478 and, we think, that is an authority for the view which we take in this case that the sanction of the 31st October to the private individuals is no bar to the proceedings which are now being taken at the instance of the Second Class Magistrate by his Kárkun.

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We, therefore, reject the application.

Application rejected.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

NARSINH AND OTHERS (ORIGINAL DEFENDANTS 1*a*, 1*b* AND 1*c*), APPELLANTS, *v.* VAMAN VENKATRAO AND OTHERS (ORIGINAL PLAINTIFFS 1—3 AND DEFENDANTS 2—5), RESPONDENTS.*

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Limitation Act (XV of 1877), sections 22, 28—Civil Procedure Code (Act XIV of 1882), section 31—Civil Procedure Code (Act V of 1908), Order I, Rule 9—Lands attached to vatan—Joint owners—Lease—Lease good till the death of the surviving joint owner—Gordon Settlement of 1864—Suit by representatives of one joint owner to recover possession—Representatives of the other joint owner joined as co-defendants with the representatives of the lessee—Plaintiffs' claim allowed to the extent of their share—Appeal by plaintiffs and co-defendants claiming their share—Limitation—Treatment of co-defendants as co-plaintiffs—Amendment of plaint and decree.

Certain lands attached to a vatan belonged jointly to two brothers V. and D. In the year 1872 the lands were let by V. under a perpetual lease which was attested by D. D. pre-deceased V. In the year 1905 within twelve years from the death of V., his representatives brought a suit for the recovery of the lands let by V. They sought to recover the entire lands on the ground of eldership. The suit was brought against defendants 1*a*, 1*b* and 1*c* as the heirs of the mortgagee of the lessee (the original 1st defendant), against defendants 2 and 3 as the heirs of the lessee and against defendants 4 and 5 as the heirs of D. The heirs of defendant 1 and defendants 2 and 3 defended the suit on the ground, *inter alia*, of limitation, the suit not having been brought within twelve years from the date of the lease. Defendants 4 and 5 did not contest the plaintiffs' claim. The first Court allowed the plaintiffs' claim to the extent of their share, namely, a moiety on the ground that their claim to that extent

* Second Appeal No. 248 of 1908.

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was not time-barred. On appeal by the plaintiffs and defendants 4 and 5 the latter of whom in appeal claimed their share, namely, the other moiety, the appellate Court awarded the other moiety to defendants 4 and 5.

On second appeal by the heirs of the mortgagee,

Held, affirming the decree that the whole claim was within time. A vatandar is entitled to alienate vatan lands for the term of his natural life and his children although not separate in interest from him have no right to object to such alienation until after his death.

Where a lease of vatan property is effected by one joint owner with the consent of the other joint owner, the time for the recovery of the vatan property from the lessee runs from the date of the death of the survivor of the joint lessors.

Defendants 4 and 5 having sought to recover in appeal their share which they had not asked for in the first Court.

Held, allowing their claim that they being parties to the suit instituted within the twelve years during which their right to a share in the vatan property could be effectually determined, the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually brought before it by the institution of the suit.

A party transferred to the side of the plaintiff from the side of the defendant is not a new plaintiff to whom the provisions of section 22 of the Limitation Act (XV of 1877) apply.

Nagendrabala Debya v. *Tarapada Acharjee*(1), concurred in.

Plaint and decree of the lower appellate Court amended by entering defendants 4 and 5 as co-plaintiffs.

SECOND appeal from the decision of V. V. Phadke, First Class Subordinate Judge of Belgaum, with appellate powers, amending the decree of H. V. Chinmulgund, Subordinate Judge of Chikodi.

The facts were as follows:—

The lands in dispute were attached to a Deshpande vatan which belonged to one Raghupat who died leaving him surviving two sons, Venkatrao and Dashrath, of whom Venkatrao was the elder. In the year 1872 Venkatrao leased the lands perpetually to one Annarao Herlekar, father of defendants 2 and 3. The lease was attested by Dashrath. Annarao in the year 1881 mortgaged his right as lessee of the lands to one Krishnarao

(1) (1908) 35 Cal. 1065.

Balaji, defendant 1. Dashrath died in the year 1876 leaving him surviving two sons Abaji and Narayan, defendants 4 and 5. Venkatrao died in the year 1893 leaving behind two sons Vaman and Vishnu and a grandson Damodar Sitaram as his heirs and legal representatives. In the year 1905, that is, within twelve years from the date of Venkatrao's death, his three representatives brought the present suit to recover possession of the lands against Krishnarao Balaji, the mortgagee of the lessee Annarao, defendant 1, and he having died his sons and heirs Narsinh, Pampa *alias* Shriniwas and Sudam *alias* Raghunath were brought on the record as defendants 1*a*, 1*b* and 1*c*, respectively, against the heirs of the lessee, defendants 2 and 3, and against their cousins, the sons of Dashrath, defendants 4 and 5. The plaintiffs alleged that as they were the representatives of the elder branch of the vatandar family the entire lands belonged to them by right of eldership and that their father Venkatrao had no right under the Vatan Act to alienate to strangers beyond his life-time.

Defendant 1 contended that the lands were not kept with the plaintiffs in right of eldership and plaintiffs were not the representatives of the elder branch, that Annarao having rendered valuable service to the plaintiffs' family, the lands were given to him in gift in lieu of remuneration long before the lease of 1872, that such a gift could not be retracted and was out of the pale of the Vatan Act, that the claim was time-barred, that though defendants 4 and 5 were members of the undivided family represented by them and the plaintiffs, they were joined as co-defendants notwithstanding the fact that their claim also was time-barrred and that even if the plaintiffs succeeded in establishing their claim they could not recover possession without redeeming the defendants' mortgage on payment of Rs. 1,000.

Defendants 2 and 3 answered that the claim was time-barred, that the Vatan Act was not applicable to the lands in suit and that they had no interest in the lands and were unnecessarily sued.

Defendant 4 admitted the claim and stated that he might be joined as plaintiff if necessary.

Defendant 5 was absent.

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The Subordinate Judge found that the plaintiffs were not entitled to the entire lands by right of eldership but were entitled to a moiety, that the lands in suit were vatan governed by the Vatan Act, that the perpetual lease passed by Venkatrao to Annarao was not binding on the plaintiffs, that defendant 1 failed to show that because the claim was time-barred against the shares of defendants 4 and 5, the plaintiffs' claim was also time-barred and that the plaintiffs were entitled to recover by partition a moiety of each of the lands in suit and to get subsequent mesne profits. He, therefore, passed a decree directing the plaintiffs to recover by partition a moiety of each of the lands from defendants 1*a*, 1*b* and 1*c*, heirs of defendant 1.

On appeal by the plaintiffs, defendants 4 and 5 joined them in the appeal contending that the first Court was wrong in supposing that their claim was time-barred and it should have awarded to them the other moiety of the lands which it refused to restore to the plaintiffs. The appellate Court found that the moiety of the lands which was not awarded to the plaintiffs could be decreed to the appellants, defendants 4 and 5. It therefore amended the decree of the first Court and directed that the plaintiffs should recover from defendants 1*a*, 1*b* and 1*c*, heirs of defendant 1, half of the lands in dispute with mesne profits from date of suit and that defendants 4 and 5 should similarly recover the other half. With respect to the claim of defendants 4 and 5 the Court made the following remarks :—

> The lower Court assumes that the claim of defendants 4 and 5 is time-barred, and it is urged in appeal that the claim is barred as it was not brought within 12 years of the death of the father of defendants 4 and 5. This view is erroneous. Plaintiffs and defendants 4 and 5 were undivided until recently and their parents were undivided. That having been so, defendants 4 and 5 could not until partition, say that certain lands belonged to themselves exclusively. The father of plaintiffs was the head of the undivided family and alienations made by him were to be respected till his death or till separation of defendants 4 and 5. The suit was brought within time from the death of the father (plaintiff's) and hence it is in time. Defendants 4 and 5 have been parties all along, so that it is not a case of adding parties. For these reasons I hold that the claim of defendants 4 and 5 is in time.

Defendants 1*a*, 1*b* and 1*c*, sons and heirs of defendant 1, preferred a second appeal.

C. A. Rele for the appellants (defendants 1*a*, 1*b* and 1*c*):—The permanent lease, Exhibit 43, passed by Venkatrao in 1872 recites that the lands were held by the lessee from generation to generation. So it was a formal recognition of a perpetual tenancy which had been in existence prior to Regulation XVI of 1827. Therefore under section 83 of the Land Revenue Code, we are entitled to remain in possession as the assignees of the permanent tenant.

The Judge in appeal made out a new case for the respondents, defendants 4 and 5. They claimed the moiety for the first time in appeal. Their claim was inconsistent with their pleading and should not have been allowed: *Mylapore Iyasawmy* v. *Yeo Kay*[1], *Eshenchunder Singh* v. *Shamachurn Bhutto*[2].

It was wrong to treat the suit as one for partition. It was a suit in ejectment. Defendants 4 and 5 did not claim any share. On the contrary they admitted the plaintiff's claim to the entire lands and stated that they had no share in them. In his deposition defendant 4 admitted that he had no desire to be made a plaintiff and that he had no right to the lands. Therefore defendants 4 and 5 were not in the position of plaintiffs: *Shivmurteppa* v. *Virappa*[3], *Lakshman* v. *Narayan* [4].

Dashrath, the father of defendants 4 and 5, had attested the permanent lease and it also appears that he had knowledge of its contents. Therefore time began to run against them in 1876 when Dashrath died and their claim for a moiety is, therefore, time-barred. Even assuming that time did not run against them till Venkatrao's death in 1893, their claim for a moiety, which claim they made for the first time in appeal, was clearly time-barred as it was made more than twelve years after Venkatrao's death. Section 28 of the Limitation Act, therefore, applies.

No application was made to the Court for making defendants 4 and 5 co-plaintiffs and no amendment of the record was made.

S. S. Patkar for the respondents (plaintiffs 1—3 and defendants 2—5):—The question as to when the tenancy commenced is a question of fact and the finding recorded by the lower Court on that point against the appellants is binding in second appeal.

(1) (1887) 14 Cal. 801.
(2) (1866) 11 Moo. I. A. 7.
(3) (1899) 24 Bom. 128.
(4) (1899) 24 Bom. 182.

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Defendants 4 and 5 have been parties from the commencement of the suit and the Court in appeal was right in treating them as co-plaintiffs and in awarding them a moiety. Under section 32, paragraph 2, of the old Civil Procedure Code (Act XIV of 1882) the Court was empowered to make them co-plaintiffs. Section 22 of the Limitation Act does not apply to such a case: *Nagendrabala Debya* v. *Tarapada Acharjee*[1].

Limitation did not run against defendants 4 and 5 from the time of Dashrath's death. The lease passed by Venkatrao with respect to the vatan property was good during his life-time: *Appaji Bapuji* v. *Keshav Shamrav*[2]. Sections 28 of the Limitation Act does not apply as defendants 4 and 5 were parties to the suit from the commencement and were in the position of plaintiffs.

The record can be amended here and defendants 4 and 5 can be made plaintiffs: sections 99 and 151 of the new Civil Procedure Code (Act V of 1908).

C. A. Rele in reply:—The ruling in *Nagendrabala Debya* v. *Tarapada*[3] is distinguishable. There the plaintiff had claimed only his share and had made his co-sharer a defendant because he had refused to join as plaintiff. The decision in *Krishna* v. *Mekamperuma*[4] applies.

SCOTT, C. J.:—The plaintiffs who are the sons of one Venkatrao sued the first three defendants for possession of certain vatan land which they alleged had been leased by their father Venkatrao by a lease dated 1872 which was operative only for the period of his life. The plaintiffs were, at the date of the suit, joint with their cousins the sons of Dashrath, Venkatrao's brother, who with Venkatrao had been a joint vatandar of the Deshpande vatan to which the property in suit was attached.

The first three defendants contended that the lease of 1872 was merely a formal recognition of a perpetual tenancy which had been in existence prior to the date of the Vatan Regulation of 1827 and that therefore they were entitled to remain in possession as permanent tenants.

(1) (1908) 35 Cal. 1065.
(2) (1890) 15 Bom. 13.
(3) (1903) 35 Cal. 1065.
(4) (1886) 10 Mad. 44.

This argument rested on an allegation of fact which was held by the lower appellate Court to be not proved. This is sufficient in special appeal to dispose of the argument.

We will now discuss the points of law which have been urged. In the original Court the plaintiffs obtained a decree for a moiety only of the property in suit, on the footing that that was all they were entitled to as representing the branch of Venkatrao.

An appeal was preferred against that decision in which the 4th and 5th defendants, sons of Dashrath, joined with the plaintiffs in urging that the decree should have been passed against the first three defendants for the whole of the property in suit. The fourth ground of appeal was that the lower Court should have awarded to defendants 4 and 5 the half of the lands that it refused to restore to the plaintiffs. This contention was successful in appeal. The lower appellate Court in delivering judgment said: "the lower Court assumes that the claim of defendants 4 and 5 is time-barred, and it is urged in appeal that the claim is barred as it was not brought within twelve years of the death of the father of defendants 4 and 5. This view is erroneous, plaintiffs and defendants 4 and 5 were undivided until recently and their parents were undivided; that having been so, defendants 4 and 5 could not, until effecting a partition, say that certain lands belonged to themselves exclusively. The father of plaintiffs was the head of the undivided family and alienations made by him were to be respected till his death or till separation of defendants 4 and 5. The suit was brought within time from the death of the plaintiffs' father and hence it is in time. Defendants 4 and 5 have been parties all along, so that it is not a case of adding parties." For these reasons the decree of the lower Court was amended by a direction that the defendants 4 and 5 should recover their moiety of the property from the defendants 1 to 3.

It has been argued on behalf of the defendants 1 to 3 that this suit is altogether barred because time ran against the plaintiffs and the 4th and 5th defendants from the date of

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the lease by Vankatrao to the defendants 1 to 3. This, however, is not the law because the property in suit is vatan property which was the subject of the Gordon Settlement of 1864, and it has been laid down by this Court in the case of *Appaji Bapuji* v. *Keshav Shamrav*[1] that "the Gordon Settlement of 1864 was not intended by either party to those settlements to convert the *vatan* lands into the private property of the *vatandar* with the necessary incident of alienability, but to leave them attached to the hereditary offices which, although freed from the performance of services, remained intact, as shown by the definition of 'hereditary office' in the declaratory Act III of 1874." The fact that vatan land is attached to the office, deprives it of some of the incidents which would attach to it if it were ordinary land in the possession of a Hindu family. Thus it results from its attachment to the office, according to the decisions of this Court which are recognised in section 5 of the Vatan Act that the vatandar is entitled to alienate the land for the term of his natural life and his children although not separate in interest from him have no right to object to such alienation until after his death.

In the present case the lease was effected with the consent of Dashrath indicated by his signature as an attesting witness, and time would not run against the sons either of Venkatrao or of Dashrath until the expiry of the lives of those two persons. Therefore time for the purposes of this suit will run from the date of the death of Venkatrao, the survivor of the two vatandars. That took place on the 26th of April 1893, and the suit was filed within the period of 12 years, time being allowed for the expiry of the summer vacation of the Court which was in progress on the 25th April 1905.

Then it is said that at least the 4th and 5th defendants are not entitled to any relief in this suit. They have not joined the plaintiffs in suing for possession of the property. They have in fact put forward a case that the persons entitled to the property are the plaintiffs and not themselves. They were not entitled in appeal to come forward with a different case and to

(1) (1890) 15 Bom. 13.

ask for a moiety of the property, that they had not asked for in the first instance.

Now the case for the 4th and 5th defendants in the first Court was that there had been a partition between them and the plaintiffs, and that at that partition the plaintiffs on the ground of the eldership of their father Venkatrao had been awarded the whole of this vatan property.

The first Court held that the documents relating to this partition not being forthcoming this allegation of the assignment to the plaintiffs by way of eldership was not substantiated, and accordingly, allowed to the plaintiffs only a moiety of the property.

We do not think that the Judge of the appellate Court was in error in allowing the 4th and 5th defendants, after the failure of proof of their case with regard to partition, to fall back upon the necessary alternative that there having been no partition they were entitled to a moiety in right of their father Dashrath, and the only question which could arise, if that point of procedure were decided in their favour, would be whether their claim was barred by the law of limitation.

We have already held that time only began to run from the death of Venkatrao in 1893, and there can be no question that the 4th and 5th defendants were upon the record of this suit as defendants at the date of its institution. Is there then anything in the law of limitation which prevents them from obtaining relief in respect of their share of the property? Section 28 of the India Limitation Act provides that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property, shall be extinguished." It is necessary in order to give effect to this section to supply certain implied conditions; for instance, it would be a condition that the section would operate if the person did not bring a suit within the period prescribed. But would his right be extinguished if he were a party to a suit instituted by another within the prescribed period in which his right to the property could be effectually determined? The section does not say so, and we do not think

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that we ought to construe it as implying that this would be the case. Here the defendants were parties to the suit instituted within twelve years in which their rights to a share in this vatan property could be effectually determined as against the defendants 1 to 3, and the Court must deal with the matter in controversy so far as regards the rights and interests of the parties actually brought before it by the institution of the suit; see section 31 of the Civil Procedure Code of 1882 and Order I, Rule 9 of the Code of 1908. There can be no doubt that if the defendants had been plaintiffs in the first instance no such argument as we have been discussing could have been put forward. But it appears from the judgment of the learned Judge of the appellate Court that he, for the purposes of the suit, treated them as co-plaintiffs although he did not amend the record by placing them among the plaintiffs and striking them out from among the defendants.

It has been held in Calcutta in the case of *Nagendrabala Debya* v. *Tarapada Acharjee*[1], that a party transferred to the side of the plaintiff from the side of the defendant is not a new plaintiff to whom the provisions of section 22 of the Limitation Act apply. In that conclusion we concur. We think that we should exercise our powers of amendment by putting the plaint in the shape in which the learned Judge of the lower appellate Court intended it to be at the time he delivered his judgment.

We direct that the 4th and 5th defendants be entered in the plaint and the decree in the lower appellate Court as co-plaintiffs instead of defendants, this being consented to by their pleader. In other respects we affirm the decree of the lower Court and dismiss this appeal with costs.

Decree amended and affirmed.

G. B. R.

(1) (1908) 35 Cal. 1065.