

1889

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APPEL-
LATE
CIVIL.

14 B. 236.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Candy.

KESHAV JAGANNATH AND ANOTHER (*Original Plaintiffs*), Appellants
v. NARAYAN SAKHARAM AND OTHERS (*Original Defendants*),
*Respondents.** [2nd September, 1889.]

Limitation Act XV of 1877, arts. 123 and 131—Construction—Certificate of administration under Regulation VIII of 1827, s. 7, cl. 2 does not constitute the holder a representative—Suit to recover vatan allowance.

A certificate of administration granted under Reg. VIII of 1827 only indicates the person who for the time being is in the legal management of the property in respect of which it is granted, but does not constitute the holder of the certificate a representative of the estate for the purpose of distributing it amongst his co-sharers.

[237] In 1864, Narayan the owner of a share in a *deshpande vatan*, died childless and intestate. A certificate of administration under Reg. VIII of 1827 was granted to one Gangadhar, a distant relation, who received Narayan's share in the *vatan* up to and including the year 1871. In the meantime, *viz.*, on the 19th November, 1870, two nearer relations, *viz.*, Dhondu and Balaji, succeeded in getting Gangadhar's certificate cancelled, and obtained a certificate to themselves jointly. In 1876 the Collector recognized Dhondu alone as the heir of Narayan Baburav, and paid Dhondu's son Sakharam the share of the deceased Narayan Baburav with arrears from 1872. After Sakharam's death his son Narayan (defendant No. 1) received it down to the year 1884. In 1883 Keshav (father of plaintiff No. 1) got the certificate of 1870 cancelled and obtained a certificate to himself jointly, with defendant No. 1. Keshav died, and the plaintiffs (his son and nephew) brought this suit claiming to be co-sharers in the one anna and four pies' share of Narayan Baburav.

The defendants contended (*inter alia*) that the suit was barred. The Court of first instance awarded the plaintiff's claim for the three years previous to the suit, and rejected the rest of the claim. The defendants appealed to the District Judge who held that the plaintiff's claim was totally barred, under art. 123 of the Limitation Act (XV of 1877). On appeal by the plaintiffs to the High Court,

Held, reversing the decree of the lower appellate Court, that art. 123 did not apply, and that the suit was not barred. There was no cause of action until Narayan and his successors Dhondu and Sakharam in title were recognized by the Collector and paid the arrears of the *hak*. Gangadhar was quite independent of them, and this recognition did not take place until 1876—less than twelve years before the institution of the plaintiffs' suit.

[F., 15 B. 135 (138); R., 34 M. 511=6 Ind. Cas. 50=20 M.L.J. 288 (F.B.)=8 M.L.T. 4; 5 Bom.L.R. 355; 2 Ind. Cas. 15=5 N.L.R. 41; 2 L.B.R. 184.]

THIS was a second appeal from a decision of H. J. Parsons, District Judge of Thana.

One Narayan Baburav owned a one anna and four pies' share in a *deshpande vatan* allowance received annually from the Government treasury.

In 1864 Narayan Baburav died childless and intestate, and a certificate of heirship in respect of the *vatan* allowance was obtained by one of his distant *bhaubands* named Gangadhar, who continued to receive the allowance up to and inclusive of the year 1871-72.

In the meantime, *viz.*, on the 19th November, 1870, two nearer *bhaubands* of the deceased Narayan Baburav, *viz.*, Dhondu and Balaji, had

* Second Appeal No. 138 of 1887.

succeeded in getting Gangadhar's certificate of heirship cancelled and a joint certificate issued to themselves.

[238] In 1876 the Collector recognised Dhondu alone as the heir of Narayan Baburav, and Dhondu's son Sakharam was paid Narayan's share in the *vatan* with arrears from 1872. After Sakharam's death his son Narayan, (defendant No. 1), received it down to 1884.

In January, 1883, one Keshav, (the father of plaintiff No. 1 and the uncle of plaintiff No. 2), got the certificate which had been granted in 1870 cancelled, and obtained a certificate to himself jointly with defendant No. 1. Keshav died, and on the 28th August, 1884, the plaintiffs (his son and nephew) brought this suit claiming to be co-sharers in the one anna and four pies' share of Narayan Baburav.

The defendants contended (*inter alia*) that the suit was barred.

The Subordinate Judge who tried the suit awarded the plaintiffs' claim to the allowance after the 18th August, 1881, rejecting that before that date.

The defendants appealed to the District Judge, who held that the plaintiffs' claim was totally barred, and reversed the lower Court's decree.

The plaintiffs preferred a second appeal to the High Court.

Rav Saheb Vasudeo Jagannath Kirtikar and V. G. Bhandarkar, for the appellants.—The Subordinate Judge was right in awarding the plaintiffs' claim. This suit is governed by art. 131 of the Limitation Act XV of 1877. The several certificates granted under Reg. VIII of 1827 merely showed who had the management of Narayan's share. The Collector recognized Dhondu and Sakharam practically in 1876 when arrears of the allowance were paid to Sakharam, and counting from that date the suit is in time. Gangadhar was a very remote *bhauband* of Narayan, and he does not claim against the plaintiffs. The right to the allowance is a periodically recurring right, and is governed by art. 131 of the Limitation Act XV of 1877. The defendants have not held the allowance adversely to us. Article 123 applies to cases where the share is sought to be recovered from a person who *represents* the estate—*Issur Chunder Doss v. Juggut Chunder Shaha*(1). The representation to Narayan's estate commenced [239] when Dhondu and Sakharam were recognized as the heirs of Narayan in 1876. There has been no demand and refusal on the part of the plaintiffs and defendants respectively. The possession and enjoyment of Gangadhar cannot be tacked on, for he was quite independent of the defendants. The suit was within twelve years from 1876.

Telang, for defendant No. 1.—The first question to determine is, what was the right of the plaintiffs at the death of Narayan Baburav. Gangadhar could not be recognized as his heir, he being a very remote relation. The right to receive the allowance arose in 1864. The suit became barred in 1870 while Act XIV of 1859 was in force, and the Acts of 1871 and 1877 could not revive it, six years having elapsed since 1864. The plaintiffs did not get themselves entered on the Collector's records as the heirs of Narayan. They have never received any portion of the allowance. The cause of action, therefore, arose as far back as 1864, and the plaintiffs' suit is barred. This is a suit for a distributive share of the property of the intestate Narayan and should be governed by art. 123 of the Limitation Act XV of 1877 if that Act be held to apply.

(1) 9 C. 79.

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Manekshah Jehangirshah, for the other defendants.—The cause of action arose on Narayan Baburav's death in 1864, and it did not depend on the obtaining of administration certificates or recognition by the Collector. The suit is, therefore, barred.

JUDGMENT.

The judgment of the Court was delivered by

SARGENT, C. J.—The plaintiffs in this case claim to be co-sharers in a one anna and four pies' share in a *deshpande vatan* which was the property of one Narayan Baburav who died intestate in 1864, and as such sue to recover their share in the annual allowance in respect of such one anna and four pies' share which had been received from the Collector by other persons, admittedly co-sharers with the plaintiffs, *viz.*, Sakharu, the father of the defendant Narayan, and by Narayan himself. The District Judge held that the plaintiffs' right to share in the one anna and four pies' *vatan* share of Narayan was barred under art. 123 of the Limitation Act, and that, therefore, he could not [240] sue for arrears of payments in respect of their right. The District Judge treated the plaintiffs' claim to a share as one to a distributive share of the property of the intestate Narayan, under art. 123 of the Statute of Limitation of 1877, and that as the plaintiffs "had not received either directly or indirectly any particle of Narayan's share up to the present time" the right was barred.

We may remark at the outset that in the case of *Mudvala v. Bhagvanta* (1) referred to by the District Judge, and also in *Raiji Manor v. Desai Kallianrai Hukmatrai* (2), upon which the decision in the former case is based, the suit was against the person or persons who were the payers of the *hak* sued on. Those decisions cannot, therefore, except by way of analogy, be treated as authorities in dealing with the present suit, which is by one of the persons entitled to share in a *hak* against the co-sharers who have received from the Government, from whom it was due, the annual payment on account of the entire *hak* including the plaintiffs' share. However, in *Ohhaganlal v. Bapubhai* (3) and *Harmukh-gauri v. Harisukhprasad* (4) the claims were against co-sharers in the *hak*, and in the former case the Court, apparently on the authority of the above cases, held that where the title to share in the *hak* is barred as against the co-sharers, that circumstance is fatal to the claim to share in past payments on account of the *hak* which have been received by co-sharers. The District Judge has applied art. 123 of the Statute in determining whether plaintiffs' right to share was barred, but we concur in the opinion expressed by White and Macpherson, J.J., in *Issur Chunder Doss v. Juggut Chunder Shaha* (5), that the article only applies to a case in which it is sought to obtain the share from a person who is the executor of the will or otherwise represents the estate with a legal obligation to "distribute the estate".

In the present case it is true that certificates of administration under Reg. VIII of 1827 were granted to several [241] persons in succession, including the present defendant Narayan, but such a certificate, as shown by s. 9, only confers the right of management, and does not constitute the holder of the certificate a representative of the estate for the purpose of distributing it amongst the co-sharers, as appears from cl. 3 of s. 10. We do not think, therefore, that art. 123 is applicable to the present case, there never having been a representative of the estate otherwise than for the purpose of management. In *Ohhaganlal v. Bapubhai* (3), which

(1) 9 B.H.C.R. 260.
(4) 7 B. 191 (193.)

(2) 6 B.H.C.R. A.C.J. 56.
(5) 9 C. 79 (81).

(3) 5 B. 68.

was a suit against co-sharers, art. 131 was applied, and we think rightly, in determining whether the claim to share in the *hak* was barred; but in the present case there would be no cause of action until Narayan and his successors in title, Sakharam and Dhondu, had been recognized by the Collector and paid the arrears of *hak*; and as Gangadhar was quite independent of them, this was not until 1876, *i.e.*, less than twelve years before the institution of this suit.

We must, therefore, reverse the decree of the Court below and restore that of the Subordinate Judge, with costs on defendants throughout.

Decree reversed.

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ORIGINAL CIVIL.

Before Mr. Justice Parsons.

THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED
(Plaintiffs) v. SOONDERDAS DHURUMSEY AND OTHERS
(Defendants).* [20th and 21st March, 1890.]

Charter-party—Shipping—Misdescription of tonnage of ship—Misrepresentation—Contract Act IX of 1872, ss. 10, 13, 14, 18, 19.

The defendants in Bombay chartered a ship from the plaintiffs which was described in the charter-party as of the measurement of about 2,700--2,800 tons nett register. The ship had never been in Bombay and was wholly unknown to the defendants. Evidence was given that in the negotiations for the charter-party the plaintiffs stated to the defendants that the ship was certainly not more than 2,800 tonnage register. She, however, turned out to be of the registered [242] tonnage of 3,045 tons, and the defendants refused to accept her in fulfilment of the charter-party.

Held, that the defendants were entitled to treat the contract as void by reason of the erroneous statement of the plaintiffs with regard to the size of the ship. (Indian Contract Act IX of 1872, ss. 10, 13, 14, 18, 19).

[Affirmed, 15 B. 389.]

SUIT for damages for breach of charter-party.

On 15th March, 1889, the plaintiffs and defendants entered into a charter-party in Bombay whereby the S. S. "Runic," described therein as of the measurement of about 2,700—2,800 tons nett register, was chartered by the defendants for a voyage from Bombay *via* the Suez Canal to certain European ports.

At the date of the charter-party the "Runic" was not and had never been in Bombay. She arrived there on the 28th April, 1889, and proved to be a steamer of the nett registered tonnage of 3,045 tons. Notice of her arrival was duly given by the plaintiffs to the defendants, who at once repudiated the contract, on the ground that the S. S. "Runic" was of larger tonnage than described in the charter-party. The plaintiffs thereupon filed the suit. The following paragraphs of the plaint are material:—

"2. In the said charter-party the said S. S. 'Runic' was described as of the measurement of about 2,700—2,800 tons nett register." The plaintiffs say that the fulfilment of such description was not a condition

* Suit No. 372 of 1889.