APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

GURUVAYYA GOUDA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* DATTATRAYA ANANT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1903. *July* 28.

Limitation Act (XV of 1877), section 22—Civil Procedure Code (Act XIV of 1882), section 32—Suit to recover possession—Suit by one of the plaintiffs as manager of the family—Right of manager to sue—Objection as to non-joinder at a late stage—Joinder of co-plaintiffs after the period of limitation—Limitation.

A suit to recover possession of a house was originally brought by two plaintiffs, the second plaintiff being described as the manager of the family. Subsequently at a late stage of the suit, the defendants having raised an objection of non-joinder of parties, the other members of the family who, however, stated that they were satisfied to be represented by the plaintiff 2 as the manager of the joint family, were joined as co-plaintiffs, but after the expiry of the period of limitation prescribed for the suit. The first Court allowed the claim. The Judge in appeal reversed the decree and dismissed the suit as time-barred under section 22 of the Limitation Act (XV of 1877).

Held, reversing the decree of the Judge and restoring that of the first Court; that section 22 of the Limitation Act (XV of 1877) does not in itself purport to determine directly whether the joinder of the parties after the institution of a suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired. Such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed. If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination (by application of the provisions of section 22 of the Limitation Act) of the date of the institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit and would not therefore attract the application of the general provisions of the Limitation Act (XV of 1877).

The question of the right of a manager to sue in that capacity is rather one of authority, if the other co-sharers are adults, and the right to insist on the other coparceners being brought on the record is for the benefit of the defendant to insure himself against further litigation and is therefore dependent on the objection being taken at an early stage, the objection on the score of want of authorization being one of a character which it would clearly be open to the defendant to waive.

* Second Appeal No. 322 of 1902.

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SUBBAYYA v. DATTATRAYA.

SECOND appeal from the decision of J. C. Gloster, District Judge of Kárwár, reversing the decree of T. V. Kalsulkar, Subordinate Judge of Sirsi.

On the 14th September, 1877, plaintiffs 1 and 2, of whom the latter was described as the manager of the family of which the plaintiffs along with others were members, sued defendant 1 to recover possession of the house site, and compound in dispute and to recover arrears of rent. The plaint alleged that defendant 1's deceased undivided brother Anantayya rented the property about eleven years ago for rupees twelve per year; that the rent till the 7th March, 1894, was paid by defendant 1 to the plaintiffs; that further rent was not paid; that defendant 1 was the heir of the deceased Anantayya and had been in possession of the property; that on the 27th August, 1897, the plaintiffs gave notice to defendant 1 to pay the arrears of rent and to vacate the property, and that their failure to do so gave rise to the present suit.

Defendant 1, who was originally the only defendant, having failed to appear on the appointed day, namely, the 31st May, 1898, an *ex-parte* decree was passed against him, but he having applied for the setting aside of that decree the Court granted his application and, thereupon, he on the 24th September, 1898, denied the letting and contended, *inter alia*, that he was not the heir of the deceased Anantayya; that one Gopalkrishna, a minor, was the heir of the deceased; that plaintiffs 1 and 2 were not the owners of the property in suit, but they were simply *benamidars* under a sale-deed dated the 26th October, 1885; that he (defendant 1), one Subrao Anantayya, and the minor Gopalkrishna were the owners of the property, and the latter two ought to have been joined as parties; that the sale-deed was passed to plaintiff 1 and the uncle of plaintiff 2 owing to the confidence and friendship between them and the deceased Anantayya, and also because the deceased was a Government servant; that since the date of the sale-deed the Government assessment was paid by the deceased Anantayya or for him, and plaintiffs never paid it or never enjoyed the property, and that he had sold his one-third share in the property to one Mangeshrao Annappa and was, therefore, in no way liable to the claim.

On the contention of the defendant, Subrao Anantayya, Gopalkrishna and Mangeshrao Annappa having been joined as defendants 2, 3 and 4, respectively, on the 14th September, 1898, they raised the same objections, and further contended that the suit was time-barred.

At the eighth hearing of the suit the defendants by an application dated the 16th June, 1899, contended that the plaintiffs had omitted to join the remaining members of their family as parties to the suit. Notices were thereupon issued to those members, and they having appeared stated that they had no objection either to the suit being proceeded with at the instance of plaintiff 2 as the manager of the family or to their being brought on the record. The Court ordered them to be joined as co-plaintiffs, and they were accordingly joined as plaintiffs 3—13 on the ninth day of the hearing, that is, on the 30th June, 1899.

The Subordinate Judge found that the plaintiffs were the owners of the property in suit; that the suit was within time, and that the plaintiffs were entitled to recover possession of the property. He, therefore, passed a decree directing the plaintiffs to recover possession of the property and mesne profits from the date of suit till delivery of possession. The claim for arrears of rent was disallowed. With respect to the point of limitation the Subordinate Judge observed as follows:—

The suit is in time. The sale-deed (Exhibit 18) is dated 26th October, 1885. The suit was filed on 14th September, 1897, *i.e.*, within twelve years from the date of the sale-deed. Defendant No. 1 is really in possession. . . . He was made a party before. Defendants 2 to 4 were afterwards added on 14th September, 1898. These latter defendants are not necessary parties, they not having title and not being in possession. Hence, plaintiffs do not lose anything if the suit is time-barred as against them under section 22 of Act XV of 1877. Plaintiffs 3 to 13 were afterwards added on 30th June, 1899, *i.e.*, more than twelve years after the plaint was filed. The sale-deed (Exhibit 18) is passed in plaintiff 1's name and in the name of plaintiff's uncle. Plaintiff 2 sues now as manager. Other plaintiffs were added as having interest in the subject-matter of the suit. Defendants contended that the suit is barred under section 22 of Act XV of 1877. They stated that the case (*Kalidas Kevaldas*—I. L. R. 7 Bom. 217) applied and therefore the suit should be dismissed. I think the case does not apply. The objection was not taken by defendants on or before the first hearing under section 34 of the Civil Procedure Code (Exhibit 88). Under the circumstances, on the principle of the case (*Shirekuli Timappa*

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Hegde v. *Ajjibal Narashinha Hegde* and another—I. L. R. 15 Bom. 297) the suit is in time.

On appeal by the defendants the Judge agreed with the Subordinate Judge as to the merits of the plaintiffs' claim, but he being of opinion that it was time-barred reversed the decree and dismissed the suit for the following reasons :—

On the question of limitation, it is argued on behalf of the appellants that section 22 of the Limitation Act applies, and that, inasmuch as defendants 2, 3 and 4 and plaintiffs 3 to 13 were added more than twelve years after the alleged cause of action, the whole suit should be dismissed.

As regards the late joinder of the three defendants, I do not think it is fatal, for plaintiffs' title being established the relief is really sought against the person in wrongful possession and the evidence shows that that is defendant 1. Further, if the case be treated as governed by article 144, I do not think the defendants have established adverse possession for twelve years. And if, as defendants contend, they are entitled on plaintiffs' case to take article 139 as applicable, then, too, inasmuch as the period must be computed from the expiration of the one year's alleged lease, namely, from November, 1886, all the defendants were joined before the period of limitation : compare *Chandri* v. *Daji Bhau*—I. L. R. 24 Bom. 504.

The plaintiffs 3 to 12 were, however, not added till June, 1899, more than twelve years after the accrual of the cause of action as calculated above. The Subordinate Judge relies on the decision in *Shirekuli Timappa* v. *Ajjibal Narashinha*—I. L. R. 15 Bom. 297. The judgment in that case, which is a very brief one, apparently distinguished it from the case of *Kalidas* v. *Nathu*, I. L. R. 7 Bom. 217, on the ground that the defendants had taken no objection on the ground of non-joinder of parties and no fresh parties had in fact been joined.

The position here is different. Defendants did take objection (Exhibit 88), and as the result plaintiffs 3 to 12 were added.

That they were necessary parties cannot be doubted : see *Hari Gopal* v. *Gokuldas*, I. L. R. 12 Bom. 158, and, after careful consideration, I am unable to accept the Subordinate Judge's finding that the case of *Kalidas* v. *Nathu*, I. L. R. 7 Bom. 217, is inapplicable merely on the ground that the objection was not taken at or before the first hearing. The provisions of section 22 of the Limitation Act seem to me clear.

Plaintiffs preferred a second appeal.

Nilkanth A. Shiveshvarkar, for the appellants (plaintiffs) :—Our contention is that even plaintiff 1 alone was competent to bring the suit because the sale-deed was passed to him and plaintiff 2's uncle, who was dead at the time of the suit. Plaintiff 2 was

joined in his capacity as the agent of all the members of the family. It was not at all necessary to join him, but he was joined simply for the purpose of satisfying the Court that the interest of the other members of the family was not overlooked. Further, the co-plaintiffs subsequently joined were not brought on the record by our application. The Court of its own motion joined them as co-plaintiffs under section 32 of the Civil Procedure Code. Therefore, the bar of limitation cannot arise: *The Oriental Bank Corporation* v. *J. A. Charriol*,(1) *Fakera* v. *Bibi Azimunnissa*.(2)

Further, the defendants having failed to raise the plea of non-joinder at the earliest opportunity under section 34 of the Civil Procedure Code, they must be considered to have waived their right to object: *Shirekuli Timappa* v. *Ajjibal Narashinha*.(3)

Our suit was not based on any contract. It was a suit in ejectment. The Judge has relied on *Kalidas Kevaldas* v. *Nathu Bhagvan*,(4) which has no application to the present case. In that case the property involved was a joint debt for the recovery of which all the persons interested were necessary parties. Section 32 of the Civil Procedure Code refers to the Limitation Act when defendants are added and not when plaintiffs are added. Defendants have not complied with the provisions of section 34 of the Civil Procedure Code. They did not raise the objection of non-joinder of plaintiffs at the earliest stage. They raised the objection after all the evidence was recorded and after the case was heard eight times.

[JENKINS, C. J., referred to *Subodini Debi* v. *Cumar Ganoda Kant* (5) and *Ravji Appaji* v. *Mahadev Bapuji*.(6)]

Our next objection relates to the arrears of rent. The first Court held that we were owners and were entitled to recover possession. If we are owners, we are entitled to recover arrears of three years.

Shamrav Vithal, for the respondents (defendants):—The property belonged to the undivided family of the plaintiffs, though the sale-deed was in the names of plaintiff 1 and the uncle of

(1) (1886) 12 Cal. 642.
(2) (1899) 27 Cal. 540.
(3) (1890) 15 Bom. 297.
(4) (1883) 7 Bom. 217.
(5) (1887) 14 Cal. 410.
(6) (1897) 22 Bom. 672.

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plaintiff 2. The consideration for the sale proceeded from the family, therefore all the members ought to have been originally brought on the record: *Navheri* v. *Shek Jamal*.[1]

The plaintiff had not brought the suit as the surviving party to the sale-deed. He has not based his suit on the sale-deed alone, but has joined plaintiff 2 who was not a party to the sale transaction. A mere description of the plaintiff that he was the manager of the family would not enable him to bring a suit without joining all the other members. The property is not described in the plaint as the property of the family. When there is a joint family, any action taken with respect to the family property must, at the outset, be for the benefit of all the members: Mayne's Hindu Law, Sixth Edition, section 298, page 368.

[JENKINS, C. J.:—But in the present case under the sale-deed the property vested in the two purchasers.]

We submit that notwithstanding that circumstance when the suit is for the recovery of family property all the members of the family must appear on the record: Bhattacharya on Hindu Law, page 232—*Gokool Pershad* v. *Etwaree Mahto*.[2] The Bombay and Madras rulings have laid down that a manager, describing himself as such, cannot bring a suit without joining all the members: *Angamuthu Pillai* v. *Kolandavelu Pillai*,[3] *Hari Gopal* v. *Gokaldas*,[4] *Hari Vasudev* v. *Mahadu Dad Gavda*.[5] If plaintiff 1 alone had brought the suit, then the question of non-joinder would not have arisen, but as he joined plaintiff 2 as the manager, that question arose. The claim is time-barred because the additional plaintiffs were joined twelve years after the accrual of the cause of action.

Shiveshvarkar, in reply:—In the cases relied on, the objection as to non-joinder was taken in the written statement, that is, at the earliest stage of the case.

JACOB, J.:—In this suit the plaintiffs sought to recover possession of a house and compound, with arrears of rent.

(1) (1903) 5 Bom. L. R. 577.
(2) (1878) 20 W. R. 138.
(3) (1899) 23 Mad. 190.
(4) (1887) 12 Bom. 158.
(5) (1895) 20 Bom. 435.

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The Court of first instance awarded the claim except in respect of the rents.

On appeal by the defendants the District Judge, while concurring with the Subordinate Judge as to the merits of the case, held the suit to be barred by limitation.

The grounds on which this decision was based were the following:

The cause of action was held to have accrued at the latest in November, 1886.

The suit was in the first place instituted on the 14th September, 1897, by plaintiffs Nos. 1 and 2 alone, after certain proceedings, involving the joinder of additional defendants, the particulars of which it is unnecessary for the purposes of this appeal to specify, objection was taken by defendant 1 in an application presented on the 16th June, 1899, that there were other members of the joint family to which the property was alleged to belong, who must be joined as co-plaintiffs. Notices were then issued by the Court under section 32 of the Civil Procedure Code to plaintiffs Nos. 3—13, and on their statements that they were satisfied to be represented by plaintiff No. 2 as manager of the joint family, but that they had no objection to be joined as co-plaintiffs, they were brought on the record as such on the 30th June, 1899. The period of limitation had then expired, and the District Judge, applying the provisions of section 22 of Act XV of 1877, held that the suit must therefore be dismissed.

Now, section 22 of Act XV of 1877 does not in itself purport to determine directly whether the joinder of parties after the institution of a suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired. Such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed.

Now, plaintiff 1 was set out in the plaint as the actual lessor with whom the deceased Anantayya contracted, but the lower Courts have held the alleged oral leases to be not proved, and the suit as it is now before us must be regarded as one for the ejectment of the defendants as trespassers.

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For the purposes of such a claim it is not open to us to consider in this suit the suggestions that plaintiff 1, by virtue of his purchase in his own name, might be regarded as alone representing the legal estate of the joint family, or as occupying the position of a trustee on behalf of the other co-sharers, with a view to calling in aid the provisions of section 437 of the Civil Procedure Code. The sale-deed was not even mentioned in the plaint, and any questions raised in the suit in connection with the purchase had reference to the contention of defendant 1 that the purchase was *benami* for the benefit of his deceased brother.

It is further clear that plaintiff 2 was from the outset joined as manager of the joint family in view of the alternative prayer for declaration of their ownership, and for consequential recovery of possession of the property, failing proof of the oral leases.

The question therefore before us is rather, whether the claim could have been decreed in the suit of plaintiff 2 as manager, or whether the non-joinder of the other co-sharers, minors and adults, was a defect which could be overlooked by reason of the delay on the part of defendants in taking objection to it. If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination (by application of the provisions of section 22 of the Limitation Act) of the date of institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit, and would not therefore attract the application of the general provisions of the Limitation Act.

The main question in this appeal is whether, had the additional plaintiffs not been joined, it would have been competent to the Subordinate Judge to pass a decree for ejectment against the defendants, on the facts alleged and proved, in favour of the original plaintiffs.

Now it appears to be settled law as summarised by Mr. Mayne (Sixth Edition, page 368) that "a single member cannot sue.
to recover a particular portion of the family property for himself, whether his claim is preferred against a stranger who is asserted to be wrongly in possession or against his coparceners. If the former, all the members must join, and the suit must be brought

to recover the whole property for the benefit of all. .....If from any cause, such as lapse of time, the other members cannot be joined as plaintiffs, the whole suit will fail."

In the case of *Arunachala* v. *Vythialinga* (1) an exception appears to have been recognized in favour of a managing member of the family, who has instituted the suit in that capacity, but this was a mere *obiter dictum*, and has since been dissented from in *Alagappa* v. *Vellian* (2) and *Angamuthu* v. *Kolandavelu*.(3)

The authority last cited is directly against the appellants, as the suit there as here was brought by the plaintiff as family manager, claiming the property on behalf of the family. The Bombay High Court, however, has not regarded the right of the manager of the family to sue alone in that capacity for family property as absolutely excluded.

In *Kalidas* v. *Nathu*(4) the original plaintiff was not the manager of the family. It is true that in *Hari Gopal* v. *Gokaldas*,(5) Sargent, C. J., points out that this would not afford ground for distinguishing such a case as the present one, but at the same time he plainly indicates that the question of the right of a manager to sue in that capacity is rather one of authority, if the other co-sharers are adults, and that the right to insist on the other coparceners being brought on the record is for the benefit of the defendant to insure himself against further litigation and is therefore dependant on the objection being taken at an early stage, the objection on the score of want of authorization being one of a character which it would clearly be open to the defendant to waive. This principle was acted upon in another case reported at page 300 of the Printed Judgments of 1890 (*Shirekuli Timappa* v. *Ajjibal Narashinha*) and applying the same to the case now before us, we must hold that the bar of limitation was not established, as the defendant's objection to non-joinder of parties having been taken at a late stage of the suit may be disregarded.

The case of *Shiwajiram* v. *Vishnu* (6) is distinguishable. There, although it appears to have been proved as a fact that the

(1) (1882) 6 Mad. 27.
(2) (1894) 18 Mad. 33.
(3) (1899) 23 Mad. 190
(4) (1883) 7 Bom. 217.
(5) (1887) 12 Bom. 158.
(6) (1900) 2 Bom. L. R. 121.

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plaintiff had been recognized as manager by the whole family, the suit had actually been instituted by the plaintiff in his individual capacity.

We purposely refrain in this case from resting our decision in any measure on the authority of the ruling of the Calcutta High Court in *Grish Chunder Sasmal* v. *Dwarka Nath Dinda* (1) which was cited at the hearing, as that ruling appears to proceed upon a misapprehension of the principle affirmed in *The Oriental Bank Corporation* v. *Charriol* (2) on which alone it purports to be based. What had there been held was that a Court in joining parties under section 32 of the Civil Procedure Code was untrammelled by any question of limitation in respect of an application for such joinder, not that the joinder could be made in disregard of any question of limitation in respect of the suit itself as affected by such joinder.

For the reasons above given, we reverse the decree of the District Judge and restore that of the Subordinate Judge with costs of both appeals on the defendants.

Decree reversed.

(1) (1897) 24 Cal. 640. (2) (1886) 12 Cal. 642.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

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NAVROJI MANEKJI WADIA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DASTUR KHARSEDJI MANCHERJI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 539—Atash Behram (Parsi fire-temple)—Parsi community of Udwada—Trust—Suit—Capacity to hold property—Mandatory injunction—Trespasser—Removal of encroachment.

In this country a fluctuating body of persons, such as a village community, is capable of owning property.

It is opposed to the notions of the Parsi community that the Iran Shah (sacred fire) should be regarded as capable of, or the subject of, ownership; but even if there be difficulty or doubt as to its ownership, it is obvious that there

* Appeal No. 166 of 1900.