APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Melvill.

1883
February 19.

HANSJI CHHIBA (ORIGINAL PLAINTIFF), APPELLANT, *v.* VALABH CHHIBA (ORIGINAL DEFENDANT), RESPONDENT.*

Joint family property—Partition suit—Limitation Act IX of 1871, *Schedule II, Articles* 127 *and* 143—*Act XIV of* 1859, *Sec.* 1, *Cl.* 13.

Article 127 and not 143 of schedule II of Act IX of 1871 applies to a suit by a Hindu, who having been dispossessed of, or having ceased to enjoy joint family property seeks to establish his right to a share in it; consequently where there is no allegation by the defendant that the plaintiff ever claimed and was refused his share in the family property, such a suit cannot, under that Act, be barred by any lapse of time.

Held, also, that clause 13 of section 1 of Act XIV of 1859, when it provides as the period of limitation for partition suits "the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended," must be taken to have been intended to apply, in this Presidency, to the case of a son claiming partition of joint family property after the death of his father; although, in strictness, the language of that clause would not then be applicable, inasmuch as in this Presidency, and wherever the Mitakshara law prevails, sons in such a case are considered to take by survivorship rather than by inheritance.

THIS was a second appeal from the decision of H. Hammick, Assistant Judge at Surat, reversing the decree of E. M. Modi, Second Class Subordinate Judge of Bulsar.

In 1877 the plaintiff Hansji sued his brother Valabh for a moiety of certain property in the possession of the latter, alleging that it was joint family property, and had come to them through their father Chhiba, who died in 1866.

The defendant answered (*inter alia*) that the plaintiff had lived separately from the defendant and his father for thirty years, that the property was not joint, and that the suit was barred by limitation.

The Subordinate Judge held that the property was joint, and that the plaintiff was entitled to a moiety of it.

In appeal, the Assistant Judge reversed that decree and dismissed the plaintiff's claim. The following are his reasons :—

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"This suit was brought in 1877, and it is clear that the plaintiff was dispossessed of, or relinquished his joint possession of the land some time prior to 1861, when Chhiba executed his *rajinama*. Now, the plaintiff was the elder son, and supposing that there was any unity of interests subsisting in the family, his name should have been entered as Chhiba's successor. This was not done. I, therefore, consider that the entry of Valabh's name sufficiently indicated that the possession of the land was at that time and afterwards hostile to, and in no way on behalf of, the plaintiff; also it seems clear from the case that, from that time at any rate and probably for much longer, the plaintiff got no share of the produce of the land, though as he resided in the same village he could easily have obtained it, if he had been entitled to it, I must, therefore, find that the plaintiff has been dispossessed of, or has relinquished his possession of the land since 1861, if not for a longer period, and that the possession by Valabh was inconsistent with the plaintiff's having any such right in the land as he now claims. This being the case, the suit appears to be barred under the Limitation Act of 1871, article 143, schedule II, ar illustrated by the case reported in 14 Calc. W. R. 51, where it has been laid down that possession of ancestral property is good evidence of title against a co-sharer, if shown to be exclusive and to be inconsistent with the co-sharer's having any right in the portion claimed. On the ground of limitation, therefore, I find that the plaintiff cannot now claim a moiety of the land. The decree of the lower Court is reversed."

The plaintiff appealed to the High Court.

Nagindas Tulsidas for the appellant.—The Assistant Judge was wrong in holding that the suit was barred under article 143 of schedule II of Act IX of 1871. Not that article but article 127 applies to a partition suit like the present, and article 127 provides a period of twelve years commencing from the date when the plaintiff claims and is refused his share. Here there is no allegation by the defendant any where in the case that the plaintiff ever demanded his share of the family property, and that he was refused. The suit, therefore, is not barred by any provision of Act IX of 1871.

Manekshah Jehangirshah for the respondent.—The Assistant Judge has found that the plaintiff had had no possession or enjoyment of the property in dispute since 1861. The suit was not instituted till 1877. The plaintiff's claim, therefore, was barred, even before Act IX of 1871 came into force, under the provisions of Act XIV of 1859.

SARGENT, C. J.—The Assistant Judge was in error in applying to this action the provisions of article 143, schedule II of Act IX of 1871. The suit is a suit by a Hindu, excluded from joint family property, to enforce a right to share therein, and for such suits article 127 provides a period of twelve years, commencing from the date when the plaintiff claims and is refused his share. It is not even alleged by the defendant in the present case that the plaintiff ever claimed and was refused his share. The suit is consequently not barred under the provisions of Act IX of 1871.

It was, however, contended before this Court that the suit was barred under the provisions of Act XIV of 1859 before Act IX of 1871 came into operation, and that the right of action, having been once lost, could not be revived. This was not the case made in the Court below, and it is not perfectly clear on the finding of the Assistant Judge that the plaintiff had been out of possession for twelve years when Act IX of 1871 came into operation. But, at any rate, it is certain that twelve years had not then elapsed from the death of the father of the parties. Clause 13 of section 1 of Act XIV of 1859, provided as the period of limitation for partition suits "the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended, or from the date of the last payment to the plaintiff, or any person through whom he claims, by the person in the possession or management, on account of such alleged share." This clause has given rise to many difficulties, and we are aware that in the case of *Govindan Pillai* v. *Chidambara Pillai* (1) doubts were expressed whether the first provision of the clause could properly be applied to the case of a family governed by the Mitakshara law, inasmuch as the sons in such a family take by survivorship rather than by inheritance, and, consequently, ancestral property can hardly

(1) 3 Mad. H. C. Rep., 99.

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be said to "descend" from the father. But it seems to us that this is to put too artificial a construction upon an expression in what the Judicial Committee have called "this inartificially drawn statute"—*Delhi and London Bank* v. *Orchard*(1). We cannot believe that in using the words "the persons from whom the property alleged to be joint is said to have descended," there was any intention on the part of the Legislature to make a rule of limitation which should be applicable to joint families in Bengal, but not in Madras or Bombay. It may or may not be that in Bombay a son can sue for partition during his father's life-time; but we cannot suppose that the Legislature regarded a son who abstained from doing so as sleeping upon his rights. It is very common for one son of a rayat, as in the present case, to go and seek his livelihood, while leaving his father to cultivate and support himself out of the family field; and it would be most unjust to hold that by such a proceeding the son rendered himself liable to lose his share in the estate. When the father dies, matters are very different; and if the absent son is excluded for twelve years by his brothers, it might be reasonable to apply the latter provision of clause 13. But we think that the first provision of the clause would properly have been applied, while Act XIV of 1859 was in force, to persons situated like the plaintiff, and that his suit, if brought within twelve years from the death of his father, would not have been barred by the provisions of that Act.

We, therefore, reverse the decree of the Assistant Judge and restore that of the Subordinate Judge, with costs on defendant throughout.

Decree reversed.

(1) L. R., 4 I. A. at p. 135.