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February 19.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 218 *of* 1870.

SHIDHOJIRA'V .....*Appellant.*

NA'IKOJIRA'V .....*Respondent.*

Attachment—Limitation—Act XIV. of 1859, *Sec.* 1, *cl.* 13—*Exclusive possession.*

Suits to enforce the right to share in any property, on the ground that it is joint family property, must be brought within twelve years, exclusive of the period during which the property was under attachment by Government and neither party was in possession.

A custom of primogeniture in the family of a *Desdi* in the Southern Maratha country supersedes, if clearly proved, the general Hindu Law of descent.

Case of *Subbaiya* v. *Rajesvara* (4 Mad. H. C. Rep. 354) followed.

THIS was a special appeal from the decision of C. H. F. Shaw, District Judge of Belgaum, in Appeal No. 85 of 1869, confirming the decree of the Principal Sadr Amin of Dharwar.

The suit was instituted by Shidhojiráv for a partition of, and a half share in, the entire family property, moveable and immoveable, in the possession of Náikojirá v. Shidhoji alleged in the plaint that his great-grandfather, Narsojiráv, and the defendant's grandfather, Singájiráv, were brothers; that the property was joint property till 1853, when the defendant ousted him (plaintiff) in execution of a decree, obtained by the defendant in that year against the plaintiff's father. The defence chiefly was that the claim was barred by the law of limitation and that the family was divided. The Court of first instance threw out the claim, as barred by limitation.

In appeal, the District Judge raised the issues: (1) whether the custom of the family of the *Adkar Desáis* supersedes the Hindu law of partition of the *Watán* and permits only

maintenance to cadets, and if so, whether this custom is good; (2). Whether the claim is barred by Act XIV. of 1859.

The Judge found that, in the family of the *Desáis*, a custom existed which did not admit of partition of the family property, but only allowed maintenance to younger members. He, however, held that the custom was not to prevail against the law of the land. He also held the claim to be barred under Act XIV. of 1859, Sec. 1, Cl. 13.

The special appeal was argued before SARGENT, Acting C.J., and MELVILL, J.

Leith (with him *Shántárám Náráyan*) for the appellant.

The Hon. A. R. Scoble (Adv. Gen.) (with him *Bhairavnáth Mangesh*) for the respondent.

SARGENT, C.J.:—The first question in this case is whether the suit is barred by the Act of Limitation. The claim is for a share of a *watan* alleged to be joint family property. That such is its character is not denied by the defendant, and the question must, therefore, be determined by the application of Cl. 13 of Sec. 1 of Act. XIV. of 1859.

The true construction of that section is, we think, in the main, correctly expressed by the High Court of Madras in the case of *Subbaiya* v. *Rajesvara* (*a*). "What is necessary," they say, "to constitute the bar is proof of possession and enjoyment of the property, as the possessor's own separate property, to the absolute exclusion of the person suing to enforce the right to share, for twelve years computed from either of the events mentioned in the clause, so as to rebut the presumption of constructive joint-possession arising out of the relation of co-parceners." Or to adapt the rule to the more general case, there must be possession and enjoyment by some one or more of the other members of the family, or by some one managing on behalf of the family, without participation by the plaintiff, or persons through whom he

(*a*) 4 Mad. H. C. Rep. 357.

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claims in the usufruct of the property. Now, assuming that the first clause of the section, which makes the time run from the death of the persons from whom the plaintiff claims, is applicable to a family governed by Mitákshará law, there is no evidence in the present case of exclusive enjoyment by the plaintiff's branch of the family previous to the death of Appáji, although there may be of possession and management. Nor can the Judge, we think, be understood as meaning more than this when he says: "There can, however, be no doubt but that Appá was the acknowledged proprietor at the time of his death in 1844, and that Amrut was merely his manager," for he goes on to say: "The judgment of the District Court at Dharwar merely had the effect of declaring the *státu quo* of parties; and if Shidhoji and his mother had acted wisely, proceedings should at once have been commenced to effect partition."

As to what occurred after the death of Appá, the late *Desái* of Adkur, it is admitted that Amrut, the plaintiff's father, had exclusive enjoyment until 1845 when the property was attached by the Assistant Political Agent at the instance of the defendant's mother. Between that time and 1853, when Náikoji was put into possession, neither party enjoyed the estate, and it was not until the last-mentioned year that the defendant acquired exclusive possession and enjoyment. As the plaint was filed on the 29th March 1864, twelve years had not elapsed since then before the present suit was instituted. It was, however, urged that the Political Agent must be deemed to have been in possession on account of the defendant, who ultimately succeeded in the suit instituted by him in 1847. But a constructive possession of that nature, by making the decree in that suit relate back to the date of the attachment, is, in our opinion, inadmissible in a question under the Act of Limitation. The question is what was the actual state of things during the period in question; and neither of the members of the family during that time was either in possession or enjoyment of the *vatan*. We think,

therefore, that the Court below was wrong in holding that the suit was barred; and it becomes necessary to consider whether effect can be given to the family custom, which the Court has found to be proved, namely, that cadets should receive maintenance and not partition.

By Sec. 21 of the Amended Letters Patent of 1865, the High Court, in its appellate jurisdiction, is directed to administer the same law, equity, and rule of good conscience, as the Court, in which the proceedings in the case were originally instituted, ought to have applied.

That law, by Sec. 26 of Regulation IV. of 1827, is to be the "usage of the country" *in* which the suit arose; and if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity, and good conscience alone. The expression "usage of the country" is sufficiently general to allow either of a very large or restricted application. In the case of *Basvantráv Kedingáppá* v. *Mantáppá Kedingáppá* (*b*), the defendants pleaded a custom, for many generations in the family, by which the younger members received only a grant of land for their maintenance, and had no right to enforce partition of the *watan;* and the Court, whilst doubting whether the custom was sufficiently proved, refused in any case to give effect to it, saying "that it would be a dangerous doctrine that any petty family (and in the case under consideration a third of the family property is valued for the purposes of the suit at little more than Rs. 500) is at liberty to make a law for itself, and thus to set aside the general law of the country."

It is to be remarked that in the case cited, the family did not belong to any particular class or section of the community, and that the custom set up was that of a single family. In the present case, the family are *Desáis,* and belong to a class who, at one time, at least, occupied an important position in this Presidency; and further, the alleged custom would appear,

(*b*) 1 Bom. H. C. Rep. Appx. 42, 2nd Ed.

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from Steele's work on the Laws and Customs of Hindoo Castes in the Dekkan Provinces, to be in accordance with a very general usage of that class of hereditary officers. At page 229 he says: "Among Desmookhee Wuttundars, in some places, the eldest takes the whole property, giving, to his brothers and relations, villages, shares of villages, haks or nemnooks, for their subsistence. In others, the eldest reserves to himself a larger share, with the privileges of Burepuna and Karbharee or management, giving the rest a smaller share each. In others, the eldest merely takes the management and Burepuna privileges, all sharing the property equally." He then deals with the cases of Deshpandeys, Patells, and Koolkarnies, showing that the practice, in some shape or other, of providing for the support of the entire family, without actual partition, is very general amongst all the district and village hereditary officers. Sir H. Maine, in his Ancient Law at p. 294, points out how the general law of equal distribution of property yields to the exigencies of the case, when the property is associated with an hereditary public office. He says: "All offices, in India, tend to become hereditary, and, when their nature permits it, to rest in the eldest member of the eldest stock." These special circumstances distinguish the present one from the one cited, as also from the case reported in 6 Mad. H. C. Rep. 93, where the Court held that a single family could not set up a particular custom in derogation of the general law. The Court, after summarising the conflicting views of Jurists on the subject of customary law, say: "That the authors, who deal with this subject, are all discussing customary law as applicable to a whole community or a large section of it. They would never have conceived it possible for a customary law antagonistic to the general law to be established by evidence of the acts of a single family confessedly subject to that general law." It is difficult to reconcile this ruling with the remarks of the Privy Council in *Soorendronath Roy* v. *Mussamut Heeramonee* (*c*). There the question was whether a single family, which had come

2 (*c*) 1 Moo. Ind. App. 91.

into Bengal from a distant part of India, had retained, as a family usage, the law of descent peculiar to that part, and the Privy Council held that the evidence established they had done so, and made use of that conclusion in deciding as to the *factum* of a disputed will. Their Lordships say: "The prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place, of the property of people of that class or race, stands on the footing of usage or custom of the family;" and "whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both."

To the same effect are the remarks of the Privy Council reported in the case of *Serumah* v. *Palathan* (*d*) where their Lordships recognize the possibility of a family custom being proved, adding that it should be distinctly proved.

In the present case, however, the alleged custom, for the reasons we have before given, cannot be regarded as the usage of a single family. To summarize what has been said, we find a general usage, amongst a large and important class of the community, of dispensing with actual partition, and providing for the maintenance of the family by specia arrangements varying in different families, the general character of which, however, is the vesting of the family property principally in the representative of the elder branch, subject to the support of the other members; and the custom now pleaded is one of the forms which the general usage assumes in numerous instances. We think, therefore, that we shall best give effect to the spirit of the Regulation, as well as to the tenor of the decisions of the Privy Council, by holding that an alleged custom, by which the property of a family, circumstanced as this is, is vested in the representative of the eldest branch, charged with the maintenance of the other members, is one which, if clearly proved, should be

(*d*) 15 Calc. W. Rep. P. C. 47.

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allowed to displace the plaintiff's right to partition under the general law.

The Judge has found the custom proved without giving any reasons for his decision, as he was bound to do, if, indeed, he intended to do more than express an opinion, having already made up his mind that the suit was barred. We cannot, therefore, accept his finding, the more particularly on a question requiring much careful examination of the evidence, and must remand the case for retrial on the merits; and, in doing so, we think it right to draw his attention to a very clear statement of the sort of proof, which is required by law to establish a legal custom, in the judgment of the Madras Court, *Sivananja* v. *Muttu* (*e*): "It must be satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the family, class, or district of country; and the course of practice, upon which the custom rests, must not be left in doubt, but be proved with certainty."

In case the Judge should find the custom proved, he should proceed to determine what provision should be made for the plaintiff. Although maintenance forms no part of his claim, we think that, in analogy to the practice, adopted by this Court in numerous cases, where a widow has sued or been sued for property and failed, of awarding maintenance where it was clear she was entitled to it: *Rázábái* v. *Sadu* (*f*), *Rakhmábái* v. *Rádhábái* (*g*), this may properly be done in the present suit, to avoid unnecessary litigation. We, therefore, reverse the decree of the Court below and remand the case for retrial on the merits having regard to the above remarks.

Costs of appeal to abide the result as to proof of custom.

(*e*) 3 Mad. H. C. Rep. 77.

(*f*) 8 Bom. H. C. Rep. A. C. J. 99. (*g*) 5 Ibid. 193.