

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Chainani.

1952 THE HUBLI PANJARPOLE AND OTHERS (ORIGINAL DEFENDANTS),
 Aug. 29 APPELLANTS v. SARASWATEVVA kom BAYAPPA KALGHATGI
 (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908) O. I, RR. 8, 10—Suit against an unregistered association with numerous members—Suit instituted without leave to sue in a representative capacity—Whether such leave can be granted subsequently—Addition of parties—When is the suit deemed to be instituted—Indian Limitation Act (IX of 1908), S. 22—Whether suit in time.

C. a Hindu widow, alienated some properties as guardian of her minor son. The alienee made a gift of the properties to the Hubli Panjarpole (defendant). C died on March 4, 1932, the minor son having predeceased her. The plaintiff, as the reversionary heir, brought a suit against the defendant to recover possession of the properties on the ground that the alienation made by C was not binding on the plaintiff. On December 2, 1947, the plaintiff made an application for leave to sue the defendant in a representative capacity under O. I, R. 8 of the Civil Procedure Code, 1908. The leave to convert the suit into a representative suit was granted and notices were issued to persons interested in the Panjarpole. Defendants Nos. 9 to 12 offered to come on record and were added on January 8, 1948. On the question whether the suit was within time.

Held, (1) that the Hubli Panjarpole being an unregistered association with numerous members could be sued only in a representative capacity by obtaining leave of the Court under O. I, R. 8 and the suit as originally filed was defective.

Atmaram Babaji v. Narayan Arjun,⁽¹⁾ *N. W. P. Club v. Sadullah*,⁽²⁾ and *Michael v. Briggs*,⁽³⁾ followed.

(ii) that it is open to a party to apply for such leave and to take such further action as is required by O. I. R. 8 even during the pendency of the suit and the suit is not liable to be dismissed on the ground that the requisite leave had not been obtained at the commencement of the suit;

Fernandez v. Rodrigues,⁽⁴⁾ relied upon.

(iii) that as the suit was materially defective when it was filed and additional parties had to be brought before the Court under O. I, R. 10, to remove the defect, though not in their individual capacity but as constituting the Panjarpole collectively, s. 22 of the Indian Limitation Act 1908, came into operation and the suit was to be deemed to have been instituted when the parties were so added;

* First Appeal No. 15 of 1949.

⁽¹⁾ (1921) 46 Bom. 132.

⁽²⁾ (1898) 20 All. 497.

⁽³⁾ (1890) 14 Mad. 362.

⁽⁴⁾ (1897) 21 Bom. 784, F. B.

(iv) that even assuming that it was not a case of addition of new parties, the suit in its altered representative form could not relate back to the date on which the original suit was filed as it was not a mere misdescription of the defendant but a material alteration in the nature of the suit;

(v) that, therefore, the plaintiff's suit was barred by limitation.

Meyappa Chetty v. Subramaniam Chetty,⁽¹⁾ referred to.

Seerangathuni v. Bava Vaithilinga Mudaliar,⁽²⁾ relied upon.

FIRST APPEAL from the decision of D. R. Ugrankar, Civil Judge, Senior Division, Hubli.

The facts are sufficiently set out in the judgment.

B. M. Kalagate, for the appellants.

P. V. Vaze, for the respondent.

GAJENDRAGADKAR J. This is an appeal by defendants Nos. 1 and 9 to 12 against the decree passed by the Civil Judge (S. D.), Hubli, directing them to deliver possession of the properties in suit to the plaintiff. The plaintiff is the daughter of Rayappa and her case was that after the death of her mother Chandawa she was entitled to the properties in suit. These properties are two fields S. Nos. 42 and 43 situated at Agrahar Timasagar and a house. These properties belonged to Rayappa who died leaving behind him three sons and four daughters. The last surviving son was Chandrappa. He died a minor. During his minority Rayappa's widow Chandawa alienated these properties as guardian of her minor son. On September 25, 1900, she mortgaged all the three properties to Tejappa for Rs. 1,000. The interest agreed to be paid was 18 per cent per annum and the period stipulated for repayment was six months. On May 18, 1904, Chandawa sold two lands to Tejappa for Rs. 1,000 and in consequence the house which had been mortgaged by her along with the lands was released from mortgage. It appears that some time before the sale-deed was executed Chandrappa had died by plague. On July 29, 1905, Tejappa made a gift of those two lands to the Hubli Panjarapol. In the present suit Saraswatewa the last surviving daughter of Rayappa claims to be the reversioner of the properties of her brother Chandrappa and she alleges that the alienations effected by Chandawa were not binding on her and so, she claims to recover the possession of the three properties in suit. Chandawa died on March 4, 1932, and the present suit has been filed on March 3, 1944. Her claim

⁽¹⁾ (1916) 1 A. C. 603.

⁽²⁾ (1921) 40 M. L. J. 532.

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with regard to the house has been dismissed. But she has succeeded in regard to the two lands and it is with these two lands that we are concerned in the present appeal.

The principal point which has been urged before us by Mr. Kalagate on behalf of the appellants is one of limitation. Mr. Kalagate contends that the suit is barred by limitation, because at the time when leave was obtained by the plaintiff under O. I, r. 8 to sue the Hubli Panjarapol by its members in a representative capacity, more than 12 years had elapsed after the opening of reversion. When the suit was originally filed, Hubli Panjarapol was defendant No. 1 by its Chairman Sangappa Murusavirappa Korvi. This suit was filed in the Court of the Second Class Subordinate Judge at Hubli, but when it was registered the jurisdiction of the learned Subordinate Judge had been enlarged. Even so on February 21, 1947, the plaintiff moved the learned Judge to transfer the suit to the Civil Judge (S. D.) on the ground that the real valuation of the property was more than Rs. 5,000 and the learned Judge made an order returning the plaint to the plaintiff for presentation to the proper Court on the same day. This order is obviously wrong; because when the suit was registered, the learned Judge had pecuniary jurisdiction to try the suit. However, that very day the plaint was presented before the Civil Judge (S. D.). An application was made before him on December 2, 1947, by exhibit 37 in which the plaintiff alleged that it was necessary to sue the Panjarapol in a representative capacity under O. I, r. 8 of the Code of Civil Procedure. She, therefore, asked for leave to convert her suit into a representative one under O. I, r. 8. The learned Judge granted the application and ordered notices to be issued to the persons interested in the Panjarapol. After the notices were thus issued defendants Nos. 9 to 12 offered to come on the record and they were added on January 8, 1948. Now, Mr. Kalagate's contention is that this is a very stale claim and it may be technically within time on March 3, 1944, but he argues that as it was filed on this day, the suit was defective and would have been dismissed as incompetent. The defect was cured by the application made by the plaintiff on December 2, 1947. But this application cannot help the plaintiff to overcome the difficulty of limitation because on this date the suit was clearly barred by time.

The Hubli Panjarapol is an unregistered association with numerous members. Now, there can be no doubt that such an institution can be sued and can sue only under O. I, r. 8.

In *Atmaram Babaji v. Narayan Arjun*,⁽¹⁾ the plaintiff had sued in ejectment in his own name and the claim was made by him on the authority of a resolution passed by the managing committee of the caste authorising him as the president of the managing committee to file such a suit. A plea was raised that the suit was incompetent since it had not been filed under O I, r. 8 and it was upheld by this Court and the suit was dismissed. Macleod C. J. rejected the contention of the plaintiff based upon the resolution passed by the managing committee on the ground that the said resolution would not entitle the plaintiff to sue in his own name. "There being numerous members of the community", observed the learned Chief Justice, "having the same interest in the suit, notice of the institution of the suit to all such persons as well as the permission of the Court was necessary for filing the suit as provided in O. I, r. 8 of the Code of Civil Procedure". A notice had in fact been given by the plaintiff, but it was found to be defective. In the result this defective suit was dismissed. The Allahabad High Court has applied the same principle to a suit by the Secretary of a Club in *N. W. P. Club v. Sadullah*,⁽²⁾ and so too in *Michael v. Briggs*,⁽³⁾ an action to recover the price of goods supplied to the members of a non-proprietary club or on his responsibility was held to be incompetent when it was filed only in the name of the Secretary of the Club. It was observed that the Club was a mere association of gentlemen for social purposes, managing its affairs by a committee and a secretary. And when a suit is filed against such an association, the proper procedure to follow is to obtain leave of the Court under O. I, r. 8. Therefore, in our opinion, there cannot be any doubt that the suit originally filed against the Panjarpol by its Chairman was defective and would have been dismissed if the plaint had not been subsequently amended.

It is true that ordinarily leave has to be and should be obtained under O. I, r. 8 at the time of the institution of the suit. Where there are numerous persons having the same interest in one suit, the Court should be invited at the outset to give leave to bring the suit in a representative capacity. If there are numerous defendants having the same interest, leave has to be obtained to bring the suit against them in a representative capacity and when leave is granted, notice of

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the institution has to be issued to all persons as may be directed by the Court. Even so, it cannot be disputed that the suit would not be dismissed only on the ground that the requisite leave has not been obtained under O. I, r. 8 at the commencement of the proceedings; it would be open to a party to apply for such leave and to take such further action as is required by O. I, r. 8 even during the pendency of the suit. In *Fernandez v. Rodrigues*,⁽¹⁾ a Full Bench of this Court has held that the permission requisite under s. 30 of the Code of 1882 which corresponds to O. I, r. 8 can be granted even after the suit was filed. The point which was raised before the Full Bench was whether there was jurisdiction in the Court to entertain a suit where no leave has been obtained previously under s. 30 of the old Code and the Full Bench held that there was no question of jurisdiction involved and it would be open to the Court to grant leave even after the suit is filed. Incidentally we may refer to the statement made by Mr. Justice Tyabji in his judgment wherein the learned Judge observed (p. 786).

"It is really a question of adding parties when leave is being granted under the said section."

Therefore, it was perfectly open to the learned Judge to have granted leave under O. I, r. 8 on December 2, 1947. But that does not dispose of the point of limitation raised before us by Mr. Kalagate. The question which we have to consider is if when leave was granted, the suit was already barred by limitation, can it be said that the leave which is granted operates retrospectively and that the suit in its present representative form must be taken to have been instituted on March 3, 1944? Now, the legal position appears to be that on this day, the Hubli Panjarapol had not been properly sued and technically the suit against the Panjarapol would have been dismissed on that ground alone. It may perhaps be that by obtaining leave under O. I, r. 8 *new parties as such* are not added, but a defect in the suit is removed by bringing before the Court either directly or constructively all the constituent members of the Panjarapol. But if the suit was materially defective when it was filed and if for removing such defect additional parties had to be brought before the Court—may be not in their own individual rights but as constituting the Panjarapol collectively—it seems to us difficult to hold that the suit in this altered representative form could be said to relate back to the date on which the original suit was filed. It is clear that if the parties

⁽¹⁾ (1897) 21 Bom. 784.

are added under O. I, r. 10, s. 22 of the Limitation Act will come into operation and the proceedings against these added parties shall be deemed in the words of Tyabji J. to have been begun only on the service of the summons. In the present case it is possible to say that in the eyes of law parties are added after leave is granted under O. I, r. 8 and so the suit must really be taken to have been properly filed on December 2, 1947. But even if it is held that technically it is not a case of addition of new parties as such, technically again it is equally clear that it is a case where the suit has been properly filed for the first time when leave was obtained; and if that be so, the point of limitation raised before us by Mr. Kalagate must obviously be answered in his favour. It cannot be said that in the suit as it was originally filed the defendant institution had been merely misdescribed. In fact the said institution had not been properly brought before the Court at all; and so it is only when action is taken under O. I, r. 8 that the suit is properly brought against the defendant. It is thus not a case of making a formal amendment in the plaint at all. The suit which would have been dismissed as having been improperly filed is allowed to be converted into a proper and competent suit and so this material alteration in the nature of the suit cannot operate retrospectively. That in our opinion is the true legal position.

We may with advantage refer to the observations made by the Privy Council in *Meyappa Chetty v. Subramaniam Chetty*,⁽¹⁾ while they were dealing with s. 22 of the Straits Settlements Ordinance of 1896. This section is substantially the same as s. 22 of the Indian Limitation Act. Dealing with the said s. 22 their Lordships observed that (p. 611):

“It contemplates cases in which a suit is defective by reason of the person or one of the persons in whom the right of suit is vested not being before the Court.”

On this view, the said s. 22 has no application to cases in which the suit which was originally properly constituted as to parties has become defective because there has been a change or devolution of interest. Such cases do not fall within the mischief of s. 22. Applying this test if the suit which was first filed against the Panjarpol by its Chairman alone was defective in the sense that the Panjarapol had not been properly sued at all and if the defect was subsequently removed and the suit became a proper representative suit after leave was granted under O. I, r. 8, the provisions of s. 22 of the Limitation Act must come into operation and the question of limitation must

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be dealt on the basis that the proper suit against the Panjarapol was filed on December 2, 1947. In *Seerangathuni v. Bava Vaithilinga Mudaliar*,⁽¹⁾ Chief Justice Wallis and Mr. Justice Ramesan were dealing with a claim made by one of the two executors against the widow of the testator. The widow pleaded that the plaintiff alone was not entitled to sue without joining his co-executor. The said co-executor was then added as a defendant. But on the date when he was added the widow's claim of adverse possession had become complete though it was not complete at the time when the suit was originally filed. The question which the Court had to consider was whether the later addition of the co-executor to the suit as a defendant justified the claim of adverse possession made by the widow. Their Lordships held in favour of the widow. They took the view that the original suit was defective and when the defect was removed the claim made against the testator's widow had been barred by adverse possession. It seems to us that similar considerations would apply to the case with which we are dealing. Therefore, in our opinion, the suit must be deemed to have been properly filed as a representative suit on December 2, 1947, and if that be so, the claim made by the plaintiff is obviously barred by limitation.

On this view, we do not think it is necessary to consider the question as to the legal necessity and inquiry on which the Judge has found in favour of the plaintiff and against the defendants.

The result is the appeal succeeds and the plaintiff's suit is dismissed with costs throughout.

Appeal allowed.

K. B. S.

⁽¹⁾ (1921) 40 Mad. L. J. 532.