Supreme Court of India
Ram Prasad Dagduram vs Vijay Kumar Motilal Mirakhanwala ... on 18 April, 1966
Equivalent citations: 1967 AIR 278, 1966 SCR 188
Author: A Sarkar
Bench: Sarkar, A.K. (Cj)

PETITIONER:
RAM PRASAD DAGDURAM

Vs.

RESPONDENT:
VIJAY KUMAR MOTILAL MIRAKHANWALA & ORS.

DATE OF JUDGMENT:
18/04/1966

BENCH:
SARKAR, A.K. (CJ)
BENCH:
SARKAR, A.K. (CJ)
MUDHOLKAR, J.R.
BACHAWAT, R.S.

CITATION:
1967 AIR 278 1966 SCR 188

ACT:
Code of Civil Procedure (Act 5 of 1908), 0. 1, r. 10(1) and (2)--Scope of.
Indian Limitation Act (9 of 1908),s. 22 and Art. 132-Addition of parties-Suit when deemed to be filed--Suit for foreclosure-Period of Limitation-Indian Act extended to Part B State-Period of limitation abridged by Indian Act-Law of limitation applicable.

HEADNOTE:
The appellant executed a mortgage in 1934 in favour of the proprietrix of a firm in the State of Hyderabad. The mortgage amount became due in 1943. The first respondent, who was the daughter's son of the mortgagee, claiming to be her adopted son. filed a suit for foreclosure of the mortgage, in 1954, after the death of the mortgagee. The trial Court dismissed the suit on the ground that the adoption was not established. The first respondent appealed to the High Court and, pending the appeal, applied for adding his natural mother as a co-plaintiff and her two sisters as defendants as they were not willing to join as plaintiffs, and sought consequential amendments in the plaint. The High Court granted the application under 0. 1, r. 10(1), Civil

Procedure Code, on 4th November, 1958 and thereafter, disposed of the appeal by passing a preliminary decree for foreclosure in favour of the added parties. The High Court did not go into the question of adoption but dismissed the first respondent's suit.

HELD: (Per Sarkar, C.J.): The order adding parties cannot be supported under either sub-r.(1) of sub-r. (2) of 0. 1, r. 10. Sub-r. (1) provided for addition of plaintiffs and could not therefore justify the addition of defendants. In the case of addition of parties under sub-r. (2), the provisions of s. 22 of the Limitation Act admittedly apply and under it in the present case, a suit by the added parties, on the date they were added, would have been barred. It would have been futile, therefore, to make an order under sub-r. (2). [190 G-H; 191 D-E]

Ravji v. Mahadev's case (I.L.R. 22 Bom. 672) doubted. There is no reason to think that s. 22 of the Limitation Act does not apply to O.1, r. 10, sub-r. (1). [191 G]

A person suing as the proprietor of a firm does not sue in a representative capacity. He sues in his personal capacity. [192 E-F]

Per Mudholkar and Bachawat JJ: The High Court bad power to join the co--plaintiff under 0. 1, r. 10(1) and to join her sisters as defendants under 0. 1, r. (2), and to allow onsequential amendments of the plaint under 0. VI, r. 17, but, as regards the added parties, by reason of s. 22(1) of the Indian Limitation Act, 1908. the suit must be regarded as instituted on the date on which they were added and was therefore barred by limitation. [197 C]

In 1951, the Hyderabad Limitation Act was repealed and the Indian Limitation Act was extended to the State. The Indian Act abridged the period of limitation for the enforcement of the mortgage,

189

but did not impair or take away any vested right. Therefore, on the date of the institution of the suit, the law of limitation applicable was the Indian Act. [194 E-F]

The respondent, as the original plaintiff, sued in his own right and on his own behalf. Therefore, the parties added must be regarded as a new plaintiff and new defendant respectively. Section 22 of the Limitation Act in express terms applies whenever a new plaintiff or a new defendant is substituted under 0. 1, r. 10(1) or (2). The effect of the section is that the suit must be deemed to have been instituted by the new plaintiff when he was made a party. [196 E-G]

Ravji v. Mahadev, (1897) I.L.R. 22 Bom. 672, disapproved.

Since the suit in the instant case was for foreclosure only it was governed by Art. 132 of the Limitation Act and must be regarded as instituted in November 1958, beyond 12 years from the date when the mortgage money was due. [195 C]

Vasudeva Mudaliar v. K. S. Shriniwas Pillai I.L.R, 34 I.A. 186, applied.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1046 of 1963. Appeal from the judgment and decree dated November 17, 1959 of the Bombay High Court in First Appeal No. 484 of 1957 from Original Decree.

S. T. Desai, and J. B. Dadachanji, for the appellant. Sarjoo Prasad, B. P. Singh and Naunit Lal, for respondents Nos.1 and 2.

Ganpat Rai, for respondent No. 4.

SARKAR, C. J. delivered a separate Opinion. The Judgment of MUDHOLKAR and BACHAWAT JJ. was delivered by BACHAWAT, J. Sarkar C.J. This appeal arises but of a suit filed by the respondent Vijay Kumar against the appellant on February 9, 1954 to enforce a mortgage. The plaint stated that the appellant executed the mortgage on December 13, 1934 in favour of Tarabai, the proprietor of the firm of Narayandas Chunilal, and that the amount secured on it became due on December 13, 1943. Vijay Kumar claimed that he was adopted by Tarabai on July 16, 1948 as a son to her deceased husband Motilal Hirakhanwala and became entitled to enforce the mortgage as her sole heir on her death on April 23, 1952. After setting out the particulars of the mortgage, Vijay Kumar asked for a decree for foreclosure. In his written statement the appellant admitted the mortgage but denied that Vijay Kumar had been adopted by Tarabai and stated that she had died leaving as her heirs three daughters, Rajkumari, Premkumari and Mahabalkumari, the mother of Vijay Kumar Besides denying Vijay Kumar's right to enforce the mortgage. the appellant took various other defenses to the action to which it is unnecessary for the purpose of this appeal to refer.

The learned District Judge who heard the suit, held that the adoption of Vijay Kumar had not been established and on that ground alone he dismissed it, having rejected the other defenses raised by the appellant. Vijay Kumar appealed against that judgment to the High Court of Hyderabad but that appeal was, on a subsequent reorganisation of States, transferred to the High Court of Bombay. Thereafter on November 3, 1958, Vijay Kumar made an application in the appeal for an order adding his mother Mahabalkumari as a co- plaintiff with him as she was willing to be so added, and her sisters Rajkumari and Premkumari "who were not available for joining in the suit as plaintiffs", as defendants. He also sought permission to add a new paragraph to the plaint, in which after reiterating his right to enforce the mortgage as the adopted son of Motilal and Tarabai, he stated. "In case, however, the plaintiff's adoption is held not to be proved or not to be valid, the estate of Motilal and Tarabai Hirakhanwala and of M/s Narayandas Chunilal will vest in Tarabai's three daughters, viz., Rajkumari, Premkumari and Mahabalkumari". The prayers in the plaint were also sought to be amended by asking that the decree sought might be passed in favour of Vijaykumar and Mahabalkumari. The appellant opposed this application but it was allowed by the High Court. The records of the appeal were, thereafter, reconstituted by adding Mahabalkumari as an appellant and Rajkumari and Premkumari as respondents and amending the plaint a,. sought. Premkumari filed a written statement denying the adoption of Vijay Kumar and his right to enforce the mortgage.

Rajkumari never appeared in the proceedings arising out of the suit. The appeal was thereafter heard by the High Court and allowed. The High Court refused to go into the question of adoption and passed a preliminary mortgage decree for foreclosure in favour of Mahabalkumari, Rajkumari and Premkumari and further directed that the suit as brought by Vijay Kumar would stand dismissed. The present appeal has been brought by the original defendant against this judgment of the High Court under a certificate granted by it.

I think that Mr. S. T. Desai for the appellant was right when he said that the order adding parties could not be supported. The High Court purported to make the order under sub-r. (1) of 0. 1, r. (10) of the Code of Civil Procedure. We were not called upon by counsel to consider any other provision. That sub-rule, however, cannot justify the order, for it only permits addition of a plaintiff and does not provide for the addition of a defendant while the order directs addition of both a plaintiff and two defendants. Was it then properly made in solar as it added a plaintiff ? I do not think so. The addition of Mahabalkumari as a plaintiff could not be made under the sub-rule unless it was necessary for the determination of the real matter in dispute. Now, adding her as a plaintiff would have availed nothing unless Rajkumari and Premkumari were also added as defendants, and that could not be done under the sub-rule. No decree could have been passed in her favour alone if the case of adoption failed, for she would then be entitled to the mortgagee's right along with her sisters. The addition of Mahabalkumari as plaintiff only would have been futile; it would not have helped in the decision of any matter in dispute. Now, sub-r. (2) of 0. 1, r. (10) permits the addition of both plaintiffs and defendants in certain circumstances. The order however was not sought to be justified under that provision and there was good reason for it. It was conceded-and in my opinion rightly-that in view of s. 22 of the Limitation Act. the suit as regards the parties added under this sub-rule had to be deemed to have been instituted when they were added. This was also the view expressed by the High Court. Now it is not in dispute that a suit filed on the date when the three sisters were added, to enforce the mortgage would have been barred. We may add that there is authority for the view that even the addition of defendants alone may attract the bar of limitation: see Ramdoyal v. Junmenjoy(1). Guravayya v. Dattairayaa(2). I think that the addition of Rajkumari and Premkumari as defendants was of the kind considered in these cases. Therefore, it would have been futile to add any of the parties under this sub-rule. In view of the bar of limitation, such addition would not have resulted in any decree being passed and, therefore, the addition should not have been ordered. I am, however, not to be understood as holding that apart from the difficulty created by s. 22 the order could have been properly passed under the sub-rule. I have the gravest doubts if it could. It is unnecessary to discuss the matter further.

The High Court, relying on Ravji v. Mahadev,(3) expressed the view that when a party is added under sub-r. (1) of 0. 1, r. (10), s. 22 of the Limitation Act does not apply and no bar of limitation arises. No other reason was given by the High Court or suggested by counsel in this Court to avoid the bar of limitation imposed by s. 22. If the bar operated, no addition of parties could, of course, be made. As I am of opinion that the order could not be justified by the terms of that sub-rule, it is not really, necessary for me to consider this question of limitation. I wish however to observe that, as at present advised, I am not at all sure that s. 22 does not apply to an addition of parties under sub-r. (1) of r. (10) of 0. 1. There is no principle to support such a view. Nor do I think that Ravji's case(1) clearly expresses it. All that is held--and that too in the judgment of one of the learned Judges

only-was that when in a suit by a benamidar the real owner is (1) (1887) I.L.R. 14 Cal. 791.

(2) (1904) I.L.E. 28 Bom. 11.

(3) (1898) I.l.R. 22 Bom. 672.

added, it was really the original suit that was continued. Obviously, the learned Judge thought that he was dealing with a case where there was no real addition of parties. It would seem that is not the case where an order under the sub-rule is made. That would be a case like that of a correction of a misdescription of a party for which a resort to the sub-rule would not be necessary: Purshotam Umedbhai & Co. v. Manilal & Sons.(1). Then again Ravji's case(1) does not seem to have been approved in later Bombay cases: see e.g. Krishnaji, v. Hanmaraddi(2). Further Ravi's case(1) would not support the order in hand if my reading of it is correct. The present is not a case of a continuation of the Original suit. Here parties were added to press their own rights which are in conflict with and antagonistic to those which were being pressed in the suit as originally framed. I do not consider it necessary to pursue this matter further on the present occasion.

It was then said that in the present case there was no sub- stantial addition of parties as the original suit was in the capacity of a proprietor of the firm of Narayandas Chunilal and all that was done was to add persons who might be the real proprietors. This was said in order to get out of the bar of limitation by showing that it was the original suit that was continued in spite of the addition of parties. There seems to be authority for the view that when a suit is filed in a representative capacity, if it turns out to) be doubtful whether that capacity existed or had continued, the proper representative or the owner, as the case may be, might be added even after the date when the suit would be barred. I will assume that these cases lay down the law correctly, but they do not, in my view, afford any assistance in the present case. First, a suit by a person claiming to be the sole owner of the properties of a business carried on in a firm name, as Vijay Kumar's suit was, is not a suit in a representative capacity; he represents no one but himself. A firm is not a legal entity which could or had to be represented by any one else. As is well known, a firm means only the partners taken together. There is no such thing as the capacity of a proprietor of a firm; the capacity of a proprietor of a firm is only the proprietor's individual capacity. Secondly, no authority has been brought to our notice which shows that if parties are added with a claim which is antagonistic to the claim of the original plaintiff in the suit, as has happened here, that would still be a case where the original suit should be deemed to have been continued.

It may be that if the suit had initially been filed in the form in which it stood after the amendment, it would have been a good suit, as to which however I do not say anything on the present occasion. If it were so, that would have been under the other (1) [1961] I S.C.R. 982. (2) (1898) I.L.R. 22 Bom. 672. (3) (1963)I.L.R. 58 Bom 536.

provisions of the Code permitting joinder of parties and perhaps also of causes of action when instituting a suit, none of which was or could be pressed for our consideration. These provisions are "merely permissive and relate to what the plaintiff might do if he is so minded": Sri Mahant Prayaga Doss v. The Board of Commissioners for Hindu Religious Endowments, Madras.(1) That is not the

case where addition of parties is sought under 0. 1, r. (10), sub-rr. (1) and (2); such additions can only be made under the provisions of these sub-rules only.

For these reasons, I think that the order adding parties is insupportable. If that order goes, as it should, the decree which is in favour of the added parties cannot stand, for they are then strangers to the suit. As there is no decree in favour of Vijay Kumar and as in fact the suit considered as brought by him has been dismissed by both the courts below-by the High Court with the tacit approval-and there is no appeal by him, this appeal must be allowed. In this view of the matter, I do not feel called upon to deal with the other grounds advanced by Mr. Desai.

I would allow the appeal and set aside the judgment of the High Court and restore that of the trial Court. The appellant will not get the costs in any of the courts below or this Court.

Bachawat, J. On December 13, 1934 the appellant executed a mortgage in favour of one Tarabai, widow of Motilal Harakhanwala. Tarabai had three daughters, Mahabalkumari, Rajkumari and Premkumari. On July 16, 1948, Tarabai is said to have adopted Vijay Kumar as a son to her deceased husband. Vijay Kumar is the natural son of Mababalkumari. On April 23. 1952, Tarabai died. On February 10, 1954, Vijya Kumar claiming to be the adopted son and heir of Tarabai, instituted a suit for foreclosure of the mortgage executed in her favour. The appellant contested the suit. On December 30, 1955, the District Judge, Aurangabad dismissed the suit, holding that Vijay Kumar was not the adopted son and heir of Tarabai. Vijav Kumar preferred an appeal to the former High Court of Hyderabad. After the reorganisation of States, the appeal was transferred to the Bombay High Court. On an application made by Vijay Kumar on November 3, 1958, the High Court on November 4, 1958 made an order for addition of Mahabalkumari as plaintiff and Rajkumari and Premkumari as defendants to the suit and for consequential amendments of the plaint. After the addition of the parties, the appeal came up for final disposal before the High Court. At the hearing of the appeal, the respondents submitted that the question whether Vijay Kumar was the adopted son of Tarabai should not be decided in this litigation and a decree should be passed in favour of the added parties on the footing that they were the heirs of Tarabai. The High Court accepted this submission, set aside the finding of the trial Court on the question of the adoption of (1) 1927 I.T.R. 50 Mad.41.

Vijay Kumar, dismissed the suit as brought by him and directed the trial Court to pass the usual preliminary decree in favour of Mahabalkumari, Rajkumari and Premkumari. The High Court held that the mortgage money fell due on February 9, 1943 and the suit being instituted within 12 years from this date, was not barred by limitation. The appellant now appeals to this Court on a certificate granted by the High Court. The main question in this appeal is whether the claim of Mahabalkumari, Rajkumari and Premkumari to enforce the mortgage is barred by limitation. The mortgage deed dated December 13, 1934 provided that the mortgage money would be payable in annual installments within a period of nine Fasli years, and in the event of non-payment of five installments, the mortgagee would be entitled to recover the entire mortgage money. The appellant did not pay any of the installments. The High Court rightly held that the deed gave the mortgagee an option to enforce the mortgage in the event of non-payment of five instalments. It was open to the mortgagee not to exercise this option. As the mortgagee did not exercise the option, the mortgage

money fell due on the expiry of nine years, that is to say, on February 9, 1943, and limitation commenced to run from this date.

On December 13, 1934 when the mortgage was executed and on February 9, 1943 when the mortgage money fell due, the Hyderabad Limitation Act was in force. By art. 133 of the Hyderabad Limitation Act, the period of limitation for a suit by a mortgagee for foreclosure was thirty years from the date when the money secured by the mortgage became due. But as from April 1, 1951, the Hyderabad Limitation Act was repealed and the Indian Limitation Act, 1908 was extended to the State of Hyderabad by the Part-B States (Laws) Act (Act III of 1951), Prima facie, the Indian Limitation Act, 1908 which was in force on the date of the institution of the suit was the law of limitation applicable to the suit. On behalf of the respondents, it was argued that by reason of the proviso to s. 6 of the Part-B States (Laws) Act, 1951, art. 133 of the Hyderabad Limitation Act continued to apply to the suit. There is no substance in this contention. The respondents had no vested right in the law of procedure for enforcement of the mortgage. They did not acquire under art. 133 of the Hyderabad Limitation Act any right or privilege as contemplated by the proviso to s. 6 of the Part-B States (Laws) Act, 1951. No doubt, art. 132 of the Indian Limitation Act, 1908 abridged the period of limitation for the enforcement of the mortgage. But this abridgment did not impair or take away any vested right. Section 30 of the Indian Limitation Act, 1908 inserted by the Part-B States (Laws) Act, 1951 made suitable provision safeguarding vested rights in cases where the period prescribed was shorter than that prescribed by the corresponding law previously in force in the Part-B State.

It was argued on behalf of the respondents that art. 147 of the Indian Limitation Act applied to the suit. We are unable to accept this contention. In Vasudeva Mudaliar v. K. S. Shriniwas Pillai,(1) the Privy Council held that Art. 147 applied only to an English mortgage as defined in the Transfer of Property Act before its amendment in 1929, as, in respect of such a mortgage only, the mortgagee could sue for "foreclosure or sale." That decision has never been questioned and we see no ground for differing from it. The deed dated December 13, 1934 created an anomalous mortgage and conferred a right of foreclosure only upon the mortgagee. The mortgagee had no right to sue for sale in the alternative. The present suit was for foreclosure only, and was governed by art. 132 and not art. 147. The suit would be barred by limitation if it were instituted on November 4, 1958 when Mahabalkumari, Rajkumari and Premkumari were added as parties to the suit. The question is whether the suit should be regarded as having been instituted on November 4, 1958 having regard to s. 22(1) of the Indian Limitation Act, 1908. Section 22(1) reads:

> "Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party."

Admittedly, the name of the original plaintiff is not a mis- description of the names of Tarabai's daughters. This is also not a case where a wrong defendant has been sued as representing the estate of a deceased person and subsequently the real representative is added as a defendant. Nor is this a case where a wrong plaintiff has sued in a representative capacity and the person whom he intended to represent was subsequently added as a plaintiff. This is a case where the original plaintiff sued in

his own right and on his own behalf. No doubt, Vijay Kumar claimed the right to enforce the mortgage as the legal representa- tive of Tarabai. But he made this claim on his own behalf and not as representing the daughters of Tarabai. Mahabalkumari must be regarded as a new plaintiff and Rajkumari and Premkumari must be regarded as new defendents and by reason of s. 22(1) the suit must as regards them be deemed to have been instituted when they were made parties. In Moyappa Chetty v. Supramanian Chetty(2), the Privy Council had occasion to consider the similar provisions of s. 22 of the Straits Settlements Ordinance No. 6 of 1896, which read:

> "When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall as (1) L.R 34 I.A. 186 (2) (1)1916) LR, 43 1 A. 113,121.
>
> regards him be deemed to have been instituted when he was so made a party..." Construing this section, Lord Parker of Waddington observed:
>
> "Their Lordships are of opinion that s. 22 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. Section 133 of the Civil Procedure Code provides against the defence of a suit on this ground and enables the proper party to be added or substituted. If A is the right person to sue, it would be clearly wrong to allow him, for the sake of avoiding the Limitation Ordinance, to take advantage of a suit improperly instituted by B."

Similarly, in this case the daughters of Tarabai cannot, for the purpose of avoiding the Limitation Act, take advantage of the suit improperly instituted by Vijay Kumar. In Subodini Devi v. Cumar Ganoda Kant Roy, Bahadur(1), the Calcutta High Court held that there was a difference between substituting a new person as plaintiff under s. 27 of the Code of Civil Procedure, 1882 and the addition of a new person as defendant under s. 32 of the Code and that the change of parties as plaintiffs did not affect the question of limitation. This decision was followed by Parsons, J. in Ravji v. Mahadev(2). But the learned Judges deciding those cases did not refer to s. 22 of the Indian Limitation Act, 1877 and they a,')pear to have completely overlooked that section. Section 22 males no distinction between sub-r. (1) and sub-r. (2) of 0. 1, r. 10. The section in express terms applies whenever a new plaintiff or a new defendant is substituted after the institution of a suit. The Court has power to add a new plaintiff at any stage of the suit, and in the absence of a statutory provision like s. 22 the suit would be regarded as having been commenced by the new plaintiff at the time when it was first instituted. But the policy of s. 22 is to prevent this result, and the effect of the section is that the suit must be regarded as having been instituted by the new plaintiff when he is made a party, see Ramsebuk v. Ramlall Koondoo(3). The rigorous of this law has been mitigated by the proviso to s. 21 (1) of the Indian Limitation Act, 1963, which enables the Court on being satisfied that the omission to include a new plaintiff or a new defendant was due to a mistake made in good faith, to direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. Unfortunately, the proviso to s. 21(1) of the Indian Limitation Act, 1963 has no application to this case, and we have no (1) (1887) I.J,.R. 14 caL. 400.

(2) (1897) I.L.R.

(3) (1881) I.T,.R. 6 CAL. 815, 823-824.

power to direct that the suit should be deemed to have instituted On a date earlier than November 4, 1958. It follows that as regards Mahabalkumari, Rajkumari and Premkumari the suit must be regarded as instituted on November 4, 1958. As far as they are concerned, the suit is barred by limitation and no decree can be passed in their favour. The decree passed by the High Court in their favour cannot be sustained and must be set aside.

We think that the High Court had power to join Mahabalkumari as a party plaintiff under 0. 1, r. 10 of the Code of Civil Procedure and to join Rajkumari and Premkumari as defendants under 0. 1, r. 10(2) and to allow consequential amendments of the plaint under 0. 6, r. 17. But having regard to the bar of limitation, the added parties are not entitled to obtain any relief.

So far as Vijay Kumar is concerned, the suit as brought by him was dismissed by the High Court. There is no appeal by him. On his behalf, it was not contended that we should exercise in his favour our powers under 0. 41, r. 33 of the Code of Civil Procedure, or that we should set aside the decree of dismissal of the suit against him and remand the case to the High Court for decision of the question whether he is the adopted son and heir of Tarabai. Even if such prayer were made, on the facts of this case we would not be inclined to exercise our powers under 0. 41, r. 33 and to set aside the decree of the High Court as to the dismissal of the suit against him.

In the result, the appeal is allowed, the decree passed by the High Court in favour of respondents Nos. 2,3 and 4, Mahabalkumari, Rajkumari and Premkumari, is set aside and the decree of the trial Court dismissing the suit is restored. The suit is dismissed. We direct that the parties will pay and bear their own costs in this Court and in the Courts below.

Appeal allowed.