

PRIVY COUNCIL.*

SUNDERABAI AND ANOTHER (PLAINTIFFS) v. THE COLLECTOR OF BELGAUM AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Bombay.]

P. C.°

1918.

July 5, 8;
October 15.

Limitation Act (IX of 1908), Schedule I, Article 152—Presentation of appeal beyond the prescribed period of limitation—Proper order to endorse on such memorandum of appeal—Suits Valuation Act (VII of 1887), section 8—Court Fees Act (VII of 1870), section 7, sub-section 4, clause (c)—Bombay Civil Courts Act (Bombay Act XIV of 1869), sections 8 and 26—Party following mistaken advice as to proper Court to which to appeal—Sufficient cause for not presenting appeal in proper time—Power of Desai in Belgaum District to alienate hereditary property of the Vatan as against his widow, his adopted son, and the servants of the Vatan—Bombay Regulation XVI of 1827—Bombay Act II of 1863.

Where a memorandum of appeal is presented beyond the prescribed period of limitation the proper order which the Court should endorse on it would be that it was presented for admission on the date when the memorandum of appeal was handed into the office of the Court and that notice of the order and its date should be given to the respondent.

Krishnasami Panikondar v. Ramasami Chettiar⁽¹⁾, followed.

An appeal from a Subordinate Judge which from its nature should rightly have been presented to the District Court and not to the High Court, was not presented to either Court until after the period of 30 days prescribed by the Limitation Act, 1908, Schedule I, Article 152 had expired for an appeal to the District Court; it was then, on 19th July 1910, presented to the High Court well within the 90 days allowed for such an appeal, but the High Court directed it to be presented to the District Court which made an order admitting it "without prejudice to any objection that may be taken by the respondent" as to its being barred by limitation. It appeared that the District Judge had when Legal Remembrancer advised that the appeal rightly lay to the High Court when it was presented to that Court on 19th July 1910. After the District Judge had admitted the appeal it was, by order of the High Court, removed to that Court, and after hearing the parties, and considering the affidavits which were filed, an order was made by the High Court admitting the appeal on the ground that they were satisfied that there had been

*Present:—Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

⁽¹⁾ (1917) 41 Mad. 412; L. R. 45 I. A. 25.

sufficient cause shown for not having preferred the appeal to the District Court within the prescribed period of limitation.

Held, that the appeal was not barred by limitation, the fact that the defendants had acted on mistaken advice as to the law in appealing to the High Court in 1910 did not preclude them from showing that it was owing to their reliance on that advice that they had not presented the appeal to the Court of the District Judge within the proper period.

Brij Indar Singh v. Kanshi Ram⁽¹⁾, referred to.

On the question whether a Desai in the Belgaum District could dispose by will of the hereditary lands of the Vatan as against his widow, his son adopted by the widow, and the hereditary servants interested in the Vatan property, their Lordships of the Judicial Committee agreed with the High Court in holding that such property was not alienable. Only the testator's private property was alienable.

APPEAL No. 57 of 1916 from a decree (1st August 1913) of the High Court at Bombay, which reversed a decree (16th April 1910) of the First Class Subordinate Judge of Belgaum.

Two questions arose for determination in this appeal: (a) whether the appeal by the defendants from the decree of the Subordinate Judge was not barred by limitation, and if not, (b) whether a Desai in the Belgaum District could dispose by will of the hereditary lands of the Vatan, as against his widow, his son by adoption by the widow, and the hereditary servants interested in the Vatan property.

Probate of the will, dated 6th June 1906, and a codicil dated 13th August 1906, was granted by the District Court.

The present suit was instituted on 22nd February 1909 by the plaintiffs Nos. 1 and 2 (the appellants), the widow and alleged adopted son of the testator, Lingappa Jayappa Sar, Desai of Nawalgund, and by a 3rd

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plaintiff representing the hereditary servants interested in the Vatan property, against the executors of the will, disputing the power of the testator to dispose of the Vatan property, and praying for declarations, (1) that no right accrued to the executors under the will, and the codicil thereto, and (2) that the second respondent was the validly adopted son of the testator. They also asked for an injunction restraining the defendants from ever recovering the property from the plaintiffs, valuing that part of his claim at Rs. 5.

The defendants contested the allegations in the plaint as to the execution of the will, as to the power of the testator to make it, and as to the validity of the adoption if made.

The Subordinate Judge decided the case in favour of the plaintiffs, and made the declarations, and granted the injunction prayed for.

Instead of appealing to the District Court within the period of 30 days in accordance with Article 152 of the Limitation Act 1908, and with section 8 of the Suits Valuation Act, and section 7, sub-section 4, clause (c) of the Court Fees Act, which would have been the proper course to adopt, the respondents, on 19th July 1910, some days after an appeal to the District Court was barred, filed an appeal to the High Court well within the prescribed period of limitation (90 days) which was heard by Chandavarkar and Batchelor JJ., who held that the appeal did not lie to the High Court, and that the memorandum of appeal should be returned to the defendants for presentation to the District Court.

The appeal when so presented on 18th March 1912, was admitted by the District Judge without taking any evidence, or satisfying himself that there was any

sufficient reason for the appeal not having been presented within the period allowed by the Limitation Act, but without prejudice to any objection which might be taken by the plaintiffs as to its being barred.

On 25th April, however, the appeal was transferred to the High Court and came before a Division Bench for hearing on the 9th July 1913, when an objection was taken that it was barred by limitation; the appeal was then adjourned and evidence was allowed to be given by the respondents to show why they had in the first place filed their appeal in the High Court and not in the District Court. On the adjourned hearing another Bench Scott C. J. and Heaton J. purported to excuse the delay in the presentation of the appeal to the District Court, and eventually allowed the appeal and dismissed the suit except as to certain lands as to which there was a reference to the lower Court and as to which no question arose in this appeal.

The facts relating to the merits of the case, and the judgment now appealed from, will be found in the report of the case on appeal to the High Court in I. L. R. 38 Bom. 272.

On this appeal,

De Gruyther K. C. and *E. B. Railces*, for the appellants contended that the appeal by the respondents from the decision of the Subordinate Judge properly lay to the District Court; that was the effect of section 8 of the Suits Valuation Act (VII of 1887), section 7, sub-section 2, clause (c) of the Court Fees Act (VII of 1870) and sections 8 and 26 of the Bombay Civil Courts Act (Bombay Act XIV of 1869). But such an appeal had to be preferred within 30 days under Article 152 of

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Schedule I of the Limitation Act 1908, and that period had already expired before any appeal was brought. No appeal from the Subordinate Judge lay to the High Court. Reference was made to *Vachhani v. Vachhani*⁽¹⁾ and **Hari Sanker Dutt v. Kali Kumar Patra*⁽²⁾. Section 3, it was contended, of the Limitation Act 1908, and not sections 5 and 14 applied to the present case; but even if section 5 was applicable there was no sufficient cause for admitting the appeal after time; and the District Court which alone had jurisdiction to do it, made no order under section 5 to that effect. There was, therefore, no proceeding pending which could be transferred to the High Court, and that Court had no jurisdiction to make an order admitting the appeal. [*Dunne K. C.* referred to *Brij Indar Singh v. Kanshi Ram*⁽³⁾]. That decision was not applicable as in this case an appeal to the District Court was barred when the appeal was presented to the High Court. The appeal should have been dismissed under section 3 of the Limitation Act 1908.

It was also contended that the Vatan lands were not alienable; and reference was made to section 16 of Bombay Regulation XVI of 1827, and to section 12 of Bombay Act II of 1863⁽⁴⁾.

A. M. Dunne K. C. and *Kenworthy Brown*, for the respondents were not called upon.

* 1918, October 15th.—The judgment of their Lordships was delivered by

SIR JOHN EDGE.—This is an appeal from a decree, dated the 1st August 1913, of the High Court at Bombay

(1) (1908) 33 Bom. 307.

(2) (1905) 32 Cal. 734.

(3) (1917) 45 Cal. 94; L. R. 44 I. A. 218.

(4) The arguments as to whether the lands were alienable were substantially those on the appeal to the High Court, *Rep. Note*.

which varied a decree, dated the 16th April, 1910, of the First Class Subordinate Judge of Belgaum.

The suit in which this appeal has arisen was brought on the 22nd February, 1909, in the Court of the First Class Subordinate Judge of Belgaum by the plaintiffs, who are appellants here. They alleged that the property in suit was inalienable; that Lingappa Jayappa, who had purported to dispose of that property by his will of the 6th June, 1906, and a codicil of the 13th August, 1906, had no power to alienate the property; and that the plaintiff, Jayappa Lingappa, was the validly adopted son of Lingappa Jayappa; and they claimed a declaration that Lingappa Jayappa deceased, had no power to make a will dated the 6th June, 1906, and a codicil, dated the 13th August, 1906, and that no right accrued to the defendants under the will and codicil; a declaration that the plaintiff, Jayappa Lingappa, was the adopted son of Lingappa Jayappa deceased; and a perpetual injunction restraining the defendants from recovering the properties in suit from the plaintiffs. The claim for the injunction was valued in the plaint at Rs. 5.

In the written statement it was alleged that the claim of the plaintiffs was groundless; that Lingappa Jayappa had full power to dispose of the property in suit, and did so dispose of it by his will and codicil; and that the alleged adoption was not authorised and was invalid.

The widow of Lingappa Jayappa professing to act under an authority which she alleged had been given to her by the testator in his lifetime, adopted Jayappa Lingappa as a son to her deceased husband on the 10th December, 1906.

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Lingappa Jayappa, hereafter referred to as the testator, died on the 23rd August, 1906, and the Court of Wards took charge of the property in dispute in this suit. In June, 1907, the Collector of Belgaum, *ex officio*, an executor of the will, applied to the Court of the District Judge of Belgaum for a grant of probate of the will and the codicil. That application was opposed, but the Court of the District Judge granted probate of the will and codicil, and that grant was upheld on appeal.

The First Class Subordinate Judge of Belgaum tried the suit. He having found that the property in suit was inalienable; that the testator had no power to alienate it; and that the plaintiff Jayappa Lingappa had been validly adopted; by his decree of the 16th April, 1910, made the declarations and granted the injunction claimed in the plaint. From that decree the defendants appealed to the High Court at Bombay. For the necessary purposes of that appeal they applied for copies of the judgment of the trial Judge, but did not obtain them until the 11th June, 1910. They presented their appeal to the High Court on the 19th July, 1910, which if the appeal lay to the High Court was well within the ninety days allowed for an appeal to the High Court. On objection taken on behalf of the defendants, the High Court on the 11th March, 1912, rightly decided that the appeal lay to the Court of the District Judge of Belgaum and not to the High Court, and affirmed a principle, which had been previously applied by the High Court at Bombay, that—

“Where a plaintiff sues for a declaratory decree and asks for consequential relief, and puts his own valuation upon that consequential relief, then for the purposes of Court fee, and also for the purposes of jurisdiction, it is the value that the plaintiff puts upon the plaint that determines both.”

The High Court directed that the memorandum of appeal should be returned to the defendants for

presentation to the District Judge of Belgaum, and the learned Judges intimated in this judgment that the appeal would be removed into the High Court. On the 16th March, 1912, the defendants presented the memorandum of appeal to the Court of the District Judge, and alleging that the appeal had been presented to the High Court of Bombay under the *bona fide* belief that the appeal lay to that Court, prayed that it might be admitted. On the 18th March, 1912, the District Judge made the following order :—

“ The appeal is admitted to the file without prejudice to any objection that may be taken by the respondents as to limitation or otherwise.”

The District Judge in making that order does not appear to have decided that the defendants, who were the appellants before him, had sufficient cause within the meaning of section 5 of the Indian Limitation Act, 1908 (Act IX of 1908), for not preferring the appeal to his Court within the period of limitation, which by Article 152 of the First Schedule to that Act was thirty days from the date of the decree appealed from.

It so happened that the District Judge to whom the memorandum of appeal was presented for admission had in 1910 as Legal Remembrancer to the Bombay Government advised that the appeal from the decree of the trial Judge lay to the High Court, and on his advice the appeal had been preferred on the 19th July, 1910, to the High Court. The District Judge knowing that the appeal would probably be removed into the High Court may reasonably have preferred that the High Court should decide the question under section 5 of the Act.

It appears to their Lordships that when a memorandum of appeal is presented beyond the prescribed period of limitation the proper order which a Judge

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should endorse upon it would be to the following effect: "Presented for admission on the (date when the memorandum of appeal was handed into the office of his Court). Let notice go to the respondents (date of the order)." The Board in *Krishnasami Panikondar v. Ramasami Chettiar*⁽¹⁾ impressed on the Courts in India the urgent expediency of adopting a procedure which should secure at the stage of admission the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal.

After the District Judge had admitted the appeal, it was by order of the High Court removed into that Court. The learned Judges of the High Court, after hearing the parties and considering the affidavits which were filed, were rightly satisfied that the defendants had sufficient cause for not having preferred their appeal to the Court of the District Judge within the period of limitation. The fact that the defendants had acted on mistaken advice as to the law in appealing to the High Court in 1910 did not preclude them from showing that it was owing to their reliance on that advice that they had not presented the appeal to the Court of the District Judge within the prescribed period of limitation: see *Brij Indar Singh v. Kanshi Ram*⁽²⁾.

The High Court, after a very full and careful consideration of the history of the title to the property in suit, of the Government Resolution of the 6th February, 1862, of the Bombay Act II of 1863, and of the proceedings which were affirmed or authorised by that Act and of the will and codicil in question, came to the conclusion that some of the properties claimed

⁽¹⁾ (1917) 41 Mad. 412; L. R. 45 I. A. 25. ⁽²⁾ (1917) 45 Cal. 94; L. R. 44 I. A. 218.

by the plaintiffs in this suit were alienable and the private property of the testator, and dismissed the suit as to them, and as to other of the properties claimed by the plaintiffs came to the conclusion that they were inalienable, and as to them did not interfere with the decree of the trial Judge. The High Court rightly found that the widow of the testator had no authority to adopt a son to her deceased husband, and consequently the suit, so far as it claimed a declaration that Jayappa Lingappa was an adopted son of the testator, must be treated as dismissed. The High Court made an order of remand as to some of the property in question in the suit. The return to that order of remand was accepted as correct, and the High Court, on the 11th December, 1914, made the necessary order upon it.

Their Lordships agree with the conclusions of the High Court and with their reasons for those conclusions, and will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of this appeal,

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Messrs. *Ranken Ford, Ford, and Chester.*

Appeal dismissed.

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