APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball.

DULABH VAHUJI (ORIGINAL DEFENDANT), APPELLANT, *v.* BANSIDHAR-RAI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1884 *July* 31.

Limitation—Suit to recover arrears—Suit for money had and received—Deshpánde vatan- Suit by one sharer against other—Act XV of 1877, *Sched.* II, *Art.* 62.

Where a person having previously obtained a decree declaratory of his title sues his co-sharer in a *deshpánde vatan*, who is bound by the decree to recover arrears, his suit is a suit for money had and received by the defendant to the plaintiff's use; and the period of limitation is three years as prescribed by article 62, Schedule II of Act XV of 1877.

The previous decree operates as *res judicata* as regards the plaintiff's title, except so far as circumstances subsequent to decree may affect it.

Non-participation of profits by the plaintiff for more than twelve years from the date of the previous decree does not extinguish his title, and he can recover arrears for three years preceding the date of his suit to recover them.

THIS was a second appeal from the decision of M. B. Baker, Judge of the district of Khándesh, reversing the decree of Ráv Sáheb Dámodar G. Gharpure, Subordinate Judge of Nandurbár.

The facts of the case were thus stated by the Subordinate Judge:—

"Ganga Vahuji was one of the sharers in the *deshpánde vatan* of the Sháhádá and Taloda tálukás of the Khándesh District. Long after her death the present plaintiffs with another person named Dulerái, representing themselves to be her nearest heirs, instituted in 1862 a suit in this Court against the present defendant and two others, (all of whom, it was alleged, had divided Ganga Vahuji's share of the *vatan* equally between them,) for a declaration of their title to such share, and obtained a decree, which was, however, reversed in appeal to the District Court as against the other two defendants in the suit, the present defendant having consented to that decree and not having appealed. The decree of the Appellate Court was confirmed, in special appeal, by the High Court. Upon the ground of that decree of the original Court, which stood unreversed as against

* Second Appeal, No. 55 of 1883.

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the present defendant, this suit has been brought by the plaintiffs for recovering that portion of Ganga Vahuji's share of the *vatan* which the defendant is alleged to have received in the division between her and the other two defendants for the years 1870-71 to 1875-76, both inclusive, and the cause of action is stated to have occurred on the 1st of August of each of the said years on which the defendant received the portion from the Government treasury. The plaint also states that Dulerái, one of the plaintiffs in the former suit, having been dead, and nothing being known about his heirs, the present plaintiffs have also sued for his share in the decree, on the ground of a *vatan* custom vesting the shares of the heirless deceased in the survivors.

"The defendant in her written statement contended that the suit could not be maintained without the heirs of Dulerái and Bansidharrái being joined as plaintiffs, the son of Dulerái named Mansukhrám and the wife of the second son of Bansidharrái being alive; that the dismissal of the special appeal barred the plaintiffs from urging their prsent claims; and that the claim was barred by the law of limitation."

The Subordinate Judge, following the decision in the case of *Mádvala* v. *Bhagvánta* (1), held the claim to be barred, and rejected it. The District Judge held that that decision did not govern the claim, but the decision in *Chhagalál* v. *Bápubhái*(2). He, therefore, reversed the Subordinate Judge's decree, and awarded six years' arrears amounting to Rs. 694-12-6.

The defendant appealed to the High Court.

Pándurang Balibhadra for the appellant.—The old decree of 1863 was not merely declaratory, but capable of execution. The present suit will, therefore, not lie. [The Court overruled the objection.] The suit is barred by lapse of time. The former decree was passed on the 24th of August, 1863, and the present suit was brought on the 18th of January, 1877. During the period of over thirteen years the defendant has refused to give to the plaintiffs any share of the *vatan*, and it is admitted by the plaintiffs that they have not received any. The plaintiffs cannot sue to establish his title and, therefore, his suit for arrears is barred

(1) 9 Bom. H. C. Rep., 260. (2) I. L. R, 5 Bom., 68.

—*Lado Lakshman* v. *Krishnáji Sadáshiv*[1]; *Raiji Manor* v. *Desái Kaliánrái Hukmatrái*[2]; *Mádvala* v. *Bhagvánta*[3]; and *Keval Kuber* v. *The Tálukdári Settlement Officer*[4]. A declaratory decree only conferred a cause of action, and that a suit founded upon it must be brought within twelve years. In no case can arrears for more than three years be allowed—*Harmukhgauri* v. *Harisukh-prasád*[5] and *Morbhat* v. *Gangádhar*[6].

The claim is, therefore, barred by limitation.

Ráv Sáheb *V. N. Mandlik* (Government Pleader) for the respondent.—As to arrears, I must admit that no more than arrears for three years can be awarded. On the question of limitation the suit is governed by the decision in *Chhaganlál* v. *Bapubhái*[7]. The previous decree operates as *res judicata* on the question of title, and the plaintiffs need not sue to establish a right which recurs every year the defendant receives the *vatan* emoluments.

The judgment of the Court was delivered by

SARGENT, C. J.—The plaintiffs seek by this action to recover arrears of a share in a *deshpánde vatan* for the years 1870 to 1875, which, it was alleged, had been received by the defendant himself, a co-sharer in the *vatan*. It is not in dispute that since 24th August 1863, on which date plaintiffs obtained a decree against the defendant, declaring their right to the share of one Ganga Vahuji in the *vatan*, the plaintiffs have received no payment on account of their share. The Subordinate Judge held, on the authority of *Mádvala* v. *Bhagvánta*[3], that as there had been no payment on account of the plaintiffs' share, nor any recognition of their title within twelve years before the institution of this suit, the cause of action to establish title was barred, and, therefore, also the claim to all arrears. The District Judge, however, was of opinion, on the authority of *Chhaganlál* v. *Bápubhái*[7], that as the plaintiffs had obtained a declaratory decree in 1863 against the defendant establishing their right to share in the *vatan*,

(1) 6 Bom. H. C. Rep., 41, A. C. J.
(2) 6 Bom. H. C. Rep., 56, A. C. J.
(3) 9 Bom. H. C. Rep., 260.
(4) I. L. R., 1 Bom., 586.
(5) I. L. R., 7 Bom., 191.
(6) I. L. R., 8 Bom., 234.
(7) I. L. R., 5 Bom., 68.

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it was not necessary for them to establish their title again, and awarded them six years' arrears, as prayed for.

In *Raiji Manor* v. *Desái Kalliánrái*(1), the ruling in which was followed in *Mádvala* v. *Bhagvánta* (2), it was held that the cause of action to establish title and the cause of action to recover arrears in the case of a periodical payment, such as a *hak* or service *vatan*, were not distinct and independent, and that when the former was barred, the right to arrears was also barred. In the last two cases it is to be remarked that the action was against the person or persons by whom the *hak* or *vatan* was payable. But in *Chhaganlál* v. *Bápubhái*(3) the action was, as here, by one sharer in a *vatan* against a co-sharer who had received moneys on account of the *vatan*, and it was held that the ruling in *Ráiji Manor* v. *Desái Kalliánrái*(1) was not applicable in that particular case, as the plaintiff had already obtained a declaratory decree establishing his title, and that "it was no longer necessary for him to establish his periodically recurring right against any person who was bound by that decree"; and although the plaintiff had not received any payment for thirteen years, the Court awarded him the arrears for the last six years. We agree in this conclusion, except as to the amount of arrears. The Court has given six years' arrears instead of three, following the decision in *Chhaganlál* v. *Bápubhái*(3), which, however, was admitted by Melvill, J., in *Harmukhgauri* v. *Harisukhprasad*(4) to be wrong in that respect. We must, therefore, vary the decree of the District Judge by awarding the plaintiffs Rs. 347-6-3 instead of Rs. 694-12-6.

Parties to pay their own costs of second appeal.

Decree varied accordingly.

(1) 6 Bom. H. C. Rep., 56.
(2) 9 Bom. H. C. Rep., 260.
(3) I. L. R., 5 Bom., 68.
(4) I. L. R., 7 Bom., 191.