Privy Council Appeal No. 52 of 1922.

Kalyandappa bin Ayappa Desai, since deceased (now represented by Ayappa bin Kalyandappa Deshmukh and others) - - *Appellants*

v.

Chanbasappa bin Dodappa Desai - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 13TH MARCH, 1924.

Present at the Hearing:

LORD SHAW.
LORD PHILLIMORE.
LORD BLANESBURGH.
LORD SALVESEN.

[*Delivered by* LORD PHILLIMORE.]

The suit in this case was brought in the Court of the Subordinate Judge of Bijapur to recover possession of certain watan lands and other lands of ordinary tenure, the plaintiff making a claim as the nearest agnate to the last male owner, and averring that his title accrued on the death of the latter's widow. The principal defendant, the now respondent, being in possession of the property, pleaded various defences of which the one which is important for present consideration, depends upon the Indian Limitation Act.

The plaintiff recovered judgment before the Subordinate Judge for possession of the watan lands but not of the lands of ordinary tenure. Appeal was taken to the High Court of Judicature at Bombay, which reversed the decision of the Subordinate Judge and gave judgment for the defendant.

From this decree, the representatives of the original plaintiff have appealed to His Majesty in Council. As to the non-watan lands the plaintiff acquiesced in the decision of the Subordinate

Judge against him. Of the watan lands there were two kinds, and it was contended for the defendant that as regards one kind, known as Desgat watans, he was in a more favourable position than with regard to the others and must in any event succeed. But the Subordinate Judge and the High Court agreed, though for somewhat different reasons, that the parties stood in the same position with regard to both kinds of watan lands. Their Lordships do not find it necessary to go into the reasons given by the Subordinate Judge, but they are satisfied upon the ground given in the judgment of the High Court, that the defendant was in no better position with regard to the Desgat watans than he was with regard to the other watan lands. But as regards both classes of watans, there is, as the High Court observed, a serious defence under Article 118 of the Indian Limitation Act.

The facts of the case can be stated in a comparatively short compass. The plaintiff was cousin to the former owner of this property, by name Dodappa. Dodappa married Malkamma, the second but not contesting defendant in the case, and died long ago. The plaintiff averred that after Dodappa's death in the year 1880, Malkamma took in adoption to him as his son, one Madivalappa, who was her daughter's son: that Madivalappa married Baslingamma and died himself in 1895: that upon his death Baslingamma took the ordinary Hindu woman's estate and died in 1903: and that upon her death, plaintiff's title accrued: and that as he brought his suit on 1st July, 1912, he had brought it within the period of 12 years allowed to him by Article 141 in the Second Schedule to the Limitation Act.

He stated in his plaint that the defendant denied the validity of Madivalappa's adoption and set up that he, on the other hand, was the person validly adopted by Malkamma as son to Dodappa.

The defendant No. 1 did in substance set up this case. He admitted some show of adoption of Madivalappa, but denied that it was legal or valid; and he set up his own adoption by Malkamma in 1901. In the proceedings in the first Court, the validity of the adoption of Madivalappa was in contest; but the Subordinate Judge decided that it was valid; and this validity was not disputed in the appeal to the High Court. If Madivalappa were validly adopted, the property passed to him at once upon the adoption; and when he, the adopted son, died, his heir should succeed subject to the estates of the two widows. The adoption, therefore, of the first defendant, if it can be enquired into at all, must be pronounced either invalid or ineffectual, and such as to confer no title upon the first defendant to the lands in suit.

The point of law as between the two parties can be stated as follows. Plaintiff says: "I deduce a good title. You have no right to possession as against me, and I bring my suit within 12 years, that being the period allowed to me by Article 141 in the First Schedule of the Limitation Act, which provides that for a suit by a remainderman or a reversioner 'entitled to the possession of immovable property on the death of a Hindu . . .

female,' there is a period of 12 years from the time ' when the female dies.' "

The defendant says : " You can try to put it in that way, but in truth your suit is one governed by Article 118, being one ' to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place,' for which you have only six years from the date ' when the alleged adoption becomes known to the plaintiff ' ; and as regards knowledge, I can show you knew of my claim (as indeed he could show) more than six years ago."

It is true that the plaintiff in his plaint as originally framed claimed a declaration that the defendant had not been validly adopted, which was imprudent. But he wisely asked to amend this plaint as striking out this claim and making the suit a plain one for possession, and this amendment was allowed.

The controversy as to which of the two principles of limitation should be applied in cases of this nature is an old one and has given occasion to many decisions, some of which are in conflict. Some of these authorities amount to decisions on the exact point, which if they are decisions of this Board, must be accepted as conclusive. Others may be said to consist of dicta rather than actual decisions ; and others are again decisions of the High Courts in India, and as such entitled to much respect but in no way binding upon their Lordships.

The earlier of these decisions turned upon the construction of the Act of 1871. The article in the schedule of that Act, which dealt with cases of adoption, was in different language from the article in the schedule to the Acts of 1877 and 1908, the two latter being identical in terms.

The Article in 1871, No. 129, is expressed as follows :—

> " To establish or set aside an adoption—twelve years from the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father."

It will be shown hereafter that not only is the description of the suit different from that contained in Article 118 of the two later Acts, but that the time from which the limitation begins to run is different.

However, as regards the earlier Act, the decisive authority is a decision of this Board in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (13 I.A., page 84, decided 1886.) In that case their Lordships held that the words " to establish or set aside an adoption " " were not technical words and did not describe with accuracy any known form of suit," and that therefore any suit which brought the validity of an adoption into question must be considered as a suit to set aside an adoption, even though it might also be looked at as a suit by the man entitled to recover possession ; and that therefore Article 129 and not Article 142 (as then numbered) applied.

In the course of their judgment their Lordships made a reference to the Act of 1877, which by that time had been some years in force, though the case had been started so long ago that it was

governed by the earlier Act of 1871. These observations are as follows :—

> " It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Article 118 of the Act of 1877, which corresponds to Article 129 of the Act of 1871 so far as regards setting aside adoptions, speaks of a suit ' to obtain a declaration that an alleged adoption is invalid or never, in fact, took place,' and assigns a different starting-point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it affects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression ' suit to set aside an adoption ' to be one of a loose kind, and that more precision was desirable."

The next case to be cited is that of *Mohesh Narain Moonshi* v. *Taruck Nath Moitra* (20 I.A., page 30, decided in 1892), in which it was endeavoured to argue that the Act of 1877 and not the Act of 1871 applied ; but it was held that the defendant had established his right before ever the Act of 1877 came into force, and was therefore (though his adoption was an invalid one) entitled to insist upon the Limitation Act of 1871 in his favour. In this decision there was again a reference to the Act of 1877, and the words used by their Lordships were as follows :

> " It was suggested that, the Act of 1871 having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the later statute, in which the language used is somewhat different, the suit there referred to as necessary to save the limitation being described as one ' to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.' It seems to be more than doubtful whether, if these were the words of the statute applicable to the case, the plaintiff would thereby take any advantage."

But then their Lordships proceeded to give the reason why the Act of 1877 would not apply.

In neither of these cases did their Lordships intend to pronounce any decision on the construction of the Act of 1877. Perhaps it might be observed that there is a shade of inclination in the passage of the first judgment towards there being a definite change in the law, and a shade of inclination in the opposite direction in the second judgment.

When the Act of 1877 came to be applied, there were differences of opinion in the various High Courts in India. The authorities are somewhat evenly balanced. Their Lordships, however, deem it unnecessary to go into the detail of any of the cases which preceded the next judgment of this Board, except the very important decision of the full Bench in the Bombay High Court presided over by Sir Lawrence Jenkins, C.J., and decided in the year 1899. The case is reported as *Shrinivas* v. *Hanmant* (I.L.R. 24 Bombay, page 260). It was there held, partly on grounds of public policy, partly in supposed obedience to the judgments of this Board, and partly in deference to the supposed indications of opinion by this Board, that the same rule should be applied to the Act of 1877 as to the Act of 1871, and that a suit to recover

possession which involved the decision of an issue as to the validity or invalidity of the defendant's adoption, was a suit to obtain a declaration that an alleged adoption was invalid or never took place, to which Article 118 of the Act of 1877 applied and which therefore must be brought within a period of years dating from the plaintiff's knowledge, and was, in the particular instance, time-barred. The limit of time for these declaration suits which was 12 years under the Act of 1871, had become 6 years under the Act of 1877.

In that suit, as in the present suit before it was amended, the plaintiff claimed a declaration that the adoption of the defendant was invalid, and he also claimed possession of the property, and when pressed by Article 118 he endeavoured, as in the present case, to throw aside his claim for declaration and rely only on the claim for possession. But it was held that the real matter for decision was a question for adoption, and that, therefore, Article 118 applied.

As it was put by one of the learned Judges :—

> " Article 141 applies to the ordinary simple case of a reversioner where the validity of the adoption is not the substantial point in dispute, or where the plaintiff can succeed without impugning the validity of the defendant's adoption."

Shortly afterwards the case of *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (reported in 33 I.A., page 156, decided in 1906) came before this Board. In that case again there was a conflict between the reversioner and a defendant claiming under an adoption which was held either non-existent or invalid by both Courts in India. Whereupon the defendant appealed ; but his appeal was dismissed. It should be observed parenthetically that in the head-note to the report, the important word " not " is unfortunately omitted.

The conclusion arrived at in that case was shortly stated by Lord Macnaghten, who delivered the judgment of the Board ; and their Lordships cannot do better than quote the passage in full :—

> " On the appeal before their Lordships it was argued that there was at any rate an apparent adoption, and that, on that assumption, it mattered not whether the adoption was valid or invalid, because there was enough to satisfy the provisions of the Limitation Act of 1871, as interpreted by this Board in the case of *Jagadamba Chowdhrani* v. *Dakhina Mohun* Mr. Cohen, who argued the case with great ability, relied entirely on the Act of 1871. He contended that the Limitation Act of 1877 did not apply because the appellant relied on title acquired before the passing of the Act of 1877, and his rights were therefore saved by Section 2 of that Act. He admitted that if the Act of 1877 applied, his client was out of Court.
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> " Their Lordships are unable to accede to Mr. Cohen's argument. Giving full effect to the Jagadamba Case and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption, amounts to acquisition of title within the meaning of Section 2 of the Act of 1877.
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> " Their Lordships think that the appeal may be disposed of on this short ground, whether the alleged adoption was or was not an apparent adoption to which the ruling in the Jagadamba Case would apply if the Act of 1871 were now in force."

This language looks at first sight conclusive in favour of the plaintiff in the present suit ; but it has been thought in subsequent cases in India, and has been argued before their Lordships, that the decision of this point was unnecessary, because the plaintiff, being a minor, had three years after attaining majority to bring his suit, and that this provision in his favour superseded the protection given to the defendant by Article 118 and left the matter open to be decided according to Article 141. This line of reasoning seems to assume that you cannot impute knowledge to a minor—a view which is certainly not in accordance with the facts of human nature. But it is not necessary to go so deeply into the matter. It is obvious from a perusal of both the arguments and judgment that the minority of the plaintiff (though mentioned in the argument) was not the reason for the decision, and that the intention was to decide the same point as is contended for in the present appeal.

In consequence of this decision the High Court of Madras in the case of *Velaga Mangamma* v. *Bandlamudi Veerayya* (reported I.L.R. 30 Madras, page 309, and decided in 1907) went back upon its previous decision in I.L.R. 26 Madras, page 291, decided in 1902, and held in obedience to the decision of this Board that Article 118 only applied to declaratory suits in respect of adoption and not to suits for possession, and that in suits for possession Article 141 was the proper one to apply.

Next in order comes the decision of this Board in *Muhammad Umar Khan* v. *Muhammad Niaz-ud-din Khan* (reported in 39 I.A., page 19, decided in 1911). That was the case of a Mahomedan adoption, in which the District Judge said that Article 118 was inapplicable, as the adoption was " inherently invalid and *ipso facto* void " ; but the Chief Court reversed his decision and held that the adoption was not inherently invalid, and that Article 118 applied, and the suit was barred by it.

The Chief Court did not, however, mean to hold that the adoption was valid ; because, if the Judges had thought that, there would have been no necessity to rely upon the doctrine of limitation. What the learned Judges meant was that it was an adoption with sufficient colour of title to have it treated as one which would have to be got out of the way by a plaintiff suing for possession, and therefore that the time limit applicable to suits for declaring an adoption invalid applied.

This decree of the Chief Court was affirmed by this Board upon other grounds, it is true ; but in affirming it their Lordships expressed themselves upon the point of limitation as follows :—

> " Although their Lordships consider that the question of an adoption was an immaterial issue, they think it advisable to say that the omission to bring within the period prescribed by Article 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakur Tirbhurwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (1). Under the general Mahomedan law an adoption cannot be made ; an adoption if made in fact by a Mahomedan, could carry with it no right of inheritance.

> " It may further be observed that, even if an adoption by a Mahomedan was permissible by any valid custom in the Punjab, the Chief Court found that it had not been proved that the parties to the suit belonged to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply."

As against the weight of this authority, it has been observed that, generally speaking, a Mahomedan adoption does not confer any right of succession to property, as, indeed, their Lordships said in the passage just quoted. But, on the other hand, as the passage shows and the general trend of the case shows, there may be a tribal custom among Mahomedans (and this particular case came from the Punjab, which is the home of customs) allowing adoption to carry rights of succession. Indeed it was upon some such idea that the Chief Court had relied when it introduced Article 118 as fixing the period of limitation.

That Hindu tribes converted in more recent times to Mahomedanism may keep as part of their customary law the old Hindu law in respect of family matters and succession, is shown in the recent case of the Halai Memons in 1922, (*Khatubai* v. *Mahomed Hagi Abu*, 50 I.A. page 108).

Anyhow, it would seem that their Lordships desired to take this opportunity of elucidating and affirming their decision in the case in 33 I.A. In this connection it should be noted that, though the judgment is stated to have been delivered by Sir John Edge, one of the members of the Board was Lord Macnaghten, who had delivered the judgment in 33 I.A., and must have known well what was intended to have been conveyed by the earlier judgment and by this one.

In 1913 these judgments came under consideration by the High Court of Bombay in *Shrinivas Sarjerav* v. *Balwant Venkatesh* (reported I.L.R. 37 Bombay, page 513) ; and the learned Judges came to the conclusion that, notwithstanding the passages in the two decisions of this Board which have been last cited, they were still bound by the principle expressed in the decisions on the Act of 1871 ; and they accordingly held that the period of limitation in a case like the present is that of six years from the knowledge of the adoption, differing on this point from the High Court of Madras. Their decision has been followed by the Court in the present case, the learned Judges observing that "the adoption of the defendant may be clearly invalid by Hindu law and Malkamma's power of adoption may have been already exhausted ; nevertheless the law of limitation will effectively defeat the plaintiff's claim."

Their Lordships are of opinion that the High Court of Bombay both in this and in the previous case attached too little weight to the authority of the last two judgments of this Board, and further that the learned Judges seemed not to have noticed that since the decision in 33 I.A., the Limitation Act of 1908 was passed by the Indian Legislature with this Article in precisely the same language as that used in 1877 after the construction already put upon it by this Board. This, in the view of their Lordships, is a point of considerable importance.

The matter might almost rest here; but as this question has so often been raised and discussed, their Lordships would wish to put it upon the ground of principle as well as on the ground of authority. In the Act of 1871, as observed in the judgment in 13 I.A., the words used had no technical meaning, and they were treated as expressing popular language to which in popular reasoning the meaning which prevailed could attach. In the Acts of 1877 and 1908, the matter is otherwise. The words " a suit to obtain a declaration " are terms of art. They relate back to the Specific Relief Act passed in the same year 1877, being Act No. 1 of that year, whereas the Limitation Act is Act No. 15. Section 42 of the Specific Relief Act deals with declaratory decrees, and the illustration (Letter F) is much in point :—

> " A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid."

It is to this class of suit that this particular limitation applies. The date from which the time begins to run is a subjective or personal date; and the condition of obtaining the particular relief which is sought in a declaratory suit is that the plaintiff should not be guilty of laches, the measure of laches being fixed by the statute as six years. But if a claimant chooses to run the risk that an adoption which he has not attacked will have every presumption made in its favour by reason of its long standing, he can wait till his reversionary right has accrued, and even till the limit (no doubt a very wide limit) of 12 years from that accruer has passed.

Strange consequences would otherwise ensue. It was decided by this Board in *Venkatanarayana Pillai* v. *Subbammal* (42 I.A., page 125), in the year 1915, that a suit by a presumptive reversioner for a declaration that an adoption was invalid was one brought in a representative capacity and on behalf of all reversioners, and that on the death of a presumptive reversioner the next presumable reversioner would be entitled to continue a suit which his predecessor had begun.

If a suit for possession involving the invalidity of an adoption were to be treated as coming under Article 118, the first reversioner might have known, and the second might not have known, of the adoption six years before. Or *vice versa*. And the suit for possession might succeed or fail, and the defendant might be ousted of his property or keep it if the first reversioner died before he brought his suit to a hearing.

Moreover, it seems not to have been noticed by the Judges of the Bombay High Court who decided the case in 37 Bombay, that one of the cases cited in 39 I.A. was *Bijoy Gopal Mukerji* v. *Srimati Krishna Mahishi Debi* (34 I.A., page 87 decided in 1906). And this case seems to indicate the true canon of construction. Article 91 provides a period of limitation for a suit " to cancel or set aside " certain instruments, the period from which the time begins to run, dating again from the plaintiff's knowledge. The case in

34 I.A. was a suit for a declaration that a particular form of lease, made by a Hindu widow, had become inoperative against the reversioners, and for possession of the property. The suit was brought more than three years after the plaintiffs knew of the making of the lease; and the High Court of Calcutta thought that the time limit applied. The Chief Justice put it that, according to the authorities, if the plaintiffs could recover possession without setting aside the lease, then Article 141 would apply; but if they had first to set aside the lease, then Article 91. Their Lordships agreed so far, and agreed further that the particular lease was voidable only and not void. But they held that the reversioner might treat it as a nullity, and showed his election to do so by bringing an action for possession, and that he had 12 years for so doing; and in that case the plaintiff had not, as in the present case, amended his plaint by striking out the claim for a declaration.

The present case seems *a fortiori*. The adoption of the first defendant was void, and the plaintiff is entitled to brush it aside and sue for the possession to which he has a right. His time limit is 12 years from the death of the Hindu widow, and he was in time.

A further point was taken for the appellant against the judgment of the High Court which seemed to assume that one adopted son could claim to be the brother and heir of another adopted son. But it is not necessary for their Lordships to pronounce upon this contention, which might otherwise have had to be seriously considered.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the decree of the High Court should be reversed and the decree of the Subordinate Judge restored, and that the appellants should have their costs here and below.

In the Privy Council.

KALYANDAPPA BIN AYAPPA DESAI, SINCE DECEASED (NOW REPRESENTED BY AYAPPA BIN KALYANDAPPA DESHMUKH AND OTHERS)

v.

CHANBASAPPA BIN DODAPPA DESAI

DELIVERED BY LORD PHILLIMORE.

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