

## APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1911.

August 30.

MAHARANA RANMALSINGJI BHAGWATSINGJI THAKORESABH (ORIGINAL DEFENDANT 1), APPELLANT, v. BHATT MAHASHANKAR NILKANTH (ORIGINAL PLAINTIFF), RESPONDENT, AND, BHATT MAHASHANKAR NILKANTH (ORIGINAL PLAINTIFF), APPELLANT, v. MAHARANA RANMALSINGJI BHAGWATSINGJI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Limitation Act (XV of 1877), article 144—Summary cess—Interest in immoveable property.*

The right to levy Summary cess, whether it originated in agreement or in unlawful exaction, is an interest in immoveable property and is governed by twelve years' limitation under Article 144 of the Limitation Act (XV of 1877).

CROSS-SECOND Appeals against the decrees of Dayaram Gidumal, District Judge of Ahmedabad, in appeals Nos. 209 and 211 of 1907, confirming the decree of K. Barlee, Assistant Judge, in Original Suit No. 1 of 1904.

Suit to recover damages for levies alleged to be unauthorized.

The plaintiff was the holder of certain alienated land (Barkhali) in the village of Javraj in the Sanand and Koth estate in the Ahmedabad District. The estate was administered by the Talukdari Settlement Officer, Bhimbhai, on behalf of the Thakore of the said estate. On the 11th March 1903 the said Talukdari Settlement Officer issued notices to the plaintiff requiring him not to remove the crops from his fields until he had paid the Summary, Salami and Local Fund cesses due on his lands. Subsequently on the 5th May 1903 another notice was given to the plaintiff by the Deputy Manager of the Sanand and Koth estate, the said Talukdari Settlement Officer being on leave, and to enforce payment certain quantity of wheat was attached, but the attachment was removed on the 27th June 1903. Subsequently, on the return of Bhimbhai from leave, he issued a notice to the plaintiff and attached from plaintiff some silver anklets weighing 183 tolas and put them up for auction.

\* Cross-Second Appeals Nos. 827 and 900 of 1909.

The plaintiff, therefore, brought the present suit on the 4th January 1904 against the Tálukdári Settlement Officer, Bhimbhai, praying for (1) a decree against the defendant for Rs. 25 damages due to illegal attachment of the wheat, (2) the return of the anklets illegally attached, and (3) perpetual injunction against the defendant restraining him from selling the silver anklets.

A temporary injunction was granted to prevent the sale of the anklets. The injunction was, however, withdrawn by an order, dated the 26th February 1904, of the District Judge of Ahmedabad, who directed that the Thakore of Sanand and Koth should be joined as a co-defendant. Afterwards Bhimbhai died and his successor in the Tálukdári Settlement Office was brought on the record.

The defences raised were, *inter alia*, that the Thakore had a prescriptive right to levy the cesses complained of inasmuch as the Salami had been levied for over 100 years, the Summary cess was levied, though not under the provisions of the Summary Settlement Act, for 35 years, and the Local Fund for 30 years, that the notices served on the plaintiff were legal and the plaintiff was not entitled to any damages, that the plaintiff was liable to pay to the Thakore of Sanand and Koth annually Rs. 75-0-7, that is Rs. 27-3-0 as Summary, Rs. 34-9-11 as Salami and Rs. 13-3-8 as Local Fund, that the anklets having been sold for the satisfaction of the cesses due by the plaintiff, he was not entitled to their restoration or their value, that the suit was barred by sections 4, 6 and 11 of the Land Revenue Jurisdiction Act (X of 1876) and that the suit against the Tálukdári Settlement Officer was not maintainable.

The Assistant Judge found that the lands in suit were exempt from payment of Summary cess but not from payment of Salami and Local Fund, that the notices served upon the plaintiff were legal with respect to Salami and Local Fund and illegal with respect to Summary cess, that the plaintiff was not entitled to recover damages from the Tálukdári Settlement Officer and he could not recover Rs. 100 for the value of the anklets, that the suit as against the Tálukdári Settlement

1911.

RANMAL-  
SINGJI  
v.  
MAHA-  
SHANKAR.

1911.

RANMAL-  
SINGJI  
v.  
MAHA-  
SHANKAR.

Officer, defendant 2, was barred by section 6 of Act X of 1876 but not by section 4, that the plaintiff was entitled to the sum illegally recovered from him on account of Summary only and that the plaintiff and his predecessors in title paid Salami before 1869. The Assistant Judge, therefore, decreed that the plaintiff should recover from defendant 1, Thakore of Sanand and Koth, Rs. 27-3-0 on account of Summary. The suit as against defendant 2, the Tálukdarí Settlement Officer, was dismissed. With respect to the Summary cess the Assistant Judge remarked :—

I now come to the question of the Summary cess. The defendant has admitted that this is not levied under the Summary Settlement Act, but was levied in A.D. 1869 in accordance with the ancient rights of the Darbar. He bases his claim on prescription. This claim in my opinion cannot stand. No evidence has been brought to show that a Gujarát Tálukdar has the Sovereign right of imposing taxes. This cess then was illegal in its origin, and following 4 Bombay 79 I hold that it is impossible therefore for the defendant to acquire a prescriptive right to levy it.

The defendants and the plaintiff presented separate appeals, Nos. 209 and 211 of 1907 respectively, to the District Court which dismissed both the appeals observing :—

In the written statement the defendant said the "Summary" was levied by prescriptive right. There is no Gujaráti word like "Summary" and it is clear that a cess was levied by the Darbar after Bombay Act III of 1867 came into force.

The Darbar was a Tálukdar and was not liable to pay the Summary cess. It is not shown to have been a part of the quit-rent leviable like the old Salami, and the observations at page 248 of I. L. R. VI Bom. 244 apply.

No prescriptive right is proved (*vide* 8 Bom. H. C. R. 166; also I. L. R. 8 Bom. 398, 14 Bom. 526, 4 Bom. 79).

Defendant 1 and the plaintiff preferred Cross-Second Appeals, Nos. 872 and 900 of 1909, respectively.

Defendant 1 in his second appeal, No. 872 of 1909, urged *inter alia* that (1) the lower Court erred in holding that the lands held by the plaintiff were exempt from the payment of the cess styled 'Summary' to the appellant, (2) the lower Court ought to have held that where nothing was proved to show a limitation of the Tálukdar's right to enhance or impose a cess by the terms of the grant, he had every right to levy

any cess within the limits of the village Dharo, (3) the lower Court erred in holding that the appellant had not acquired the right to levy the Summary cess and (4) the lower Court ought to have held that the plaintiff was estopped from questioning the appellant's right to levy the cess in dispute when on his own admissions he had paid the same without protest for more than 20 years.

*L. A. Shah* for the plaintiff (respondent in S. A. 827 and appellant in S. A. 900).

*B. J. Desai* with *N. K. Mehta* for defendant 1 (appellant in S. A. 827 and respondent in S. A. 900).

BEAMAN, J.:—This suit was brought by the plaintiff against the Tálukdári Settlement Officer of that time, Mr. Bhimbhai, to recover damages for certain alleged wrongful acts performed by the defendant in the recovery of certain cesses, which he alleged to be due from the plaintiff.

Before the suit had proceeded far, it appears that the Tálukdári Settlement Officer, through his pleader, applied that the Thakore of Sanand and Koth, whose agent he (the Tálukdári Settlement Officer) was in these proceedings, should be joined as a necessary party. The Assistant Judge of Ahmedabad raised a preliminary issue and held that the Thakore of Sanand and Koth was a necessary party to the proceedings. He was accordingly joined; but no amendment appears to have been made of the plaint and no further relief claimed against the Thakore, who then stood on the record as the second defendant.

During the pendency of the litigation Mr. Bhimbhai died. His successor in the office of the Tálukdári Settlement Officer was then put upon the record in his place. It is to be observed in connection with this brief history of this case that the results have been a little startling and we think a little irregular.

The suit against the original defendant was in form a purely personal action; but the District Judge was of opinion that

1911.

RANMAL  
SINGJI  
v.  
MAHA-  
SHANKAR.

1911.

RANMAL-  
SINGJI  
v.  
MAHA-  
SHANKAR.

before the defendant's liability for damage, in respect of the acts complained of, could be made out, certain questions would have to be investigated in which the Thakore of Sanand had an interest. These questions broadly were:—Whether the Thakore of Sanand was entitled to levy three cesses called Salami, Summary and Local Fund upon the lands of the plaintiff. Still it is to be borne in mind that the reliefs actually prayed for by the plaintiff were exclusively reliefs against the original defendant No. 1 personally. He had asked for damages and for an injunction restraining the said defendant No. 1, Mr. Bhimbhai, from selling some anklets, which had been attached for failure to pay the Darbar demands.

It is quite clear, I think, that this being a personal action, no liability could have descended from Mr. Bhimbhai to his successor in the Talukdārī Settlement Office on the pleadings as originally framed, and never, since so far as we could ascertain, amended. Still less, apparently, could any relief have been obtained upon those pleadings against the second defendant, now appearing on the record as the first defendant, the Thakore of Sanand. No relief was asked for against him, and it certainly appears strange that the result of this litigation should have been to award the plaintiff a relief against the defendant No. 1 (appellant) which he (the plaintiff) had never asked for.

Going, however, a little more closely into what was probably intended in the Courts below, it appears to us that when the Thakore of Sanand was added as a party the Courts contemplated the claim for damages against the original defendant, Mr. Bhimbhai, being extended, so far as the liability could be shown in him, to the Thakore of Sanand. When we look to the frame of the issues we can entertain no doubt that before the case was tried the Thakore of Sanand was in full possession of the plaintiff's substantial contention against him that these levies by his agent, the Talukdārī Settlement Officer, were unauthorized. We do not think, therefore, that the Thakore was in any way prejudiced by the somewhat unusual course of procedure adopted in the Courts below.

On the issue which he was interested in contesting, he appears to have had full opportunity of laying before the Court all the evidence upon which he relied. We have been much impressed with the argument that since this issue was merely incidental to the substantial claim for damages, which was personal in the first instance at least to the defendant Bhimbhai, the Thakore of Sanand has not had that full opportunity, to which he was entitled, of having the question whether over the whole of his estate levies of this kind are or are not authorized fully investigated and answered. We should have been disposed to give more weight to that contention had we not come to the conclusion, after giving our best attention to the elaborate arguments addressed to us on both sides, that the Courts below have come to a wrong decision and that the appellant is entitled to succeed here; so that whatever irregularities are to be detected in the procedure of the Courts below, these irregularities could only have been insisted upon as prejudicing the appellant, and since the appellant has succeeded here, we need not, we think, dwell further upon them.

There is this, however, to be pointed out that the Courts below, while decreeing part of the plaintiff's claim against the Thakore, whose estate is still under management, dismissed the suit altogether, as indeed we think they were clearly bound to do, against the Talukdári Settlement Officer, who had been substituted merely in his official capacity for his predecessor upon whom the tort was charged.

Had the decisions of the Courts below been confirmed, it is easy to see, the difficulties might have arisen, as a result of their thus dismissing the suit against the official manager of the Thakor's estate, while decreeing a part of it at least against that estate still under management.

We come now to consider the substantial question in issue between the parties. The Courts below have found that the two out of the three contested levies were authorized; and although there has been a cross-appeal, Mr. Shah has conceded that if we are of opinion that the third of these levies is also

1911.

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RANMAL-  
SINGJI  
v.  
MAHA-  
SHANKAR.

1911.

RANMAL  
SINGJI  
v.  
MAHA-  
SHANKAR.

authorized, it would be taking up our time unprofitably to press his cross-appeal in respect of the former two. We may, therefore, confine our attention exclusively to the levy of Summary, which the Courts below found to have been unauthorized and in respect of which they allowed the plaintiff damages against the appellant.

The facts are not in dispute. The levy originated in the year 1869, so that its origin is not in doubt or uncertainty. Since then it has been paid uninterruptedly and without dispute by the present plaintiff. But the Courts below found that the Thakore of Sanand could fall back upon no prescriptive right to continue a levy which was in its origin unauthorized. That is the sole ground of their decision. Avoiding as far as possible the use of a word of so ambiguous a connotation as "prescription" or "prescriptive," we think that this case falls to be decided under the terms of the Indian Statute of *Limitations*.

First we are to consider whether a levy of this kind is an interest in immovable property, within the meaning of Articles 142 and 144 of the second Schedule of the Limitation Act. Being a Summary (cess), where it is levied in the Regulation Districts, there could be no doubt or uncertainty as to its true meaning. Where the Summary Settlement was introduced, we shall be speaking now very broadly, the object was to ascertain what persons were entitled to hold their lands free from payment of assessment. Where persons so claiming were able to establish complete titles no difficulty arose; but where the titles although alleged were not clear, those claiming under them were unable to establish them in their completeness, the Summary Settlement allowed them to commute for the payment of assessment in full, upon the basis of their really having had some title, though its precise nature was unascertainable, by the payment of what is called Summary (cess). If that had been the procedure followed in the Talukdári estate of Sanand, then, we think there can be no question but that such a commutation in lieu of payment of full assessment would have been such an interest in immovable property, as

for example the Tora Giras Haks. The Tora Giras Haks, which were not more than a money commutation for black-mail, formerly levied on certain villages, have been held by the Privy Council to be an interest in immoveable property. So, we think, that the payments under the Summary Settlement fall under the same principle and are governed by that decision. It is alleged, however, on behalf of the defendant that nothing of the kind occurred in Sanand. Seeing, however, that the levy of this cess almost synchronized with the introduction of the Summary Settlement in the Regulation Districts and that its name is clearly borrowed from that Settlement, we entertain no doubt but that the Darbar of Sanand levied or intended to levy it upon the same principles. If so, it is referable in reality to an agreement between the parties, and if that were found as a fact, then there would be no need to go further and rely upon the law of limitation. If on the other hand the Darbar, without any preliminary inquiry or agreement, and against the wishes of its subjects, imposed this new cess as merely unauthorized exaction, it appears to us that its position for the purposes of limitation would be still stronger; and this is what the plaintiff-respondent alleges actually occurred.

Now the exaction of a cess of this kind, the incidence of which is upon real property and in no sense upon the person for the time being in possession of it, appears to us to be beyond all doubt an interest in the immoveable property, both within the numerous definitions of that term to be found in our various statutes, and under the principles of the decision of the Privy Council upon the Tora Giras case.

Since then this interest in immoveable property, whether it originated in agreement or in unlawful exaction, has been enjoyed by the defendant-appellant for more than forty years, uninterruptedly before suit, we are entirely unable to see how the provisions of Article 144 of the second Schedule of the Limitation Act are to be evaded. We think that there can be no question that if we are correct in holding that this levy is an interest in land, the uninterrupted receipt and enjoyment of

1911.

RANMAL-  
SINGJI  
v.  
MAHA-  
SHANKAR.

1911.

RANMAL-  
SINGJI  
v.  
MAHA-  
SHANKAR.

it by the defendant-appellant must be adverse, in the fullest sense of that Article, to the plaintiff-respondent. For if it is an interest in land, then the enjoyment of it by the persons claiming it, whether that enjoyment took the form of the commuted money payment or goes the length of actual enjoyment of so much of the immoveable property, seems to us to make no difference for the purposes of limitation and is in each case plainly adverse to the person owning the remaining interest in that immoveable property.

In this view the case becomes one of great simplicity. Since, as we said, the enjoyment of the Darbar has been adverse for considerably more than the statutory period and beyond all question to within not less than twelve years of the suit, the right upon which the plaintiff founds his claim against the Darbar is, in our opinion, incontrovertibly time-barred, and the plaintiff's claim for damages founded on the *alleged invasion of this right must be rejected*, so far as the defendant-appellant is concerned. We therefore think that the decision of the lower appellate Court was wrong and that the plaintiff's suit must now be dismissed against the Darbar-appellant, as it has already been dismissed against the second defendant, the Talukdári Settlement Officer, with all costs. The Cross-Second Appeal No. 900 of 1909 is dismissed with costs. Also Second Appeal No. 898 of 1909 is dismissed with costs.

*Appeals dismissed.*

G. B. B.

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