

Privy Council Appeal No. 98 of 1927.

Radhoba Baloba Vagh and others - - - - - *Appellants*

v.

Aburao Bhagwantrao Shirole and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 14TH JUNE, 1929.

Present at the Hearing :

LORD CARSON.

SIR LANCELOT SANDERSON.

SIR BINOD MITTER.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by the plaintiffs against a decree of the High Court of Judicature of Bombay, dated the 17th of February, 1925, which reversed a decree of the Subordinate Judge of Poona, dated the 22nd of January, 1923.

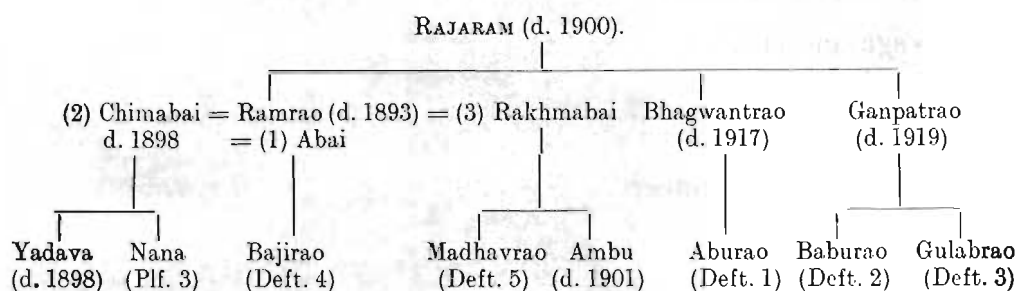
The plaintiffs brought the suit for a declaration that the immovable and movable properties mentioned in the plaint were the ancestral properties of the joint family of the third plaintiff, Nana Ramrao, and the defendants, and that the plaintiff Nana had a one-ninth share in the said properties, for partition and other consequential reliefs.

It appears that by a deed, dated the 6th of June, 1910, Nana sold his one-ninth share in certain of the properties mentioned in the plaint for Rs. 1,500 to the father of the first and second plaintiffs.

The father of these plaintiffs died, and it was alleged that after his death, namely, on or about the 13th of August, 1919, Nana obtained a further sum of Rs. 500 from the first and second plaintiffs, and that the first and second plaintiffs had thus become the owners of Nana's one-ninth share of the property described in Schedule B of the plaint.

Consequently the first and second plaintiffs were joined with Nana as parties in the suit for partition.

The pedigree relied upon by the plaintiffs was as follows :—



The defence of the first five defendants was twofold: they alleged—(1) that Nana was not the son of Ramrao, that Chimabai, the mother of Nana, was of a wicked nature, and was driven out of the house by Ramrao; that Nana was never joint with the defendants, and that he was not a member of the joint family. (2) That the suit was barred by the law of limitation.

It was alleged that, after attaining majority, Nana made an attempt to get a share in the property, that he was told in clear terms that he had no interest therein, and that his right was denied by the defendants, by his deceased paternal uncles, and others.

No date for the alleged attempt by the plaintiff and the alleged denial of his interest was specified in the written statement of the first five defendants, but in the course of the evidence given on behalf of these defendants it was alleged that the date was 1905–1906 or 1906–1907.

The suit was instituted on the 24th of July, 1920, and these defendants, relying upon Article 127 of Schedule I of the Indian Limitation Act IX of 1908, alleged that the suit was barred by limitation.

The defendants 6, 7 and 8 were added as parties to the suit by reason of their having an interest in some of the property, but they did not dispute the plaintiff's case.

The learned Subordinate Judge held that Nana was the son of Ramrao by his wife Chimabai and that there was no exclusion made to the knowledge of Nana. Consequently he made a preliminary decree in favour of the plaintiffs to the effect that the plaintiff Nana had a one-ninth share in the immovable and movable property therein mentioned, and he directed that the lands should be partitioned by the Collector. The learned Judge, after dealing with certain incidental matters, directed that the defendants Nos. 1 to 5 should pay the plaintiffs' costs as well as those of the other defendants.

The first and fifth defendants, viz., Aburao Bhagwantrao Shirole and Madhavrao Ramrao Shirole, appealed to the High Court against the decree of the learned Subordinate Judge, making the other parties to the suit respondents.

On the hearing of the appeal the finding of the learned Subordinate Judge as to the legitimacy of Nana was not disputed, and the only question argued before the High Court was whether Nana, the third plaintiff, had been excluded from the joint

family property to his knowledge for more than twelve years before the date of the suit, viz., the 21st of July, 1920.

The learned Judges of the High Court allowed the appeal and dismissed the suit, but directed that there should be no order as to costs throughout. The ground of their decision was that the whole series of facts, beginning with 1898, when his mother died, showed that Nana's connection with the family had been severed and that he acquiesced in that severance.

Their conclusion was that Nana was excluded from the joint family property from 1898, and that he must be taken to have been perfectly well aware of the fact in 1904, when he came of age.

From the judgment and decree of the High Court the plaintiffs have appealed.

The material facts of the case are as follows:—After the death of his first wife Abai, Ramrao married Chimabai, who became the mother of two sons, Yadava and Nana.

Within a year of this second marriage and while Chimabai was living in the family dwelling-house, Ramrao married a third time, Rakhmabai being the third wife.

It was found by the learned Subordinate Judge that Ramrao had a second son by Chimabai, namely, Nana, the third plaintiff, who was born in June, 1886. As already stated, this finding is not now disputed; but it is not immaterial to note that the case of the first five defendants was that Chimabai's second son was named Keshav, who was alleged to be dead.

The learned Subordinate Judge held that Keshav was "a fabulous person."

The family dwelling-house of Ramrao and his joint family was at Bhamburda, and there is no doubt that up to 1886 Chimabai was living with her husband in the aforesaid family house.

Apparently there was much friction in Ramrao's family, due, it is alleged, to the presence of Rakhmabai, and in the year 1886, soon after the birth of Nana, Chimabai and her two children were taken by her maternal uncle, Appa, with the consent of her husband Ramrao, to live with him at a place called Patas.

Chimabai and her two sons lived with her maternal uncle until 1888.

On the 8th September, 1888, Chimabai sent what was called a "notice" in writing to her husband Ramrao, demanding maintenance for herself and her two children. The "notice" was as follows:—

"The date the 8th of September 1888 A.D.

"NOTICE.

"To

"Ramrao Bin Rajaram Shirole residing at Bhamburde, Taluka Haveli, District Poona.

"Notice is given by the undersigned as follows:—

"You are my husband and you married a second wife afterwards, and consequently you could not make proper arrangement for my living (with you), and you were always troubling and beating me. Thereafter during

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the period of my delivery no proper arrangements were made, and consequently I became very ill. At that time my maternal uncle had come to Poona, to whom you told that he should take me with him, as I was very ill. Therefore my maternal uncle took me to his place, *i.e.*, at Patas. Even though 2½ years have elapsed since then, you have never again inquired of me. Besides, I have two small children. You have not even cared for them, nor are you taking us to your place. You should, therefore, make arrangements for the maintenance of myself and my children from this day. This is in order. If you fail to do so, I shall take legal steps against you. You should send a reply to this Notice within fifteen days from to-day."

The result of the "notice" was that Chimabai and her two children were brought back by Ramrao, or by one of his brothers acting on his behalf, to the family dwelling of Ramrao at Bhamburda, and Chimabai and her two sons lived there until Ramrao's death in 1893.

Chimabai and her two sons after 1893 continued to live in the family dwelling-house until 1898, when Chimabai and her elder son died of the plague.

Chimabai died on the 23rd February, 1898, and Yadava, the elder son, died on the following day.

Nana's maternal uncle, Appa, went to Bhamburda for Chimabai's obsequies, and, with the consent of Bhagwantrao, the paternal uncle of Nana, he took Nana to his own home in the village of Sonavadi.

At that time Nana was twelve years old.

It is material to note that this is the date at which, according to the judgment of the High Court, Nana's connection with the family was severed, and his exclusion from the joint family property began.

Nana lived with and was maintained by his maternal uncle, Appa, at Sonavadi, and assisted his uncle in his agriculture.

Nana was illiterate. This is one of the facts relied upon by the first five defendants as showing that he was excluded from the joint family and the joint family property. It was, however, pointed out by the learned Subordinate Judge that when Nana's father died he was about seven years old and had not attained the school-going age.

After his father's death, as the learned Subordinate Judge held, Rakhmabai ruled the family, and it was not the fault of Nana that he was not put to school.

In 1898 Nana was removed to the house of his maternal uncle at Sonavadi, where there was no vernacular school, although there appeared to have been a school at Dhond, to which Sonavadi boys used to go.

It was alleged by the first five defendants, as already stated, that in 1905 or 1906 Nana went to Bhamburda and demanded a share of the family property, and that he then received a definite refusal from some of the members of the joint family. These defendants relied on this alleged incident as evidence of an exclusion from the joint family property at that time.

The learned Subordinate Judge said that he did not believe the witnesses called to prove the above-mentioned alleged demand and refusal in 1905 or 1906, and he held that Nana's demand for a share was not made until 1909, when it was refused, and that, consequently, the suit was in time.

The learned Judges of the High Court came to no definite decision as to the alleged incident of 1905-1906, but based their decision upon the general evidence in the case.

Their Lordships' attention was drawn to the evidence, upon which the first five defendants relied, to support the allegation that it was in 1905 or 1906 that Nana demanded a share of the joint family property and was refused. They are clearly of opinion that the learned Subordinate Judge's decision in this respect was right, and that there was no satisfactory evidence upon which it could be held that in 1905 or 1906 Nana made a demand for a share of the property and was refused by the members of the joint family.

Nana was married in or about 1908. His marriage took place at Sonavadi at the same time as the marriage of Appa's brother, and Appa's evidence was that Nana's marriage caused no additional cost.

It is clear that no application was made by or on behalf of Nana to the members of his joint family for any assistance towards his marriage expenses.

About two years after his marriage Nana began to live separately, and he then got some land, which he rented from the Government, at Sonavadi.

The plaintiffs' case was that in 1909 Nana went to Bhamburda and saw Bhagwantrao, who was the eldest surviving brother of Ramrao, and presumably at that time the *karta* of the family, as Ramrao died in 1893 and Rajaram died in 1900.

Nana's evidence was to the effect that at this interview Bhagwantrao advised him to continue joint and not to demand a separate share; but that he, Nana, insisted on a partition.

Then, it was alleged, Bhagwantrao promised to arrange an advance of money for Nana, and that he took Nana to Baloba Narayan Vagh, the father of the first two plaintiffs, and that he obtained the sum of Rs. 1,500 from Baloba Narayan Vagh.

Nana alleged that Bhagwantrao, although still persisting in his refusal to partition the property, did not deny Nana's share in it.

There is no doubt that Nana did obtain Rs. 1,500 from Baloba Narayan Vagh, the father of the first two plaintiffs, though, according to the deed of sale, to which reference has already been made, the said sum was not obtained until June, 1910.

On the 6th June, 1910, Nana executed the deed of sale in favour of Baloba Narayan Vagh, the father of the first two plaintiffs. It was recited therein that the properties included in the deed were ancestral and belonged to the joint family of Nana's

father and uncles, that Nana had a one-ninth share therein, and the amount of the consideration was Rs. 1,500.

The deed contained the following recital:—

“ I was six or seven years old when my father died. After my father's death my mother Chimabai and I used to live with my uncle for some days. But owing to step-motherly relations there were quarrels and disputes between my mother and other members of the family. Thereafter my mother died. Therefore I used to live with my maternal uncle, Appa Bahirji Patil Pawar, who resides at Sonavdi, Taluka Bhimthadi. About a year ago I came to Poona and asked my uncles and my stepbrothers to effect a partition and to allot to me my one-ninth share of our ancestral property. But they refused to give (my) share. I am not a permanent resident in Poona, and as I follow the occupation of a cartman at Mouje Sonavdi Peta Dhond, I cannot live at Poona and I cannot afford to fight a suit (in a court of law). Therefore I have received from you Rs. 1,500—in words, rupees fifteen hundred—as price of my one-ninth share of the aforesaid property and have sold to you my right of ownership, title and interest with respect to the one-ninth share of the said property.”

It was argued on behalf of the defendant-respondents that the recitals in the above-mentioned deed were not admissible as evidence against them on the issue whether Nana demanded a share of the property in 1909.

It was submitted that it did not come within Section 157 of the Indian Evidence Act, Act I of 1872, upon which the learned Counsel for the plaintiffs relied.

It was urged that the statement therein contained as to the fact of his having gone to Poona and having asked his uncles and stepbrothers to effect a partition about a year before the deed was executed could not be said to be a former statement made by Nana at or about the time when the fact took place, inasmuch as the statement in the deed was made a year after the fact was alleged to have happened.

It may be that this particular statement does not come within Section 157 on the ground that it was not made at or about the time of Nana's alleged interview with Bhagwantrao in 1909, but, in their Lordships' opinion, the deed is admissible in evidence as corroboration of the evidence given by Nana and his witnesses upon material matters, as, for instance, the statement by Nana that Bhagwantrao said he had no money, but that he would “ find a creditor ” for Nana, and that Bhagwantrao did take him to Baloba Narayan Vagh. In other words, the deed is some evidence of the act alleged to have been done in pursuance of Nana's interview with Bhagwantrao, and it is material on the question whether the evidence of Nana and his witnesses on this part of the case can be relied upon.

While dealing with this part of the case, their Lordships observe that it is difficult to understand how Nana would have been able to negotiate the arrangement culminating in the deed of the 6th June, 1910, without assistance from someone.

He was illiterate, he had been living away from Bhamburda since he was a boy, he would not have sufficient knowledge of his

own to enable him to describe the parcels of immovable property which are so fully set out in the deed, and it is extremely unlikely that a man in Nana's position would be able to negotiate with Baloba Narayan Vagh on his own account and without being introduced and assisted by some responsible person.

Baloba Narayan Vagh, according to the evidence of one of his sons, was on friendly terms with Bhagwantrao and lived on Bhagwantrao's land. This is the person to whom Nana said in his evidence Bhagwantrao took him.

Apart from the particular recital in the deed as to the interview with Nana's uncles about a year ago, the deed itself is material corroboration of the plaintiffs' case and was admissible in evidence.

It appears that in 1912 Nana instituted a suit against Baloba Narayan Vagh and Bhagwantrao, treating the above-mentioned sale deed as a mortgage, and alleging undue influence on the part of Bhagwantrao. He prayed for a declaration that the deed was a mortgage and that joint possession of the property should be granted. In his written statement delivered in October, 1912, Bhagwantrao denied that Nana was entitled to any share in the joint family property. This is the first occasion, of which there is any reliable evidence, when Bhagwantrao denied that Nana was entitled to a share in the family property.

There was no allegation at that time that Nana had been excluded from the joint family property in 1905 or 1906. That suit was withdrawn for a reason which it is not material to consider.

In 1914 another suit was filed by Nana against Baloba Narayan and Bhagwantrao, and again in his written statement Bhagwantrao denied that Nana was the son of Ramrao.

On the 13th of August, 1919, Nana executed a further sale deed of his share in the property in favour of the first two plaintiffs. His claim that the previous sale deed was merely a mortgage was given up and he received a further sum of Rs. 500, which, taken with the previous Rs. 1,500 and the interest thereon, was calculated to make up a total of Rs. 3,500.

The present suit was brought on the 21st of July, 1920.

The issue in this appeal is whether the suit was barred by reason of Article 127 of the First Schedule of the Indian Limitation Act IX of 1908.

The article is as follows :—

<i>Description of Suit.</i>	<i>Period of limitation.</i>	<i>Time from which period begins to run.</i>
127. By a person excluded from joint family property to enforce a right to share therein.	Twelve years.	When the exclusion becomes known to plaintiff.

The questions arising upon the above-mentioned article are :
(1) whether Nana was excluded from the joint family property ;

- (2) if he was so excluded when did such exclusion take place ;
 (3) when did the exclusion, if any, become known to Nana.

As regards the first and second questions, it was argued on behalf of the contesting defendants that it should be held that Nana was excluded from the joint family property from the year 1898, when he went to live with his maternal uncle after his mother's death, and reliance was particularly placed upon the facts that after that date Nana never resided in the family dwelling-house, he received no maintenance or education from the members of the joint family, who did not provide anything towards the expenses of his marriage, and that for many years he did not exercise his right to partition.

The above-mentioned facts are certainly material for consideration, but in their Lordships' opinion they are not conclusive on the question of exclusion of Nana from the joint family property.

There is no definition of the word " exclusion " in the Limitation Act, and it is obvious that the question whether a person has been excluded from joint family property, must depend upon the facts of the particular case which is under consideration. It was admitted in argument by the learned Counsel for the defendants that an intention to exclude is an essential element. Their Lordships are of opinion that the above-mentioned admission is correct, and that it is necessary for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude Nana.

Their Lordships are of opinion that there was no evidence which would justify them in holding that Nana was excluded from the joint family property in 1898.

The evidence goes to show that the departure of Nana from the family dwelling-house in 1898 with his maternal uncle was voluntary. He was in no sense turned out. He went with the consent of Bhagwantrao. The reason for his departure is obvious : his father and mother were dead, he was only twelve years old, and, as the learned Subordinate Judge pointed out, Rakhmabai ruled that branch of the family, and having regard to the state of affairs under that rule and to what had previously occurred, it may well have been thought better for Nana that he should go with his maternal uncle rather than remain in the same house with Rakhmabai.

It remains to be seen whether there is evidence of his exclusion from the joint family property after that date.

As he grew up he helped his maternal uncle in his agriculture and then was able to get some land for himself from the Government. It is true that he was living in a humble way, and was not educated in the same way as the other members of the joint family who were living at Bhamburda, but there is nothing to show that he was dissatisfied with the conditions under which he was living. One reason given for his not visiting Bhamburda was that he did not go on account of the quarrelsome nature of his stepmother Rakhmabai.

His marriage expenses were practically nil, as his marriage took place at the same time as that of his maternal uncle's brother.

The mere fact that during the time that Nana was living with his maternal uncle the members of the joint family did not subscribe towards his maintenance, education or marriage expenses does not, in their Lordships' opinion, having regard to the facts of this case, prove that those in control and possession of the joint family property intended to exclude him from his share of the joint family property. It is consistent with the evidence that the members of the joint family, who were in control and possession of the joint property, though willing to allow Nana to be maintained at the expense of his maternal uncle, never did anything to indicate to Nana or anyone else that they intended to exclude him from his share in the joint family property.

It is not necessary to refer in detail again to the facts of the case : it is sufficient for their Lordships to say that up to the time when Nana attained his majority in 1904 they are consistent with there having been no intent to exclude Nana from the joint family property and no exclusion in fact.

In 1904 Nana attained his majority. Their Lordships cannot find any reliable evidence that there was any change in the position until 1909.

The defendants' attempt to prove a demand by Nana in 1905 or 1906 and a refusal by his paternal uncles entirely failed. It is material to notice that Abba, the maternal uncle of Nana, was not asked in cross-examination if he had told Nana that he was entitled to a share in the joint family property, or had drawn his attention to the advisability of claiming his share : a question which their Lordships would have expected might usefully have been put to Abba.

In short, with the exception of the alleged demand in 1905 or 1906 (the proof of which failed), their Lordships' attention was not drawn to any act or acts during the period from 1904 to 1909 which would indicate an exclusion of Nana from his right to share in the joint family property.

Their Lordships have no doubt that in or about 1909 Nana did go to Bhamburda and did assert his right to a share in the joint family property.

It was argued on behalf of the defendant-respondents that the recital in the deed of the 6th of June, 1910, viz., "that they refused to give (my) share," was inconsistent with Nana's evidence.

Their Lordships do not take that view, and are of opinion that the said recital, when read with the other terms of the deed, in which it was alleged that Nana had asked his uncles and his stepbrothers to effect a partition and to allot to him a one-ninth share, so far from being inconsistent with Nana's evidence, may be said to be corroborative thereof.

If Nana's evidence is accepted *in toto*, there was not, even in 1909, any denial by Bhagwantrao of Nana's right to a share, but

merely a refusal to partition the property at that time, and their Lordships are of opinion that the sale deed of 1910 does provide material corroboration of Nana's evidence that up to that time there was no exclusion of Nana from the joint family property.

Even if it be taken that the refusal on the part of Bhagwantrao in 1909 or 1910 to agree to a partition was based on an allegation that Nana was not entitled to share in the joint family property, and that it did amount to an exclusion of Nana from such property, the suit was brought within twelve years and was in time.

The conclusion of their Lordships on this part of the case is that the evidence is consistent with there having been no exclusion of Nana from the joint family property before 1912, and that being so, the defendants have not discharged the onus of proving the exclusion on which they relied.

In view of this opinion, it is not necessary to consider the third question above mentioned. Their Lordships, however, desire to observe that, with regard to the third question, even assuming that the facts relied upon by the defendants could be said to amount to exclusion, the defendants have failed to prove that Nana was aware more than twelve years before the institution of the suit of any intention on the part of the members of the joint family to exclude him from the joint family property when he should choose to assert his rights.

In considering the whole case, it is not immaterial to remember that the main defence of the contesting defendants was that Nana was not a member of their joint family, that the further case made was that he was definitely refused a share in 1905 or 1906, and that both these allegations have been held to be unfounded.

For these reasons their Lordships are of opinion that this appeal should be allowed, that the decree of the High Court should be set aside, and the decree of the Subordinate Judge should be restored.

The respondents 1 to 5 should pay the costs of the plaintiffs of this appeal and of the appeal to the High Court, and their Lordships will humbly advise His Majesty accordingly.

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In the Privy Council.

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