

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins and Mr. Justice Chandavarkar.*

VISHWANATH RAMKRISHNA AND OTHERS (ORIGINAL PLAINTIFFS),  
APPELLANTS, v. VASUDEV LAKSHMAN AND OTHERS), ORIGINAL  
DEFENDANTS), RESPONDENTS.\*

1901.

June 10.

*Appeal—Joint appellants—Presentation of appeal beyond time—Affidavit excusing delay in appealing made by only one of appellants stating reasons personal to himself—Appeal admitted—Variation of decree on a point affecting other appellants but not the appellant who made the affidavit—Variation not allowed—Civil Procedure Code (XIV of 1882), section 554—Limitation Act (XV of 1877) section 5—Practice.*

In a partition suit a decree was passed against twenty-four defendants whose interests in the subject-matter of the suit were not identical. Part of the property in suit consisted of a kulkarni vatan, one-third share of which (*inter alia*) was given by the decree to the plaintiffs. Eleven of the defendants appealed against the decree, of whom only six (defendants 1 to 6) had an interest in the kulkarni vatan. The decree was passed on the 11th April, 1898, and the appeal was not presented until the 7th June, 1898, *i.e.* beyond the period (thirty days) allowed by the Limitation Act (XV of 1877). The only affidavit excusing the delay was made by defendant 14, who was not interested in the kulkarni vatan, and it stated reasons for the delay which were personal to himself, and did not apply to the other appellants. On this affidavit, however, the appeal was admitted, and the lower appellate Court modified the decree and reduced the one-third share of the kulkarni vatan given to the plaintiffs to a one-sixth share. The plaintiffs thereupon appealed to the High Court.

*Held* (reversing the decree of the lower appellate Court and restoring that of the first Court) that the appellate Court erred in altering the share of the kulkarni vatan. Defendant 14 had no interest in the variation of the decree, having no interest in the kulkarni vatan, and section 544 of the Civil Procedure Code (XIV of 1882) did not apply. The variation was only in favour of defendants 1 to 6, who alone were interested in the vatans. They, however, had not excused their delay in presenting the appeal and it was barred by limitation.

SECOND appeal from the decision of M. P. Khareghat, District Judge of Ratnágiri, modifying the decree of Ráo Sáheb S. V. Joshi, Subordinate Judge of Rájápur.

The plaintiffs sued to recover by partition possession of one-sixth share of the lands and houses and one-third share of the kulkarni vatan in suit with damages and mesne profits.

\* Second Appeal 539 of 1900.

1901.

VISHWANATH  
v.  
VASUDEY.

The defendants, who were twenty-four in number and whose interests in the properties in suit were not identical, raised various contentions which are not material for the purpose of this report.

The Subordinate Judge on the 6th April, 1898, passed a decree awarding to the plaintiffs one-sixth share in the lands in dispute and one-third share in the kulkarni vatan.

Against the said decree eleven of the defendants, viz. defendants 1 to 6 and defendants 12 to 16 presented an appeal to the Judge on the 7th June, 1898. As abovementioned the appellants had not identical interests, *e.g.* only some of them, viz. defendants 1 to 6, were concerned with the question of the kulkarni vatan. More than the statutory period allowed for an appeal (thirty days from the date of the decree) had then expired, and it was therefore necessary to account for the delay in order to get the appeal admitted (section 5 of the Limitation Act, XV of 1877). One of the appellants (defendant 14) who had no interest in the kulkarni vatan made an affidavit on the 20th June, 1898, in which he set forth the reasons for not presenting the appeal in time. The reasons so given only affected himself and explained his own default. They did not explain the default of the other appellants. The following was the affidavit :

After arguments in Suit No. 484 of 1893. of the Rájápur Court file, the case was pending disposal and it was disposed of on the 6th April, 1898. But although I was present in Court that day till 5 o'clock (P.M.), the case was not disposed of during that time. After that I left under the impression that the case would be disposed of after the vacation. Seven or eight days after, when I came to know that the case was disposed of, I went to Rájápur about the 13th of April, 1898, and applied for copies of the minutes and decree (judgment), and along with the application paid Rs. 6 for expenses (*i.e.* copying charges). I could not know what particular amount it was necessary for me to pay. On the 25th of May, 1898, when I went to Rájápur Court to receive copies, I learnt that my application for copies was disposed of (*i.e.* rejected) on the ground that the amount paid by me along with the said application was not sufficient to defray copying charges. The amount paid by me was returned to me on that day. Afterwards I got Mr. Narayan Babaji Marathe, pleader for my other kinsmen and co-appellants in this case, to present an application for copies of minutes and decree (judgment) on the 25th of May, 1898. The said copies were ready on the 31st of May, 1898. I received them from the said pleader on the 4th of June, 1898. Then leaving that place I came to Ratnágiri on the 6th of June, 1898, and gave the said copies to a pleader, Mr. Narayan Mahadev Madrekar, for making an appeal. Rájápur is twenty miles from my village Gaonkhadi, and

Ratnágiri is thirteen miles from Gaonkhadi. I have duly made this affidavit in writing. Dated 20th June, 1898.

1901.

VISHWANATH  
V. VASUDEV.

The Judge forwarded this affidavit to the Subordinate Judge for a report, and after receipt of the report, provisionally excused the delay in the presentation of the appeal. On hearing the appeal on the merits, the Judge modified the decree of the Subordinate Judge by awarding to the plaintiffs one-sixth share in the kulkarni vatan instead of one-third share granted by the Subordinate Judge.

The plaintiffs preferred a second appeal.

*H. C. Coyaji* for the appellants (plaintiffs):—The appeal by the defendants to the lower appellate Court was time-barred. It was the affidavit of defendant 14, which was taken to excuse the delay and procured the admission of the appeal and it was he who applied for the admission of the appeal. The other defendants made no affidavit and their default is not explained or excused. Nevertheless it is they who have benefited by the appeal. They alone were interested in the kulkarni vatan. Defendant 14 was not interested in it at all. The appeal was admitted in his affidavit stating reasons for the delay which were personal to himself and which did not affect the other appellants. We therefore contend that there were no sufficient grounds to excuse the delay in appealing with respect to the appellants other than the applicant.—*Bai Ful v. Desai Manorbhai*,<sup>(1)</sup> *Moti Chand v. Ful Chand*.<sup>(2)</sup>

*N. M. Samarth* for respondents 1 to 3 (defendants 1 to 3):—The appeal was a joint appeal and the application for its admission, though made by one of the appellants, must be considered to be a joint application. The application to excuse the delay and to admit the appeal was not made by the applicant only for himself. It was made for all the appellants. The Judge asked for a report of the Subordinate Judge, and having considered that report, he came to the conclusion that there were sufficient grounds to excuse the delay. We submit that the Judge properly exercised his discretion in granting the application and in admitting the appeal.

(1) (1897) 22 Bom. 840.

(2) (1898) 27 Cal. 57.

1901.

VISHWANATH  
v.  
VASUDEV.

*Balaji A. Bhagavat* for respondent 10 (defendant 12).

JENKINS, C.J. :—The question for our consideration is whether the lower appellate Court was entitled to vary the decree of the first Court and reduce the one-third share in a kulkarni vatan awarded to the present appellants by that decree to a one-sixth share. The appeal to the lower appellate Court was presented beyond time, but of the several appellants one only, (defendant 14,) applied to have the delay excused. This he did on grounds personal to himself, and the result was that the appeal of all the appealing defendants was admitted and the decree of the first Court was varied in the way indicated. In this variation defendant No. 14 had no interest, and as the case clearly does not fall within section 544 of the Code of Civil Procedure, the District Judge erred in disturbing the shares in the kulkarni vatan, for there was no ground on which the delay of the appellants, defendants 1 to 6 (who alone were concerned in this question), could be excused.

The decree of the lower appellate Court must therefore be reversed except as to costs and that of the Subordinate Judge restored: the appellants' costs of this appeal to be borne by respondents 1 and 3.

*Decree reversed.*

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## CRIMINAL REVISION.

*Before Mr. Justice Candy and Mr. Justice Chandavarkar.*

IN RE MATHUR LALBHAI.\*

1901.

June 10.

*Criminal Procedure Code (Act V of 1898), sec. 517—Disposal of stolen property on conviction of the thief—Babashahi coin—Legal tender—Customary coin.*

A witness for the prosecution in a case of theft produced a sum of money in Babashahi (Baroda) coin (part of the stolen property) which the accused had paid to him in satisfaction of a debt. The accused was convicted, and at the close of the trial the Court, under section 517 of the Criminal Procedure Code

\* Criminal application of revision No. 41 of 1901.