to have been quoted before the lower appellate Court, is directly in point in the present case. The matter is discussed at p. 99 in the judgment of Scott, C.J., in *Narsinh* v. *Vaman*

[1] (1908) 35 Cal. 1065.

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Venkatrao.[1] It is pointed out that time began to run from the death of Venkatrao in 1893, and the 4th and 5th defendants were upon the record of the suit as defendants at the date of its institution. It was held that though section 28 of the Indian Limitation Act would operate to extinguish the right of a person who did not bring a suit within the period prescribed, it does not follow that his right would be extinguished if he were a party to a suit instituted by another within the prescribed period in which his right to the property could be effectively determined (p. 99):

"The section does not say so, and we do not think that we ought to construe it as implying that this would be the case. Here the defendants were parties to the suit instituted within twelve years in which their rights to a share in this vatan property could be effectually determined as against the defendants 1 to 3, and the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually brought before it by the institution of the suit; see section 31 of the Civil Procedure Code of 1882 and Order I, Rule 9 of the Code of 1908. There can be no doubt that if the defendants had been plaintiffs in the first instance no such argument as we have been discussing could have been put forward. But it appears from the judgment of the learned Judge of the appellate Court that he, for the purposes of the suit, treated them as co-plaintiffs although he did not amend the record by placing them among the plaintiffs and striking them out from among the defendants."

The High Court, then, following the case of *Nagendrabala Debya* v. *Tarapada Acharjee*,[2] held that a party transferred to the side of the plaintiff from the side of the defendant is not a new plaintiff to whom the provisions of section 22 of the Indian Limitation Act would apply, and exercised their powers of amendment by putting the plaint in the shape in which the Judge of the lower appellate Court intended it to be at the time he delivered his judgment. It is not as a matter of fact necessary in a partition suit that a defendant who claims a share in the property should be made a co-plaintiff. On behalf of the respondents it is contended that the right of the defendants is barred by 12 years' adverse

[1] (1909) 34 Bom. 91. [2] (1908) 35 Cal. 1065.

possession on the part of the alienee from the widow as they instituted no suit within that period, and therefore section 28 of the Indian Limitation Act would apply, and reference is made to *P. M. A. Valliappa Chetty* v. *S. N. Subramanian Chetty*,[1] *Sakharam* v. *Trimbakrao*,[2] and *Budesab* v. *Hanmanta*.[3] So far as the case of *Valliappa Chetty* v. *Subramanian Chetty*[1] is concerned, I am of opinion that it has no application as it refers to a case in which one plaintiff was not represented by another, and he had not himself signed the plaint, and, therefore, there could not be considered to have been any presentation of a plaint by him. *Sakharam* v. *Trimbakrao*[2] is a case under section 28 of the Indian Limitation Act which held that where the right has been extinguished, that right cannot be pleaded as a defence in a suit brought by the plaintiff for a declaration that the land could be held free of assessment. So also *Budesab* v. *Hanmanta*[3] is a case showing that adverse possession for more than 12 years by one claiming to hold land as its full owner not only extinguishes the title of the true owner, but creates a title by negation in the occupant which he can actively assert, if he lost possession, against the true owner. But none of these cases expressly deal with the special and rather unusual point which arises in this case, viz., whether although a suit by the defendants Nos. 5 and 7 themselves to recover possession of their two-fifths share in the land in dispute from the alienee from the widow would be barred under section 28 of the Indian Limitation Act read with Article 141 as being beyond 12 years from the death of the widow, yet when a suit is brought within the proper period of limitation by another reversioner, which has happened in the present case, and the defendants are made parties to that suit, and in their

(1) (1914) 26 Mad. L. J. 494. (2) (1920) 23 Bom. L. R. 314 at p. 324.
(3) (1896) 21 Bom. 509.

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written statement claimed possession of their two-fifths share, such a claim would be barred by limitation. The case quoted above *Narsinh* v. *Vaman Venkatrao*[1] deals directly with this point, and is a direct authority for the proposition that such a claim would not be barred provided the suit in which that written statement was put in was brought within limitation. Now it is not disputed that the suit of the plaintiff was within 12 years from the death of the widow, and this being so, and the defendants having been made parties from the day of the institution of the suit, the fact that their written statement itself was put in more than 12 years from the date of the death of the widow would not, in my opinion, on the construction of *Narsinh* v. *Vaman Venkatrao*[1] be barred by limitation. The present is a suit in which the defendants' right to the property can be effectually determined, and in all essentials it fulfils the condition provided by the remarks on p. 99 of that case. In these circumstances, as *Narsinh* v. *Vaman Venkatrao*[1] has never been overruled or dissented from, I am bound to follow it, and to hold that the claim of the defendants Nos. 5 and 7 to recover their two-fifths share in the property as reversioners of the widow is not barred by limitation. I do not think that in the circumstances it is necessary that they should be made co-plaintiffs along with the plaintiff as this suit, as the plaint shows, is a partition suit in which the shares of all defendants can be determined and awarded to them on their payment of the necessary Court-fee. This however is a minor matter as on the Calcutta case which has already been quoted their claim would not be barred (I refer to *Nagendrabala Debya* v. *Tarapada Acharjee*[2]) even if this alteration were made.

[1] (1909) 34 Bom. 91.

[2] (1908) 35 Cal. 1065.

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The result will be that the decree of the lower Courts must be set aside and a decree passed entitling defendants Nos. 5 and 7 to possession of the remaining two-fifths share in the suit property with mesne profits from defendant No. 6 who is in possession, subject of course to the payment of the necessary Court-fee on the value of the property to be determined by the lower Court under Order XX, rule 12, clause (2), Civil Procedure Code, together with costs in this Court and in the lower appellate Court to be paid by defendant No. 6.

Decree reversed.

J. G. R.

APPELLATE CRIMINAL.

Before Mr. Justice Mirza and Mr. Justice Murphy.

EMPEROR *v.* C. E. RING AND OTHERS, ACCUSED.*

1929 *January* 31

Criminal Procedure Code (Act V of 1898), sections 233, 234, 235 and 239 (d)—Jury trial—Offences of bribery and extortion—Charge of conspiracy—Misjoinder of charges and accused—Misdirections—Non-direction—Indian Penal Code (Act XLV of 1860), sections 120B, 161, 163 and 114.

Ten accused persons were jointly tried before the Sessions Court at Belgaum, accused Nos. 1, 2 and 3 on charges under sections 120B, 161 and 163 of the Indian Penal Code and accused Nos. 4 to 10 on charges under sections 120B 161, 163 and 114 of the Code. The charges framed at the trial were that between 28th August 1926 and 1st December 1926 accused Nos. 1 to 3 agreed together to receive a gratification other than legal remuneration from both the parties concerned in the complaint of Sanmallappa against accused Nos. 4 to 10; that in pursuance of the said conspiracy each of accused Nos. 1 to 3 being Police Officers accepted illegal gratification in the shape of Rs. 500, Rs. 200 and Rs. 200 respectively from Sanmallappa as a motive for showing favour to him; that accused No. 3 further accepted for himself and for accused Nos. 1 and 2 such illegal gratification in the shape of Rs. 1,000 in cash from accused Nos. 4 to 10 as a motive for showing favour to them in the exercise of official functions, in respect of the complaint filed by Sanmallappa against them; and further that accused Nos. 4 to 10 agreed among themselves to offer illegal gratification to accused Nos. 1 to 3 and in pursuance of the said conspiracy actually paid Rs. 1,000 to accused No. 3. It was contended that the simultaneous trial on all these charges contravened the provisions of sections 233, 234 and 235 and did not fall under section 239 (*d*) of the Criminal Procedure Code, 1898.

Held, that the joint trial of the accused persons was not vitiated by improper joinder, neither was it invalidated by the plurality of offences charged, inasmuch

* Criminal Appeals Nos. 487, 503, 504 and 518.