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[68] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice F.D. Melvill.

CHHAGANLAL AND OTHERS (*Original Defendants*), *Appellants v.* BAPUBHAI (*Original Plaintiff*), *Respondent.** [10th June, 1880.]

Limitation Acts XIV of 1859 *and IX of* 1871—*Suit to establish title and for arrears.*

The plaintiff sued the defendants to recover a share of the income of a certain vatan which was admitted to be connected with an hereditary office, but was not, strictly speaking, charged upon immoveable property. In 1861 the plaintiff had brought a previous suit and obtained a decree declaring his right to share in the vatan and awarding him arrears for six years. Under this decree he had received payment of his share up to the year 1860. In the present suit the plaintiff claimed arrears for twelve years, *viz.*, from 1862 to 1874. He admitted that he had received no payment for the year 1861, and that his claim for that year was barred.

The defendants contended that the period of limitation applicable to such a claim was six years, and not twelve years; that this was the case at any rate so long as the Limitation Act XIV of 1859 was in force, and that, therefore, the claim to so much of the arrears as was time-barred under that Act could not be revived by Act IX of 1871.

Held that, whether Act XIV of 1859 or Act IX of 1871 applied to the plaintiff's claim, the period of limitation was twelve years, Article 132 of sch. II of Act IX of 1871 was a distinct provision to that effect. There was no similar provision in Act XIV of 1859, but all hereditary offices, and all payments or allowances made on account of such offices, are to be regarded as immoveable property within the meaning and intention of that Act, and are therefore governed by the provisions of cl. XII of s. 1.

It was also contended on behalf of the defendants that even if the period of limitation were held to be twelve years, the plaintiff's claim was nevertheless barred *in toto*, inasmuch as he admitted that he had received no payment on account of his share for thirteen years preceding the institution of the suit. In support of his contention the cases of *Raiji Manor* v. *Desai Kallianrai* (1) and *Madvala* v. *Balvant* (2) were cited, where it was laid down that the cause of action to establish title, and the cause of action to recover arrears which rest on such title, are not distinct and independent of each other; so that if the former be barred, even the arrears which may be within the period of limitation cannot be recovered.

Held that, while this is the rule which must be applied to cases in which a plaintiff must establish his title before he can ask for arrears accruing due under such title, the same rule does not apply where, as in the present case, the plaintiff has in a former suit obtained a decree declaratory of his title. It is no longer necessary for him to establish his periodically recurring right against any person who is bound by that decree; and that being so, there is [69] nothing in the law of limitation which can be construed into a restriction of the plaintiff's right to recover the arrears falling due within the period of limitation.

[Diss., 8 B. 426 (432); N.F., 7 B. 191 (194); F., 16 A. 189 = A.W.N. (1894) 19; R., 9 B. 111 (114); 14 B. 236 (240); 15 B. 135 (141); 22 B. 669 (671); 26 M. 291 (298); 11 A.L.J. 580 (585); 2 O.C. 62 (63); U.B.R. (1897—1901), Vol. II, p. 535 (537); D., 22 M. 351.]

THIS was an appeal from the decision of A. L. P. Larken, Assistant Judge of Ahmedabad, confirming the decree of the Subordinate Judge of Ahmedabad.

The facts of the case, the arguments, and the authorities cited, fully appear from the judgment of the High Court.

* Second Appeal No. 416 of 1879.

(1) 6 B.H.C.R.A.C.J. 56. (2) 9 B.H.C.R. 260.

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Gokaldas Kahandas Parekh, for the appellants.
Jefferson, Bhaishankar and *Dinshak*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—This is a claim to share in the income of a certain vatan, which is admitted to be connected with an hereditary office, but is not, strictly speaking, charged upon immoveable property.

The principal objection to the claim is that it is barred by the law of limitation.

In 1861, the plaintiff brought a suit (No. 3023 of 1861) against the present defendants, or some of them, in which he asked for a declaration of his right to share in the vatan, and claimed arrears for preceding years. On the 13th October 1869, he obtained a decree in his favour. By this decree his title to a share was declared, and arrears for six years were awarded to him. The plaintiff has consequently received payment of his share up to the year 1860.

In the present suit, which was instituted in 1874, he claims arrears for 12 years, *viz.*, from 1862 to 1874. He admits in his plaint that he received no payment for 1861, and that his claim for that year is consequently barred.

It is contended, on behalf of the defendants, that the period of limitation applicable to a claim of this description is six years, and not twelve years; that, at any rate, this was so, so long as Act XIV of 1859 was in force, and that, therefore, the claim to so much of the arrears as was time-barred under Act XIV of 1859, cannot be revived by Act IX of 1871; and that, even if the period of limitation be held to be twelve years, the claim is nevertheless [70] barred *in toto*, inasmuch as the plaintiff admits that he has received no payment on account of his share for thirteen years preceding the institution of the suit.

There can be no doubt that under Act IX of 1871, the period of limitation applicable to the present claim is twelve years. Article 132 of the second schedule fixes this period for claims for money charged upon immoveable property, and the explanation subjoined to the article provides that "the allowances and fees called *malikanna* and *haks* shall, for the purposes of this clause, be deemed to be money charged upon immoveable property."

Act XIV of 1859 contains no such distinct provision as the above, and under that Act it would perhaps be impossible to hold that all payments, or allowances, coming within the designation of "haks" could be classed as an interest in immoveable property. But we have no difficulty in holding that all hereditary offices, and all payments or allowances made on account of such offices, are immoveable property within the meaning and intention of Act XIV of 1859. By s. 1 cl. 1 of Reg. V of 1827 hereditary offices were distinctly classed with immoveable property; and, as observed by the Judicial Committee in *Maharana Fatesangji* v. *Desai Kallianravaji* (1), that enactment was not repealed by Act XIV of 1859. In the statutes of limitation which have followed Act XIV of 1859, hereditary offices have been similarly treated as immoveable property. We do not see the least reason to suppose that the legislators, who enacted Act XIV of 1859, had any intention of treating hereditary offices differently from the legislators who preceded and followed them.

(1) 10 B.H.C.R. 281.

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We are, therefore, of opinion, that, whether we apply Act XIV of 1859, or Act IX of 1871, to the present claim, the period of limitation is twelve years; and, that being so decided, the question which remains is, whether the present claim is barred in consequence of the plaintiff having received no payment on account of arrears for thirteen years.

In support of their contention on this point, the defendants rely on the decisions of this Court in *Raiji Manor* v. *Desai Kallianrai* (1) [71] and *Madvala* v. *Bhagavant* (2). In the latter of these cases (and the principle of decision in the former case was the same) it was laid down that the cause of action to establish title, and the cause of action to recover arrears which rest on such title, are not distinct and independent of each other; so that, if the former be barred, even those arrears which may be within the period of limitation cannot be recovered. Some doubt has been thrown upon these decisions by the observations of the Judicial Committee, at the close of their judgment, in *Maharana Fattesingji's* case already referred to (3), and it is perhaps not easy to reconcile them with the decision of the Privy Council in *Beema Shankar and others* v. *Jamasji Shapurji and others* (4). But assuming those cases to have been rightly decided by this Court (and, as at present advised, we think that they were rightly decided), they establish no more than this, namely, that when a plaintiff has (as he generally has) to establish his title to share in a "hak," before he can obtain a decree for arrears due on account of such share, he cannot be allowed to recover any such arrears, if he come into Court too late to establish his title. Thus art. 131, sch. II of Act IX of 1871 requires a plaintiff, who seeks to establish a periodically recurring right, to bring his suit within twelve years from the date when he was first refused the enjoyment of the right. If such plaintiff were to allow this period to elapse, without suing to establish his right, he could not be allowed indirectly to accomplish the same object by bringing a suit for arrears falling due within the period of limitation. But while this is the rule which (if the decisions referred to be correct) must be applied to cases in which a plaintiff must establish his title, before he can ask for arrears accruing due under such title, it does not appear to us that the same rule applies, when, as in the present case, the plaintiff has already in a former suit obtained a decree declaratory of his title. It is no longer necessary for him to establish his periodically recurring right against any person who is bound by that decree: and this being so, we find nothing in the law of limitation which can be construed into a restriction of the plaintiff's right to recover the arrears falling due within the [72] period of limitation. It has been put forward, as an argument against this conclusion, that, if it be so the plaintiff might keep his decree in his pocket for 50 years, or more, and might then sue for arrears; and that thus there would be practically no such thing as limitation. Assuming, for the sake of argument, that such would be the case, we do not see that there would necessarily be any violation of legal principles in the conclusion which we have stated. The principle upon which statutes of limitation rest is not so much that long adverse possession creates a presumption of title; (for the law could hardly treat such a presumption as irrebuttable); but, rather, that it would be unfair to call upon a defendant to defend his title when, through lapse of time, his muniments of title would be likely to have been lost. But this consideration can have

(1) 6 B.H.C.R. A.C.J. 56.
(2) 9 B.H.C.R. 260.
(3) 10 B.H.C.R. 291.
(4) 2 M.I.A. 23.

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no application in a case like the present, in which the defendants are not called upon to defend their title. The question of title, as between the plaintiff and the defendants who are bound by the decree of 1869, has already been determined, once and for all, in the plaintiff's favour. If the plaintiff has not exacted all which he might have recovered under that decree, his omission to do so has been a distinct gain to the defendants; but it affords no answer to the plaintiff's claim to recover arrears which have admittedly accrued due to him within the last twelve years. It might no doubt be unfair to call upon the defendants to meet a claim for arrears of older date; but that is only because it is likely that the evidence of payments made by them is no longer available to them. On this principle, and to this extent only, the statute of limitation operates in their favour.

We think that the Acting Assistant Judge was right in holding the defendant Vullubhbhai to be bound by the decree of 1869. The decree purports to declare his liability; and though he was not sued by name, yet it is clear that he was not prejudiced by the omission, for in a deposition made by him in the suit he himself admitted his liability.

The cross objections taken by the plaintiff are not, we think, sustainable. The Acting Assistant Judge has found, as a fact, that the emoluments of the "vatan," have been diminished by [73] one-half since 1866, and it has not been shown to us that this conclusion is not supported by the evidence. Under these circumstances the Acting Assistant Judge was justified in holding that the plaintiff was entitled to no more than Rs. 25 from 1866 to 1873.

We, accordingly, confirm the decrees of the Courts below with costs.

Decree confirmed.

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5 B. 73.

APPELLATE CIVIL.

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

BALKRISHNA VASUDEV (*Original Plaintiff*), *Appellant v.* MADHAVRAV NARAYAN (*Original Defendant*), *Respondent.**

[15th June, 1880.]

Sale of land for arrears of assessment—Fraudulent purchaser—Trustee for the owner in equity—Act X of 1876, s. 4, cl. (c)—Clims to set aside a revenue sale—Forfeiture of tenancy—Jurisdiction.

Whenever the land revenue is in arrear, Government is entitled to sell the land and to realize its due, whoever is the defaulter.

The plaintiff sued to recover possession of certain land and prayed to set aside the sale of it by the Revenue authorities for arrears of assessment due on the land. He alleged that he had let the land to the defendant, on condition of the latter paying the Government assessment and certain rent in cash and kind to the plaintiff; that the defendant having intentionally made a default in payment of the assessment, fraudulently caused the land to be sold by the Revenue authorities and purchased it himself. The defendant traversed the plaintiff's allegations and stated that he was in possession of the land as purchasar at the revenue sale. The Subordinate Judge rejected the plaintiff's claim, holding that he failed to prove either the defendant's liability to pay the assessment or any fraud on his part, with respect to the sale of the land, and that the sale could not be set

* Second Appeal No. 88 of 1880.