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(13th August, 1889) added as a plaintiff, his claim would be time-barred, and the suit would be practically one brought by the original plaintiff alone. The District Judge, therefore, relying on the ruling in *Kalidas Kevaldas* v. *Nathu Bhagvan* (1), held that the plaintiff's suit must fail for non-joinder of parties and under the Limitation Act. He reversed the decree of the Subordinate Judge.

Against the decree of the District Court the plaintiff appealed to the High Court.

Narayan Ganesh Chandavarkar, for the appellant.

Shamrav Vithal, for the respondents.

JUDGMENT.

SARGENT, C.J.—The Judge has held, on the authority of *Kalidas Kevaldas* v. *Nathu Bhagvan*, that the suit was barred, because the other parties jointly interested in the rent claimed were not made parties to the suit in time to prevent the claim from being barred. But the objection for want of parties was **[299]** not taken by the defendants at any stage of the proceedings, nor was any issue raised on the point, and the case relied on by the Judge, therefore, does not apply.

We must, therefore, reverse the decree and send back the case for a decision on the merits. Costs to abide the result.

Decree reversed.

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Before Mr. Justice Bayley and Mr. Justice Telang.

PARASHRAM JETHMAL (*Original Plaintiff*), *Appellant v.* RAKHMA VALAD KHANDU AND OTHERS (*Original Defendants*), *Respondents.**
[7th October, 1890.]

Limitation—Limitation Act (XIV of 1859), s. 1, cl. 7—Title—Extinction of title—Bar of remedy—Statutes of limitation—Construction.

In 1864 A. sued his co-sharer B. in the Mamlatdar's Court for possession of certain land, and obtained a decree. In 1874 B. got possession of the land by inducing the tenants to attorn to him. In 1880 A. conveyed the land to C. by a deed of sale and in 1886 C. filed a suit against B. to obtain possession of the land so sold to him by A. He alleged that any claim which B. had to the land as co-sharer was extinguished by limitation, inasmuch as he had brought no suit within three years from the date of the Mamlatdar's decree against him of July 1864 to get rid of the effects of that decision (see cl. 7 of s. 1 of Limitation Act (XIV of 1859). The lower Court disallowed this contention. It also held that the Mamlatdar's decision as to possession did not affect a co-sharer's claim for partition. It, therefore, awarded the plaintiff C. only the share of his vendor A. in the property. On appeal to the High Court,

Held, confirming the decision of the lower Court, that although, under cl. 7 of s. 1 of the Limitation Act XIV of 1859, B. could not after July 1867 have sued to assert his title to the land comprised in the Mamlatdar's order of July, 1864, nevertheless his title to the said land was not extinguished, and the possession which he obtained in 1874 could property be referred and ought to be referred to

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* Second Appeal, No. 962 of 1889.

(1) 7 B. 217.

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his then subsisting title. Consequently, any one who, after his re-entry in 1874, disputed his title would have to prove his own as against B.'s title independently of any help from the Statute of Limitation.

Held, also, that a suit for the partition of property comprised in a Mamlatdar's order is not a suit to recover such property, and, therefore, does not fall within cl. 7 of s. 1 of Act XIV of 1859; and whether that property is the only one of which a partition is claimed, or whether it is one of several such properties, is not material.

[300] In the Presidency of Bombay it is only in those cases in which the possession of property has been of such a duration and character as to come within Reg. V of 1827 that the Limitation Act XIV of 1859 has been held to extinguish the original right to the property.

Quære.—Whether (assuming that the effect of the Limitation Act XIV of 1859 was similar to the effect of s. 29 of the Limitation Acts of 1871 and 1877) cl. 7 of s. 1 of Act XIV of 1859, which in terms relates to "suits to recover the property comprised in the order" of the Mamlatdar, would have barred a suit by B not based on a claim to recover the property (which implies a claim to exclude the defendant therefrom altogether), but one merely for obtaining a share of such property on the footing that A who had been successful in the Mamlatdar's Court, held it for himself and B jointly.

Statutes of limitation being in limitation of common right are not to be extended by construction to cases not clearly included within their terms.

[F., 70 P.R. 1903 = 160 P.L.R. 1903.]

SECOND appeal from the decision of W. Walker, District Judge of Ahmednagar, in appeal No. 31 of 1888.

The plaintiffs sued to recover possession of lands sold to them by Rakhma Khandu, defendant No. 1, in 1880.

The lands in suit were the family property of defendant No. 1 and his brothers, defendants 2, 3 and 4.

In 1861 the lands had been mortgaged to the plaintiffs for debts contracted by the defendant's father Khandu, who died in 1860.

In July, 1864 defendant No. 1 obtained a decree in the Mamlatdar's Court against defendant No. 2, awarding him possession of the lands in dispute.

In September, 1864, plaintiffs obtained a decree upon their mortgage. In satisfaction of this decree defendant No. 1 leased the lands to the plaintiffs for a term of ten years.

On the expiration of this lease in 1874 the defendants 2, 3 and 4 took possession of the lands by inducing the tenants to attorn to them.

On the 21st September, 1880, defendant No. 1 conveyed the lands to plaintiffs by a deed of sale.

In 1885 the plaintiffs filed the present suit for possession of the lands sold to them. They alleged *inter alia* that defendant No. 1, their vendor, had been in exclusive possession for more than twelve years; that he had obtained a decree for possession against defendant No. 2 in the Mamlatdar's Court so far back as 1864; [301] that in the said proceedings defendant No. 2 had represented his brothers (defendants 3 and 4) as well as himself, and that no steps having been taken to set aside the Mamlatdar's order, the said three defendants had now lost their rights to the property by lapse of time.

The Subordinate Judge held that the rights of defendants 2, 3 and 4 to the lands in suit were not barred by limitation, and that as the lands were joint family property, the plaintiffs were entitled to recover only their vendor's one-fourth share in the property in dispute.

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This decision was confirmed, on appeal, by the District Judge. His reasons are stated in the following extract from his judgment:—

"The Mamlatdar's decision does not affect a claim for partition: see *Bhaguji* v. *Aniaba*(1); *Shivram* v. *Narayan*(2) quoted by the lower Court; the defendants Nos. 2, 3 and 4 did not lose their right to share, either under the old law or the Limitation Act IX of 1871, as they were in possession till 1860; and under the Act of 1871, which came into force within twelve years of that date, limitation ran only from the date of demand and refusal of a share in family property. As the mortgage was in satisfaction of Khandu's debt, and the lease by defendant No. 1 was to satisfy the decree on that debt, there was no possession or dealing with the property adversely to the right of defendants Nos. 2—4. Since November 1874, when the ten years' lease to plaintiffs expired, the defendants have been in possession; but even if they had not had possession, no right could have been acquired by defendant No. 1 or his vendees, the plaintiffs, as this suit was brought within twelve years of the expiration of the lease. As the plaintiffs have failed to prove that there was a partition, and that the property went to their vendor's share, the right of the defendants Nos. 2—4 to share in the property is clear, and the plaintiffs, therefore, cannot recover more than their vendor's share."

Against this decision the plaintiffs appealed to the High Court.

[302] *Vasudev Gopal Bhandarkar*, for appellants.—The Mamlatdar having decided against defendant No. 2 in 1864, he was bound to sue for possession within three years from that time: see s. 1, cl. 7 of Act XIV of 1859. Having failed to do so, he has lost all right to the land in dispute—*Bapu Khandu* v. *Baji Jivaji* (3). The cases of *Bhaguji* v. *Aniaba* (1) and *Shivram* v. *Narayan* (2) relied on by the lower Court do not apply, as in those cases the property covered by the Mamlatdar's decision was only a portion of the family property; Starling's Limitation Act. p. 114.

Gangaram Bapsoba Rele, for respondents.—This is a suit for partition. It does not, therefore, fall within cl. 7 of s. 1 of Act XIV of 1859. *Bhaguji* v. *Aniaba* (1) and *Shivram* v. *Narayan* (2) govern the present case. We were, therefore, not bound to sue within three years from the date of the Mamlatdar's decision.

JUDGMENT.

TELANG, J.—The only point which has been argued on this appeal is the point of limitation based upon the proceedings had in the Mamlatdar's Court in 1864. Those proceedings, it appears, were instituted by the first defendant against the second, and "a decision as to possession in favour of defendant No. 1 as against defendant No. 2" was made by the Mamlatdar in July, 1864. No suit was filed by the defendant No. 2 to get rid of the effects of that decision, and it was argued, firstly, that in consequence of the defendant's failure to file such suit, his claim to the property was gone; and secondly, that as he must be deemed to have acted in the proceedings before the Mamlatdar as representing his brothers, the defendants Nos. 3 and 4, as well as himself, the whole property, after the lapse of three years from the date of the Mamlatdar's decision, became the property of defendant No. 1, and now belongs to the plaintiff as purchaser from defendant No. 1.

(1) 5 B. 25. (2) 5 B. 27. (3) 14 B. 372.

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The first question, therefore, which arises is as to the legal effect of the failure, on the part of the defendant No. 2, to file a suit to establish his right to the property within three years [303] after the order of the Mamlatdar. That order was made, as the Subordinate Judge says, under Act XVI of 1838, and presumably under cl. 2, s. 1 of that enactment. The order, therefore, fell under cl. 7 of s. 1 of Act XIV of 1859, the Limitation Act in force at the time when the order was made. By that clause the period of limitation applicable to "suits by any party bound by any order respecting the possession of property made under cl. 2, s. 1 of Act XVI of 1838" for the recovery of such property was "three years from the date of the final order in the case." And by s. 1 it was provided that "no suit shall be maintained in any Court * * * unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature." The result of these clauses in the present case is that after July, 1867, the defendant No. 2 would not have been able to maintain a suit for the recovery of the property comprised in the Mamlatdar's order of July, 1864.

But in 1874 the defendant No. 2 and his brothers got actual possession of that property, as found by the District Judge, and from that time down to the filing of this suit remained in undisturbed possession of it. Under these circumstances, it is certainly open to question whether the plaintiffs, as assignees of the defendant No. 1, can contend that they are now entitled to possession of the whole property, merely because no suit was filed to recover such property within three years after the Mamlatdar's decision.

Under Act XIV of 1859 it was held in Madras, that a plaintiff's remedy only was barred, but his right was not extinguished—*Doe dem Kullammal* v. *Kuppu Pillai* (1), *Govindan Pillai* v. *Chidambara Pillai* (2). And although in *Gunga Gobind Mundul* v. *The Collector of the 24 Pergunnas* (3), the Privy Council apparently applied a somewhat different principle in Bengal, it has always been held in Bombay that Act XIV of 1859 did not [304] repeal the section which existed in Regulation V of 1827 regarding the acquisition of title by prescription. And it has consequently been ruled that in this Presidency it was only in those cases in which the possession of property was of such a duration and character as to come within the Regulation that the result of extinguishing the original right to the property followed. Of the cases which decided this it is enough to mention *Anaji Dattushet* v. *Morushet Bapushet* (4) as among the earliest, and *Rambhat Agnihorti* v. *The Collector of Poona* (5) as one of the most recent. And in the last-mentioned case, we may remark, the decision of the Privy Council in *Gunga Gobind Mundul* v. *The Collector of the 24-Pergunnas* was considered by the Court. If, then, in 1867, the title of the defendant No. 2 was not extinguished, but only his remedy for asserting it barred, his possession in 1874 could properly be referred, and ought to be referred, to the then subsisting title. And on that ground, this case is distinguishable from *Brassington* v. *Llewellyn* (6), which was decided on the ground stated by Channell, B. in the course of the argument, that the re-entry in that case occurrred at a time when the

(1) 1 M.H.C.R. 85 (89).
(2) 3 M.H.C.R. 99 (103); and compare also *Villa Tamburatti* v. *Vira Rayan*, 1 M. 228 and 267.
(3) 11 M.I.A. 345=7 W.R.(P.C.) 21.
(4) 2 B.H.C.R. 334.
(5) 1 B. 592.
(6) 27 L.J. Exch. 297.

" title," if any had previously existed, had been " extinguished," and a new title created by the operation of the Statute of Limitations. The doctrine of remitter was held not to apply in that case. But here the case is different on the very point on which the decision in *Brassington* v. *Llewellyn* proceeded. And, therefore, any one, who after the defendants' re-entry in this case disputed their title, would have to prove his own as against the defendants, independently of any help from the Statute of Limitations.

The argument for the appellant on this part of the case proceeded on the assumption that, under the Act of 1859, the same result followed upon an adverse possession for the prescribed period as is provided for by s. 29 of the Acts of 1871 and 1877. But the case of *Rambhat* v. *The Collector of Poona* shows that that assumption is incorrect.

Further, assuming that the effect of Act XIV of 1859 was similar to the effect of s. 29 of the Limitation Acts of 1871 [305] and 1877, the question arises whether cl. 7 of s. 1, which in terms relates to suits " to recover the property" comprised in the order of the Mamlatdar, would have barred a suit not based on a claim " to recover the property"—which implies a claim to exclude the defendant therefrom altogether—but one merely for obtaining a share of such property on the footing that the defendant who had been successful in the Mamlatdar's Court held it for himself and the plaintiff jointly. The terms of the section do not require such a suit to be brought under its operation, and notwithstanding what has been said by Mahmood, J., in *Parbati* v. *Bhola* (1) about Statutes of Limitation being " statutes of repose," and therefore such as should be liberally construed, the principle has been consistently acted on in this Court, that those statutes being in limitation of common right are not to be extended by construction to cases not clearly included within their terms—see (*inter alia*) *Umiashankar Lakhmiram* v. *Chhotalal Vajeram* (2) ; *The New Fleming Spinning and Weaving Company, Limited* v. *Kessowji Naik* (3) ; *Lallubhai* v. *Naran* (4) ; *Manekji Framji* v. *Rustomji Naserwanji Mistry* (5). Further, we have the express decisions of three learned Judges of this Court (Sir M. R. Westropp, C. J., and M. Melvill and F. D. Melvill, JJ.) in *Bhaguji* v. *Aniaba* (6) and *Shivram Narayan* (7), which lay down broadly that cl. 46 of the Limitation Act of 1871, which is almost identical in terms with cl. 7, s. 1 of Act XIV of 1859, does not apply to partition suits. The rule, therefore, which has been laid down under the later Act must also be applied in determining the effect of the earlier enactment.

It was said, however, that the cases referred to were cases in which the proceedings before the Revenue Courts related to only a part of the family property, while in the present case the Subordinate Judge has held that the property comprised in the order of the Mamlatdar is all the property that belongs to the [306] family. We do not think that that constitutes a substantial distinction, having regard to the fact that the ruling of the Court is expressed in perfectly broad terms, so as to apply to all partition suits, and also to the fact that the particular property comprised in the orders of the Mamlatdar were not in those suits directed to be excluded from the partition. We

(1) 12 A. 79 (90, 91). (2) 1 B. 19. (3) 9 B. 373 (403).
(4) 6 B. 719 (724). (5) 14 B. 269 (272). (6) 5 B. 25.
(7) 5 B. 27.

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think that the principle underlying those decisions applies here—that principle being, we apprehend, this that a suit for the partition of property comprised in the Mamlatdar's order is not properly designated as a suit to recover such property. And whether that property is the only one of which a partition is claimed, or whether it is one of several such properties, is not a material question in this connection. We may further point out that in *Bhaguji* v. *Aniaba*, the suit as originally launched by the plaintiff was one for the partition merely of the one house which was comprised in the Mamlatdar's order—and although the Subordinate Judge held that there was other ancestral property also, and made a general decree for partition in favour of the plaintiff, he expressly gave a share to the plaintiff in the particular property comprised in the Mamlatdar's order. If the argument for the appellant before us is correct, the plaintiffs had under Act IX of 1871, sch. II, art. 46 coupled with s. 29, absolutely lost all right to the particular property comprised in the Mamlatdar's order, and their suit, so far as it related to the property, would have been untenable. The passage which Mr. V. G. Bhandarkar cited from Mr. Starling's book on Limitation merely states the actual decision in the two cases referred to, and is not in any way inconsistent with the view we have now expressed. We think it will be a refined distinction to hold, that where the partition suit comprises only the property to which the Mamlatdar's order related, it is altogether barred if brought more than three years after such order, while if it relates to that and also other properties, the bar of limitation does not apply to any extent whatever. In the latter case, as much as in the former, the plaintiff asks for a partition of that particular property (compare West and Bühler's Digest, p. 597 *et seq*). In the latter case, as much as in the former, it is possible to refuse him relief in respect of that particular property only. We do not think that the decisions of this Court in *Bhaguji* v. [307] *Aniaba* and *Shivram* v. *Narayan* afford any warrant for such a distinction as is here relied on.

Upon the whole, therefore, we must hold that the appellant here has not succeeded in showing that the decree of the Court below is incorrect, and we must, accordingly, confirm it with costs.

Decree confirmed.

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15 B. 307.

APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Telang.

PARVATA AND ANOTHER (*Original Opponents*), *Appellants v.* DIGAMBAR (*Original Applicant*), *Respondent.** [7th October, 1890.]

Decree—Execution of decree—Assignee of decree under oral assignment—His right to execute decree—Civil Procedure Code (Act XIV of 1882), s. 232—Plea of fraud cannot be raised in execution proceedings.

An assignee of a decree under an oral assignment has no *locus standi* at all to apply for execution of a decree, but, as regards one who claims to be an assignee in writing or by operation of law, the Court has a discretion under s. 232 of the Code of Civil Procedure (Act XIV of 1882), whether to recognize such assignment or not.

* Second Appeal, No. 267 of 1890.