

1877

DEC. 17.

5 B. 25.

APPELLATE CIVIL.

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CIVIL.

5 B. 25.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and
Mr. Justice M. Melvill.

BHAGUJI (*Original plaintiff*), Appellant v. ANIABA AND OTHERS
(*Original Defendants*), Respondents.* [17th December, 1877.]

Bombay Act V of 1864—Limitation Act, IX of 1871, sch. II, art. 46—Partition suit.

Plaintiff, in 1876, filed a suit to establish his right to and to recover a fourth share of certain property which he alleged to be ancestral. He stated his cause of action to have accrued on the 17th May 1871, on which day he had been dispossessed by an order by the Mamlatdar, made under Bombay Act V of 1864. The District Court held that the suit was barred by art. 46, sch. II of the Limitation Act IX of 1871.

Held by the High Court, on special appeal, that art. 46 did not apply, and that the suit was not barred.

[F., 5 B. 27; Appl., 15 B. 299 (305); Expl., 26 B. 146=3 Bom. L.R. 594.]

THIS was a special appeal from the decision of G. Druitt, Assistant Judge at Poona, in Appeal No. 232 of 1876, reversing the decree of Janardan Ramchandra, Second Class Subordinate Judge of Khed.

The plaintiff, Bhaguji, sued to establish his right to and recover possession of a fourth share of a house which he alleged to be the ancestral property of himself and the defendants. The plaint was filed in the year 1876. He stated his cause of action to have accrued on the 17th May 1871, on which day he was dispossessed of the house in dispute by an order of the Mamlatdar under Bombay Act, V of 1864.

[26] Defendant No. 1 admitted the plaintiff's claim. Defendants 2 and 3 answered that there were three ancestral houses, one of which had been occupied by the plaintiff himself; that the defendants were divided in interest from him; that the plaintiff never occupied the house in dispute, except once when he entered it by force and was ousted by an order of the Mamlatdar, on the complaint of defendant No. 2, and that the suit was barred by limitation.

The Subordinate Judge found that the three houses were undivided ancestral property, and that the plaintiff was entitled to a fourth share of each. He made a decree accordingly.

Aniaba (defendant No. 2) appealed. The Assistant Judge held the suit barred by limitation under Act IX of 1871, sch. II, art. 46, because it was not brought within three years from the date of the Mamlatdar's order, as required by that article. He accordingly dismissed the plaintiff's claim.

The plaintiff thereupon appealed to the High Court.

Pandurang Balibhadra, for the appellant.

Y. V. Atle, for the respondents.

JUDGMENT.

WESTROPP, C.J.—The Court reverses the decree of the Assistant Judge and remands the cause for re-trial on the merits. The Court declares that the Mamlatdar's order of the 17th day of May 1871, does not interfere with a partition suit, such as the present. The District Court should ascertain whether any and what portion of the family property is undivided ;

* Special Appeal No. 189 of 1877.

(whether the same consists of houses, lands or moveables), and should make a fair partition of such undivided property amongst the various coparceners. Costs of suit and both appeals should be disposed of by the District Court in such manner as may be just.

Case remanded.

5 B. 27.

[27] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F.D. Melvill.

SHIVRAM (*Original Plaintiff*), *Appellant v. NARAYAN AND OTHERS* (*Original Defendants*), *Respondents.** [25th August, 1880.]

Limitation Act, IX of 1871, sch. II, art. 46—Partition suit—Res judicata—Bombay Act, V of 1864.

Art. 46 of sch. II of the Limitation Act, IX of 1871, is not applicable to a partition suit.

In 1871, the plaintiff sued to establish his sole right to a portion of a field on the ground that it had been allotted to him by partition. The defendant also claimed it as his share obtained by partition. The Court rejected the plaintiff's claim, holding that no partition had taken place and that the field was the joint property of five coparceners, including the plaintiff and defendant. In 1878, the plaintiff brought a second suit for a partition of the field, including the portion for which his former suit had been instituted.

Held that the present suit for partition was not barred by the previous suit which was brought to establish the plaintiff's sole right to the lands in question.

Bhaguji Raghujji v. Aniaba (1) followed.

[*Appl.*, 15 B. 299.]

THIS was a second appeal from the decision of E. Hosking, Assistant Judge at Nasik in the District of Thana, in appeal No. 273 of 1878, reversing the decree of R. D. Paranjape, Second Class Subordinate Judge at Sinnar.

The plaintiff, Shivram, sued Narayan and three others to recover possession, by partition, of his fifth share in a field No. 159, situated at the village of Gonde in the Taluka of Sinnar. In 1871, the plaintiff sued Vithoji (defendant No. 3) in the Mamlatdar's Court for possession of the northern portion of the field in dispute under Bombay Act V of 1864. On the 11th August of that year, the Mamlatdar rejected the plaintiff's claim and gave possession of the land to defendant No. 3. The plaintiff thereupon brought a regular suit (No. 1126 of 1871) for possession of the land awarded by the Mamlatdar to defendant No. 3, alleging that it had been allotted to him by partition. The defendant No. 3 also claimed it as his share, obtained by partition. The Court, on the 20th October, 1875, rejected the plaintiff's claim, on the ground that no partition had taken place. The [28] plaintiff, therefore, brought the present suit on the 5th February, 1878, for a partition of the field in dispute and for possession of his fifth share therein.

Defendants Nos. 1, 2 and 4 admitted the plaintiff's claim. Defendant No. 3 (Vithoji) pleaded, among other things, that the claim was barred by the previous suit (No. 1126 of 1871).

* Second Appeal No. 241 of 1880.

(1) 5 B. 25.