

sections 522 and 526 of the Code of 1877, and that the plaintiff's application, to pass judgment according to the award, was not one within the contemplation of the Statute of Limitations.

We have been asked to allow the defendants leave to show cause against filing the award, on the ground that they were only served with notice on 18th December, 1866, and the award was filed on the 20th December, 1866. It is not, however, denied that the 20th December was the day named in the notice; and we see no reason, and after the lapse of sixteen years during which time the above objection has never been taken, although the award has been several times executed, we should certainly not be disposed, even if we had the power which may well be doubted, to interfere with the filing of the award.

The Subordinate Judge must, therefore, be directed "to proceed to pass judgment according to the award" to be followed by decree, and to afterwards proceed to dispose of the plaintiff's *darkhast* rejected on 28th September, 1882. We do not think we ought to accede to plaintiff's application that such decree should be made *nunc pro tunc*, as the delay cannot, we think, be said to be the exclusive act of the Court.

Parties to pay their own costs of this application.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

ANANDRAV BHIKAJI PHADKE AND THREE OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. SHANKAR DAJI CHARYA AND TWELVE OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Caste—Suit for right to exclusive worship—Non-joinder of parties—Chitpavans—Palshes—Limitation—Section 21 of Regulation II of 1827—Civil Procedure Codes Act VIII of 1859, and Act X of 1877, Sec. 30.

Four persons of the Chitpavan caste brought a suit in 1876, alleging that they and the members of their caste, in common with certain other castes, possessed the exclusive right of entry and worship in the sanctuary of a temple, and that the

* Second Appeal, No. 248 of 1882.

1883

ISHWARDAS
JAGJIVAN-
DAS
v.
DOSIBAI.

1883
June 13.

1883

ANANDRAV
BHIKAJI
PHADKE
v.
SHANKAR
DAJI
CHARYA.

defendants, members of the Palshe caste, not being of the privileged castes, infringing that right in 1871 and thereafter by entering the sanctuary and performing worship therein. They prayed for a declaration of their right and an injunction restraining the defendants from interfering with it.

The defendants contended (*inter alia*) that the suit as constituted was not maintainable; that the question was a caste question within the meaning of section 21 of Regulation II of 1827, and not, therefore, within the cognizance of the Civil Courts; and that the suit was barred by the law of limitation.

Held that nothing in the law of limitation prevented the establishment of such a right as that denied, merely because the first act of interference with it was more than a stated number of years ago. Such acts are not continuous like possession, and their only operation is to create, where often and consistently repeated during a long period, a presumption of their lawful origin.

Held, also, that the plaintiffs could maintain the suit for the personal injury alleged to have been suffered by themselves by the pollution of their sanctuary, whether under the Civil Procedure Code of 1859 or that of 1877, section 30 of the latter being merely regulative, not constitutive. Whether or not it could be contended that they and the defendants so represented their respective castes that the decree in this suit should bind all members of the two castes, would be open to argument in any future case; but it might well be consistent with general principles to hold that certain judicial proceedings, taken by or against a select number as representing a large class, might, if fairly and honestly conducted, bind or benefit the whole class.

Held, further, that this case was within the cognizance of the Civil Courts.

The right of exclusive worship of an idol at a particular place set up by a caste is a civil right for adjudication by the Civil Court, and not a caste question. The meaning of section 21 of Regulation II of 1827 is that the internal economy of a caste is not to be interfered with by the Courts, not that no possible matter of litigation in which a question of caste usage, or right, or privilege, may arise can be taken cognizance of.

THIS was a second appeal from the decision of G. Druitt, Assistant Judge of Thana, confirming the decree of M. N. Nanavati, Subordinate Judge (Second Class) of Bassein.

The facts of the case are as follows:—

The four plaintiffs were members of the Chitpavan caste of Marathi Brahmans residing at Agashi, in the Bassein Taluka of the Thana Collectorate. The thirteen defendants were members of the caste of Palshe Brahmans residing at the same place. The plaintiffs alleged that the temple of Bhavanishankar at Agashi was built by a Brahman of their caste a hundred years ago; that, according to the intentions of the founder, certain classes only of Brahmans were permitted to enter, and were in the habit

of entering, the *gabbara*, or inner shrine of the temple, and performing worship there, *viz.*, their own class of Chitpavans, the classes of Brahmans who took food with the Chitpavans, and Gurjar Brahmans, and that the defendants, although not belonging to any of the privileged classes, on the 1st of August, 1871, and thereafter on several occasions, did enter the said part of the temple and perform worship there to the injury of the plaintiffs. The plaintiffs accordingly prayed for a decree declaring their exclusive right to perform worship in the *gabbara*, and for an injunction restraining the Palshe defendants from going or worshipping there, or otherwise interfering with the plaintiffs in the exercise of their said exclusive right. The suit was brought in 1876.

The defendants answered that the suit was barred by the law of limitation ; that the plaintiffs had not the right to sue, and did not possess the exclusive right alleged ; that they possessed and exercised the right in common with the plaintiffs from the time of their ancestors ; that their entry into the *gabbara* and worship there caused the plaintiffs no injury ; and that the matter in dispute was a caste question not falling within the cognizance of the Civil Courts.

The Subordinate Judge was of opinion that the suit was barred by article 43, schedule II of Act IX of 1871. He viewed the suit as one for trespass upon immoveable property, and held it barred, as not brought within three years from the 1st of August, 1871, the date of the alleged trespass. Upon this ground he rejected the plaintiffs' claim. The Assistant Judge, on appeal, came to a different conclusion on this point. He considered that article 43 referred to claims for damages only, and was not applicable to the present suit, which he held was within time, under article 118 of the same schedule. The Assistant Judge also found in favour of the plaintiffs that the defendants did not, previous to the 1st of August, 1871, enter the *gabbara* and worship there, and that the defendants doing so would pollute the object of worship and cause injury to the plaintiffs. But he was of opinion that this was a public matter, and that the plaintiffs could not sue. He said : "The plaintiffs claim to sue on behalf of a very large, rather indefinite, number of persons, who, they say, are entitled to the right with them. But they have omitted the *pujari*, worshipper of

1883

ANANDBAV
BHIKAJI
PHADKE
v.
SHANKAR
DAJI
CHARYA.

1883

ANANDRAV
BHIKAJI
PHADKE
v.
SHANKAR
DAJI
CHARYA.

the temple. He is a Lingayat, not a Brahman, by caste. It is proved that he exercises the right of worshipping the idol, and, apparently, the plaintiffs do not object to his doing so. * * *

I have been referred to the decision in *Shri Khanti Narayan Appa v. Indupuram Ramalingam*(1) as an authority for holding that the plaintiffs may sue on behalf of on entitled. It was there held that all the inhabitants of a village were bound by a decision regarding the boundaries of the village obtained against certain of the inhabitants. In the present instance, would all Chitpavan and Gurjar Brahmans be considered bound by the decree passed in this suit? The plaintiffs show no authority at all to sue on their behalf.

“ If the plaintiffs are regarded as suing merely for themselves, it is hard to see how they can do so without satisfying the Court that their demands are acquiesced in by all other persons entitled to perform the worship. It appears to me that, in whatever capacity they sue, the plaintiffs must be regarded as suing as members of the public.” The Assistant Judge, therefore, confirmed the decree of the Subordinate Judge:

The plaintiffs made a second appeal to the High Court.

Mahadev Chimmaji Apte for the appellants.—The Assistant Judge erred in holding that the plaintiffs could not sue. This suit was brought in 1876, and is governed by Act VIII of 1859, which did not contain a provision similar to that contained in section 30 of Act X of 1877, which enacts that “ where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of all parties so interested.” However, the law here enunciated existed before. This section is a mere regulative provision, and makes no alteration in the existing law. Convenience requires that in suits where there is a community of interests amongst a large number of persons, a few should be allowed to represent the whole: *Shri Khanti Narayan Appa v. Indupuram Ramalingam*(1). [WEST, J., referred to the *dictum* of Lord Colonsay in *Jenkins v. Robertson*(2).] This is the only point ruled by the lower Court against the plaintiffs, in whose favour a decree should be passed in the High Court.

(1) 3 Mad. H. C. Rep., 226.

(2) L. R., 1 Ap. Ca. (Sc.), 117.

Shantaram Narayan for the respondents.—The right to sue may have existed in the plaintiffs, but if there was no procedure to enforce it, as it is admitted there was none before Act X of 1877, the plaintiffs could not bring the present suit. The suit would be properly framed only if the decree, which might be passed in it, would bind the whole community to which the plaintiffs belong, as well as the whole community to which the defendants belong. [WEST, J.—The test would rather be whether the decree binds the parties. NANABHAI HARIDAS, J.—The decision in *Radhabai v. Chimmaji*(1) would seem to point to that conclusion.] The defendants also contend that the suit cannot be maintained because the point at issue is a caste question. The plaintiffs merely assert the dignity of exclusive worship within the inner shrine. This is a suit, therefore, to vindicate a right to a dignity, and cannot be maintained : *Sangapa v. Gangapa*(2). In *Murari v. Suba* (3) a claim put forward by Mahars to perform the honorary duties of the Maharke office was held not cognizable by the Civil Court. Matters like these are for the Executive Government alone to arrange. Then, the defendants contend that the claim is barred by limitation. The right which the plaintiffs assert is to immoveable property within the meaning of the Hindu law, and article 43 of schedule II of Act IX of 1871 applies.

The judgment of the Court was delivered by

WEST, J.—The first point taken for the respondents in this case is that the suit was barred by limitation. The acts complained of are intrusions into a sanctuary, and what the plaintiffs seek is a declaration of their right, and an injunction against further intrusions on the part of the defendants. Such a suit is not barred by limitation merely because the first act specified may fall beyond the term of limitation. Intrusions and acts of worship, whether rightful or wrongful, are not continuous like possession, and there is not any provision of the law of limitation which prevents the establishment of a right connected with worship, or a religious institution, merely because the first interference with it may have occurred more than three, or more than six, or twelve,

1883

ANANDRAV
BHIKAJI
PHADKE
v.
SHANKAR
DAJI
CHARYA.

(1) I. L. R., 3 Bom., 27.

(2) I. L. R., 2 Bom., 476.

(3) I. L. R., 6 Bom., 725.

1883

ANANDRAV
BHIKAJI
PHADKE
v.
SHANKAR
DAJI
CHARYA.

years before the institution of the suit. If the acts of worship, or other proceedings of the defendants, in such a case have been so often repeated, and so consistent, during a long period that a presumption of a legal foundation for them fairly arises, they may properly be defended on such a presumption. A long continued and undisputed practice is to be referred, if it can be referred, to a lawful origin. In such a case as the present, proof in this way of a right exercised by the defendants would, so far as it went, disprove the exclusive right set up by the plaintiffs; but this would be a conclusion standing quite apart from limitation.

Next, it was urged that the suit could not be maintained by the plaintiffs as representing the Chitpavan Brahman community. At present, when persons sue in a representative character, section 30 of the Code of Civil Procedure provides for intimation of the suit being given to all concerned. The former Code, under which this suit was instituted, had not such a provision; but that did not deprive those whose legal interests were affected as members of a class of the right to sue. Section 30 is regulative, not constitutive. There must be a right to sue before it can be applied, and this right equally subsisted under the former Code, whatever the consequences of a suit as to finality with regard to the class or classes at large might be. The case of *Jenkins v. Robertson* (1) is instructive in this respect, and indicates that it may be consistent with general principles that certain judicial proceedings taken by, or against, a select number as representing a large class may, if fairly and honestly conducted, bind or benefit the whole class. Here the plaintiffs say they were personally injured by a pollution of their shrine in a way which the Civil Courts can readily prevent. They could properly claim protection on making out their case. If there is anything in the proceedings which has prevented the plaintiffs and defendants from being really representatives of the Chitpavans and Palshes, that can be shown in another case.

Then it is said this is a caste question excluded from the cognizance of the Civil Courts. The meaning of section 21 of Regulation II of 1827 is that the internal economy of a caste is

(1) L. R., 1 Ap. Ca. (Sc.), 117.

not to be interfered with by the Courts, not that no possible matter of litigation in which a question of caste usage, or right, or privilege may arise can be taken cognizance of. The proper and indispensable limits of the cognizance of religious and caste questions by a secular Court are indicated by Sir T. Strange:—

“ A British Court exercising ever the most delicate caution not to meddle with matters of religion, but and in so far as it happens to be inseparable from the question of right; upon which alone, as it concerns property, or the civil duties of life, it is its proper function to adjudicate ” (1). See also the opinion at page 263, Volume II. And this corresponds pretty nearly in principle to what in England has been laid down, and acted on, with regard to dissenting religious bodies not disapproved, but also not sustained, or regulated, by the State—*Cooper v. Gordon* (1). The English Courts have to adjudicate amongst sections of dissenters as to civil rights, though they have no authority in what may, by analogy, be called their caste questions. The principles set forth in the case of *Brown v. Cure of Montreal* (3) are of general application, and, should the necessity arise, would warrant the Civil Courts in going much further than they are called on to go in the present case. Now, the rights connected with the religious foundation, in the absence of any code of rules laid down by the founder or the sovereign power, have to be sought in the practice of the institution. What has long been done is presumed to have been rightly done. The evidence on that subject has led the Assistant Judge to the conclusion that the right of exclusive worship set up, as against the defendants, by the plaintiffs has been proved, and that the contradictory right set up by the defendants has not. This right is one which the Courts must guard, as otherwise all high-caste Hindus would hold their sanctuaries, and perform their worship, only so far as those of the lower castes chose to allow them. We, therefore, reverse the decrees of the Courts below, and award the relief sought, with all costs, to the plaintiffs.

1883

ANANDRAV
BHICAJI
PHADKE
v.
SHANKAR
DAJI
CHARYA.

Decree reversed.

(1) Strange's Hindu Law, Vol. I,
p. 93 (3rd ed.)

(2) L. R., 8 Eq., 249.

(3) L. R., 6 P. C., 157.