

brought in to oppose the execution proceedings." Later on in the judgment they say: "The auction-purchaser must have supposed he was purchasing the entirety, and that the members of the family, who were not parties to the proceeding, can only be allowed to prove that the debt did not justify the sale."

Applying the principle to the facts of the present case, we think that, without undue refining, it is impossible to distinguish between them and those in *Bissessur Lál v. Mähárájáh Luchmeessur*⁽¹⁾. The debt was incurred by the father—the property in question had been declared liable for the debt, as in *Bissessur Lál Sahoo v. Mähárájáh Luchmeessur*⁽¹⁾—the deceased father had been made a party by his son and heir—which are the identical circumstances relied on in the case before the Privy Council. Here, moreover, the only other members of the family were minors, which strengthens the conclusion that Rághu was sued as fully representing Kondia. Looking, therefore, at the substance of the execution proceeding, the proper conclusion, we think, is that the estate in its entirety was intended to be sold. We must, therefore, reverse the decree, and send the case back for a fresh decision after a finding has been recorded on the following issue:—"Was the debt incurred for an immoral and improper purpose?" The *onus* of proof as to which lies on the plaintiffs.

Costs of this appeal to follow the result.

Decree reversed and case remanded.

(1) I. R., 6 Ind. Ap., 233.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nándhái Hariddás.

DINKAR SADÁSHIV, (ORIGINAL PLAINTIFF), APPELLANT, v. BHIKA'JI SADA'SHIV, (ORIGINAL DEFENDANT), RESPONDENT.*

Adverse possession—Joint family—Possession by one member of family—Neglect by plaintiff to take possession of his share notwithstanding request that he would do so—Limitation.

The plaintiff and the defendant were brothers and members of an undivided family. The plaintiff was in Government service, and had been for a long time

*Second Appeal, No. 727 of 1884.

1886.

JAIRÁM
BAJÁBÁSHET
v.
JOMA
KONDIA.

1887.

January 25.

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DINKAR
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SADASHIV.

absent from his native place on duty, the family property remaining under the management of the defendant. In 1863, the defendant wrote to the plaintiff, requesting him to return and manage his share of the property, or to employ some one to manage it for him. Nothing, however, was done by the plaintiff in the matter, and the defendant continued in possession. In 1882, the plaintiff sued the defendant for partition. The defendant pleaded that the suit was barred, contending that he had been in adverse possession from the date of the letter. The Court of first instance awarded the plaintiff's claim. The defendant appealed, and the lower Appellate Court reversed the lower Court's decree, holding that the suit was barred. On appeal by the plaintiff to the High Court,

Held, that the suit was not barred. The above-mentioned letter of the defendant showed that, up to the date at which it was written, the defendant had not been in possession of the property "as his own property to the exclusion of the plaintiff," and the mere circumstance that, subsequently to the date of the letter, the plaintiff had not participated in the profits, would not, in the absence of other evidence, justify the inference that the plaintiff was then excluded.

THIS was a second appeal from a decision of G. Jacob, Acting Assistant Judge of Ratnágiri.

The plaintiff sued for partition of certain ancestral property alleged to be in the possession of his brother, the defendant. The plaintiff was in Government service, and had been for a long time absent from his native place, and in his absence the defendant managed the whole property. In 1863, or 1875, as alleged by the defendant and the plaintiff respectively, the defendant wrote the letter, referred to in the judgment, to the plaintiff, requesting him to return and manage his own share of the property, or to employ some person to manage it for him. It did not appear, however, that the plaintiff had taken any steps in the matter, or that any further correspondence had passed between the brothers. The plaintiff brought the present suit in 1882.

The defendant contended that he and the plaintiff had been separated for upwards of twelve years, that his possession of the property had been adverse to the plaintiff, and that the suit was barred.

The Subordinate Judge of Dápoli was of opinion that the plaintiff's claim was not barred, and decreed in his favour.

The defendant appealed to the Assistant Judge, who reversed the lower Court's decree.

The plaintiff preferred a second appeal to the High Court.

Dáji Abáji Khare for the appellant:—The plaintiff, being in Government employment, was obliged to leave his native place and entrust the property to the management of his brother. The possession of the property by the defendant was not adverse to the plaintiff, as there had been no separation between them. To operate as a bar, the defendant must have had possession of the property, as his own, to the exclusion of the plaintiff—*Nilo Rámchandra v. Govind*⁽¹⁾. The letter of the defendant, without any further act, would not effect a separation.

Mahádev Chimnáji A'pte for the defendant:—The plaintiff clearly had knowledge of his exclusion from the property. By his letter the defendant expressly intimated that from that time he and the plaintiff would cease to be joint, and the separation must be held to have then taken place. More than twelve years elapsed between that date and the date of the plaintiff's suit, which is, therefore, barred. The plaintiff has not, in any way, participated in the profits of the estate, which has been in the possession of the defendant, and it is, therefore, for the plaintiff to show that his exclusion was not known to him—*Obhoy Churn v. Gobind Chunder*⁽²⁾.

SARGENT, C. J.:—The defendant No. 1 wrote the letter (exhibit No. 83) in 1863 to the plaintiff in the following terms: "You say, as to the fields, you will cultivate the fields of your own share. I reply: Come and do so. I write this, because it is the season for collecting grass and twigs, and some one might take them away. Thinking of this you should take into your own management your own share. Now I am not to blame. I have written this, and you may tell any one to manage your share." This letter is of considerable importance in determining whether the plaintiff's claim is barred, whether under Act XIV of 1859 or the subsequent Acts, as it shows conclusively that, at any rate up to the date of that letter—whether it was written in 1863 or 1875 it matters not—the possession by defendant No. 1 had not been "as his own property to the exclusion of plaintiff"—see *Nilo Ramchandra v. Govind*⁽³⁾. After that letter was written it would require something more

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(1) I. L. R., 10 Bom., 24. (2) I. L. R., 9 Calc., 237. (3) I. L. R., 10 Bom., 24.

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than the mere circumstance that the plaintiff, who had independent means of support as a Government employé and lived apart from the village, had not continued to participate in the profits of the field to justify the inference that the plaintiff had, subsequently to the writing of the letter, been excluded; and there is no evidence of that nature.

We must, therefore, reverse the decree of the Assistant Judge, and send the case back for a decision on the merits. Respondent to pay the appellant his costs here. Costs in the Court below to depend on the result.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánabhái Haridás.

1887.
 January 27.

KHANDERA'V RÁ'YAJIRA'V, (ORIGINAL PLAINTIFF), APPELLANT, v.
 GANESH SHA'STRI, (ORIGINAL DEFENDANT), RESPONDENT.*

Certificate of administration under Regulation VIII of 1827, Sec. 7—Holder of such certificate a transferee of decree within the meaning of Section 232 of the Civil Procedure Code (Act XIV of 1882)—Right of such person to execute decree.

A holder of a certificate of administration granted under section 7 of Regulation VIII of 1827 is a transferee by law of a decree obtained by the deceased, within the meaning of section 232 of the Civil Procedure Code (Act XIV of 1882), and is competent to apply for execution of such a decree.

THIS was a second appeal from a decision of W. H. Crowe, District Judge of Sátára.

The plaintiff, claiming to be a representative of one Kamaljábái, presented an application for the execution of a decree obtained by Kamaljábái against the defendant. Along with his application the plaintiff presented an administration certificate granted to him under Regulation VIII of 1827.

The defendant opposed the application; but the Subordinate Judge of Wái, to whom the application was presented, overruled the defendant's opposition, and ordered execution to issue.

*Second Appeal, No. 331 of 1884.