1879

DINKAR SITARAM PRABHU v. GANESH SHIVRAM PRABHU.

The reasons for which we have to-day refused to sustain the adoption in the case of *Ramji* v. *Ghamau* are applicable in this case. It is, therefore, unnecessary to repeat them here. Yamunabai not having the estate vested in her, and not having the authority of her husband, Krishna, or of any of his co-parceners to adopt, and Dhond Prabhu being a separated kinsman of Krishna, and, therefore, not qualified to authorize the adoption (*Sri Raghunadha* v. *Sri Brozo Kishoro* (1)), it is impossible to hold the adoption of the plaintiff to be valid. We, therefore, reverse the decree of the District Judge, and restore that of the Subordinate Judge. The plaintiff must pay to the defendants their costs of the suit and of both appeals.

*Decree reversed.*

(1) L. R., 3 Ind. Apps., 154, 191, 593.

## APPELLATE CIVIL.

*Before Mr. Justice Melvill and Mr. Justice Kemball.*

1882
*February* 14.

MORO DESAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMCHANDRA DESAI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Evidence—Ejectment—Burden of proof.*

In an ejectment suit where the plaintiff claims land from which he alleges that he has been dispossessed, the general rule is that the burden is upon the plaintiff to show possession and dispossession within twelve years, or, at least, that the cause of action arose within twelve years ; and this rule is not intended to be interfered with by the Privy Council in *Radha Gobind Roy* v. *Inglis* (1)

THIS was a second appeal against the decision of J. W. Walker, Acting District Judge of Ratnagiri, confirming the decree of Rao Saheb Krishnaji Bapuji Bal, Subordinate Judge of Ratnagiri.

This was a suit in the nature of an ejectment brought in September, 1869, by the plaintiff to recover possession of some lands and other immoveable property, as well as to recover damages for the removal of a certain house and the cutting down of certain trees. The plaintiff also asked that an account might be taken as to the lands held by the defendant, Ramchandra, as a mortgagee, and that he might be allowed to redeem the said lands

* Second Appeal, No. 392 of 1881.

(1) 7 Calc. L. R. 364.

on payment of what might be found due. The plaintiff alleged that his grandfather and the grandfather of the defendant were brothers; that in 1836 there was an agreement entered into between them for a division of their property, but that no partition ever took place.

The defendant, Ramchandra, answered that a partition had actually taken place, that the suit was barred by limitation, and that he was not liable to the damages claimed. The second defendant answered to the same effect.

The Subordinate Judge rejected the plaintiff's claim, except as to three fields, which he allowed the plaintiff to redeem on payment of Rs. 110-2-0. The District Judge, on appeal by the plaintiff, found—

1st. That there was a separation in interests between the father of the plaintiff and the father of the defendant, Ramchandra, in 1836.

2nd. That in 1836 there was an agreement by which the shares of each of the members were ascertained and defined, and that, subsequently, each treated his share as separate and distinct, and that, therefore, the property ceased to be joint in that year.

3rd. That there was an actual division of certain lands, and that, in the absence of proof to the contrary, it must be taken that there has been actual division throughout of all the property; and

4th. That the plaintiff admitted, both in his plaint and in his deposition, that he had not had possession of the lands claimed since 1859; that there was no evidence adduced by the plaintiff that he was deprived of possession in that year; that the evidence adduced by the defendant went to show that the defendant, Ramchandra, had been in possession for more than twelve years before September, 1869, the date of the institution of the suit; and that, therefore, the suit was time-barred under the twelve-years' limit laid down by the Limitation Act XIV of 1859.

The decree of the Subordinate Judge was, accordingly, confirmed.

The plaintiff appealed to the High Court.

1882

MORO DESAI v. REMCHANDRA DESAI.

*Manekshah Jehangirshah* for the appellants.

*Mahadev Chimnaji Apte* for the respondent.

The judgment of the Court was delivered by

MELVILL, J.—The Courts below have held that the burden of proving possession within twelve years lies upon the plaintiff, and that he has failed to give the necessary proof.

We see no reason to believe that those Courts have either omitted from their consideration, or formed erroneous conclusions regarding any of the evidence bearing upon the question of limitation. The only question is, whether they were right in laying the burden of proof upon the plaintiff.

In actions of ejectment this Court has always laid the *onus* upon the plaintiff. The reason is stated in *Pandurang* v. *Balkrishna* (1), viz., that the limitation Acts interpose a bar to the admission of a suit, until the plaintiff satisfies the Court that his cause of action has accrued within the period of limitation. The Judicial Committee in *Maharaja Koowar* v. *Baboo Nund Lall Singh* (2) based the rule upon a similar necessity of removing the bar to an action created by Bengal Regulation III of 1793, sec. 14, which says that "the Zillah and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever against any person or persons, if the cause of action shall have arisen previous to" a certain specified date. The rule, which requires the plaintiff in ejectment to prove possession within twelve years, is laid down with equal clearness by the Judicial Committee in *Beer Chunder Jobraj* v. *The Deputy Collector of Bhullooah*(3).

On the other hand, it is contended that the more recent decision of the Privy Council in *Radha Gobind Roy* v. *Inglis* (4) establishes the proposition that in all suits for land it is sufficient for the plaintiff to establish his title, and that the burden of proving that the plaintiff has lost that title, by reason of the adverse possession of the defendant, is then shifted upon the defendant. The effect of the decision is certainly so stated in the head-note to the report; but we cannot believe that their Lordships intended, by a few remarks having reference to the

(1) 6 Bom. H. C. Rep., 125.

(2) 8 Moore's Ind. Apps., 199.

(3) 13 W. R., P. C. Rul. 23.

(4) 7 Calc. L. R., 364.

particular case before them, to upset a rule of evidence established by repeated decisions and long practice. The effect of the decision in the recent case has been much discussed by the Calcutta High Court in *Kally Churn Sahoo and others* v. *The Secretary of State for India in Council*(1) and in *Mano Mohun Ghose* v. *Mothura Mohun Roy*(2). We do not think it necessary to enter into the same discussion, or to attempt to reconcile the Privy Council decisions, feeling confident that the Judicial Committee will find no difficulty in explaining any apparent inconsistency when the question comes again before them. It is sufficient to say that the case of *Radha Gobind* v. *Inglis* was a peculiar one, having reference to the recovery of alluvial lands which had been diluviated; and we entirely concur with the opinion expressed by the Calcutta Court that there was no intention, on the part of the Judicial Committee, of interfering with the general rule that, where a plaintiff claims land from which he alleges that he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years, or, at least, that the cause of action arose within twelve years. This is the rule which has been applied to the present case; and, there being nothing in the circumstances of the case to make it an exception to the ordinary rule, we think that that rule has been rightly applied, and, accordingly, confirm the decrees of the Courts below with costs.

*Decree confirmed.*

(1) I. L. R. 7 Calc. 225.

(2) I. L. R., 6 Calc. 725.