1890
SEP. 2.
APPELLATE CIVIL.
15 B. 110.

practised on [135] the head of the family, who is her rightful guardian and protector, with whom she lives, and to whom she must look for maintenance, and if he has assented to her taking a proper person in adoption, then that son takes the estate of the widow's late husband. Possibly there are, as Mr. Mayne admits (*idem*), passages in the judgments of the Privy Council from which conclusions may be drawn contrary to such a proposition. There are passages in West and Bühler's Digest, which, if taken alone, might seem to show that the consent of all the co-parceners would be necessary (see *e. g.*, pp. 959, 968, 971, 989, 999, 1001, 1007). But the general effect of all the authorities collected in the Digest and of the *dicta* of the Privy Council is in favour of the doctrine that, if there is a father-in-law alive, and he is the guardian of the widow, and no fraud is practised on him, his sole assent is sufficient, whatever may be the motives of the widow, or the effect of the adoption on the undivided kinsmen.

In the present case, therefore, the plaintiff's adoption must be upheld, and he is entitled to the partition claimed in the plaint. Regarding the details of the partition I concur with the judgment just delivered.

Decree varied.

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15 B. 135.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Candy.

RAOJI AND OTHERS (*Original Plaintiffs*), *Appellants v.* BALA (*Original Defendant*), *Respondent.** [3rd July, 1890.]

Limitation—Limitation Act (XV of 1877), arts. 131, 62—Suit to establish title to a share in an annual allowance and also to recover arrears.

A suit by a co-sharer to establish his title to a share in an annual allowance received by the defendant from Government is one falling under art. 131, and not 144, of the second schedule of the Limitation Act (XV of 1877).

The plaintiffs sued to establish their title to a half share in the *deshmukhi* allowance annually received by the defendant from the Mamlatdar's treasury, and also to recover six years' arrears. Both the lower Courts found that the plaintiffs had not received their share of the allowance at any time within twelve years before suit, and, therefore, rejected the plaintiffs' claim as time-barred.

[136] *Held*, in second appeal, that the plaintiffs' claim for a declaration of their title to the allowance was governed by art. 131 of the Limitation Act (XV of 1877), under which article it would not be barred by the mere fact of the plaintiffs' exclusion from enjoyment of their share for twelve years before suit, unless it were shown that such exclusion was the result of refusal made upon a demand. The period of twelve years provided by that article would run from the time when the plaintiffs were first refused the enjoyment of the right.

Held, further, that the claim for arrears of the allowance fell under art. 62 of the Limitation Act (XV of 1877).

Held, also, that if the claim for a declaration of title to the allowance were barred, the claim for arrears would also be barred.

[**R.**, 22 M. 351 (352); 26 M. 291 (313); 5 Ind. Cas. 615=7 M.L.T. 278 (280); 8 Ind. Cas. 512 (514)=21 M.L.J. 21=9 M.L.T. 3; 15 Ind. Cas. 394=15 O C. 111; 9 M.L.J. 57 (59); **Cons.**, 34 B. 349 (353)=12 Bom. L.R. 157=5 Ind. Cas. 869.]

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* Special Appeal No. 488 of 1889.

1890
JULY 3.

APPELLATE CIVIL.

15 B. 135.

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona, in appeal No. 231 of 1887 of the district file.

The plaintiff sued for a declaration that they were entitled to a half share in the *deshmukhi* cash allowance received by the defendant from the Mamlatdar's treasury, and to recover Rs. 84 on account of arrears for the six years preceding the institution of the suit.

The defendant disputed the plaintiff's title to the cash allowance, and contended that the suit was barred by limitation.

The Subordinate Judge found that the plaintiffs had a share in the allowance, but had not received their share of it at any time within twelve years before suit.

He, therefore, rejected the claim as time-barred under arts. 131 and 132 of the Limitation Act XV of 1877.

On appeal the District Judge was of opinion that the case was governed by art. 144 of the Limitation Act, and as the defendant had been in exclusive enjoyment of the cash allowance for upwards of twelve years before suit, the claim was barred by limitation. He, therefore, confirmed the decree of the Subordinate Judge.

Against this decision the plaintiffs appealed to the High Court.

Daji Abaji Khare, for appellants.—Article 144 of the Limitation Act (1877) does not apply. This is not a suit for possession of immoveable property. It is one to establish our right to a *hak* or allowance, and, as such, falls under art. 131. Under this article time begins to run from the day when a demand is made and refused. In this case there never has been a refusal of our [137] claim. There is rather an admission of our right. It is admitted that we are in possession of certain lands in lieu of our share of the *hak*. The Courts below have entirely omitted to consider when our demand was first refused. Time would run against us from the date of the refusal—*Chhaganlal* v. *Bapubhai*(1); *Harmukhgauri* v. *Harisukhprasad*(2); *Kali Kishore Roy* v. *Dhununjoy Roy*(3); *The Ramnad Zamindar* v. *Dorasami*(4).

Ganesh Ramchandra Kirloskar, for respondent.—Article 131 of the Limitation Act has no application to a suit by one co-sharer against another for his share of an allowance received by the latter from Government. It applies to a suit as against the person primarily liable to pay the allowance. Plaintiff has been out of enjoyment for more than twelve years. His title to the allowance is, therefore, barred by limitation. If his title is barred, his right to recover arrears is also barred. See *Raiji Manor* v. *Desai Kallianrai Hukmatrai*(5); *Madvala* v. *Bhagvanta*(6); *Chhaganlal* v. *Bapubhai*(1); *Ramchandra Narayan* v. *Narayan Mahadev*(7).

JUDGMENT.

BIRDWOOD, J.—We are unable to agree with the District Judge that art. 144 of sch. II of the Limitation Act of 1877 is applicable to the present case. That article is applicable to suits for the "possession of immoveable property or any interest in immoveable property not otherwise specially provided for" by the schedule. In the present case, the plaintiffs ask (1) for a declaration of their right to a half share of certain moneys

(1) 5 B. 68. (2) 7 B. 191. (3) 3 C. 228.
(4) 7 M. 341. (5) 6 B.H.C.R. A.C.J. 56. (6) 9 B.H.C.R. 260.
(7) 11 B. 216.

received annually by the defendant on account of a *deshmukhi* allowance from the Mamlatdar's treasury; (2) for a decree for the payment of Rs. 14 per annum in future years in respect of the said allowance; and (3) for a decree for the payment of Rs. 84 in respect of arrears of the said allowance due for six years preceding the suit. Now, no doubt in the several Statutes of Limitation which have been passed by the Indian Legislature, hereditary offices have been treated as immoveable property, as is pointed out by Melvill, J., in *Chhaganlal* v. *Bapubhai* (1); but Act XV of 1877 [138] provides also "specially" (in art. 131 of sch. II) for a suit "to establish a periodically recurring right." Act IX of 1871 contained a similar provision, which was referred to in *Chhaganlal* v. *Bapubhai* (1) as being applicable to a claim against co-sharers to share in a *hak*. In *Keshav Jagannath* v. *Narayan Sakharam* (2), the opinion was expressed that art. 131 of sch. II of the Act of 1871 was rightly applied in *Chhaganlal's case* to a claim of that nature. In the judgment which Mr. Justice Candy has prepared it is pointed out that it is not strictly correct to say that art. 131 of the Act of 1871 was applied in *Chhaganlal's case*; but it is clear that the learned Chief Justice and Mr. Justice Candy, who decided *Keshav Jagannath* v. *Narayan Sakharam* (2), held that article to be applicable to a suit against a co-sharer to establish a periodically recurring right. That being so we must hold that art. 131 and not art. 144 of sch. II of Act XV of 1877 applies to the first prayer contained in the plaint. The period of twelve years provided by that article runs from the time when the plaintiffs were "first refused the enjoyment of the right." The lower appellate Court should have considered the question whether the plaintiffs ever demanded from the defendant (as alleged in the plaint) the enjoyment of the right and when they demanded it for the first time and were refused it (*cf. The Ramnad Zamindar* v. *Dorasami* (3)). No question of limitation, apart from that arising with reference to the prayer for declaration of right, arises with reference to the second prayer in the plaint. As to the third prayer, the plaintiffs cannot succeed if their claim for a declaration is barred. If it is not barred, then the third prayer would fall under art. 62 of sch. II of the Act. With reference to the foregoing remarks, we refer the following issue to the lower appellate Court for trial:—

Whether the plaintiffs' prayer for a declaration of right to share in the *deshmukhi* allowance is barred by art. 131 of sch. II of Act XV of 1877?

The finding to be certified within two months.

[139] CANDY, J.—In this case plaintiffs sued for a declaration that they are entitled to a moiety of the *deshmukhi* cash allowance received by the defendant every year from the Mamlatdar's treasury, the said moiety amounting to Rs. 14 every year. They also claimed six years' arrears (Rs. 84). They alleged receipt of their half share up to a time ten years prior to the institution of the suit, a demand then to a continuance of the moiety, and a refusal on the part of the defendant, who wished to pay to them one-third only, and a notice to the defendant in June, 1884, to pay them their due half share.

Defendant denied the plaintiffs' title, and pleaded (*inter alia*) that the claim was time-barred, the plaintiffs never having received any share of the said allowance. The Subordinate Judge found that "there is no doubt

(1) 5 B. 68. (2) 14 B. 236. (3) 7 M. 341.

1890
JULY 3.
APPEL-
LATE
CIVIL.
15 B. 135.

that plaintiffs have a share in the said cash allowance. Plaintiffs assert that they have a half share, while defendant says that they have a third share." But the Subordinate Judge discredited the oral evidence on both sides, that on the plaintiffs' behalf to show that a share of the allowance was paid to the plaintiffs within twelve years prior to the suit, and that on the defendant's side to show that the plaintiffs' share in the family was one-third, and not one-half. On the documentary evidence the Subordinate Judge held that there was a dispute between the plaintiffs' and defendant's ancestors for more than fifty years regarding the *deshmukhi watan*, and that the documents produced by the plaintiffs "do not show that plaintiffs used to get their share of the cash allowance at any time within twelve years before the institution of the suit."

As then the plaintiffs did not show that their right to receive a share of the *deshmukhi* allowance was refused at some period within twelve years before the institution of the present suit, which related to a periodically recurring right, the Subordinate Judge held that "under arts. 131, 132, plaintiffs' claim is time-barred."

On appeal the District Judge held that the article of the Limitation Act which applies is No. 144, and that the plaintiffs having failed to prove receipt of the allowance within twelve years, the suit was barred.

[140] The District Judge is wrong in holding that art. 144 of sch. II of the Limitation Act of 1877 applies to the present case. That article is applicable to suits for the possession of immoveable property or any interest in immoveable property not otherwise specially provided for by the schedule. No doubt the opinion was expressed in *Chhaganlal* v. *Bapubhai*(1), that whether under Act XIV of 1859 or under Act IX of 1871, such allowances would be immoveable property, and that the period of limitation for a claim by one sharer to recover arrears of his share from a co-sharer, who had received the allowance, would be twelve years; but the Judge who expressed that opinion (Melvill, J.) ruled in the later case of *Harmukhgauri* v. *Harisukhprasad* (2), that a claim for payment of arrears would be limited to three years. Though the right which plaintiffs claim to the money periodically payable by the defendant to them would under the Hindu law be *nibandha*, and would under that law rank for many purposes with *sthavar*, or immoveable property, a different principle must apply to sums realized and become payable, in the hands of him who has realized them, to the intended recipient. See the remarks of West, J., in *Morbhat Purohit* v. *Gangadhar Karkare* (3).

The question then arises what article of the sch. II of the Limitation Act, 1877, applies to a claim made by one sharer in a cash allowance to his share in the said allowance received from Government by the defendant. By the rulings in *Raiji Manor* v. *Desai Kallianrai* (4), and *Madvala* v. *Bhagvanta* (5), it has been established that the cause of action to establish title and the cause of action to recover arrears in the case of a periodical payment are not distinct and independent, and that when the former is barred, the right to arrears is also barred. Those cases were under the Limitation Act of 1859, and the suit was against the person or persons by whom the right was payable. But the principle is the same, whether the suit be against Government, by whom the allowance is payable, or against the co-sharer, who receives the same from the Government treasury.

(1) 5 B. 68. (2) 7 B. 191. (3) 8 B. 234 (238).
(4) 6 B.H.C.R.AC.J. 56. (5) 9 B.H.C.R. 260.

1890
JULY 3.
APPELLATE CIVIL.
15 B. 135.

[141] Therefore, in the present case if the plaintiffs' claim to establish title is barred, so, too, the claim to recover arrears must be barred. If the claim to establish title is not barred, or if the plaintiffs have already obtained a declaratory decree establishing their title, then though the plaintiffs may not have received any payment for more than twelve years prior to the institution of their suit, still the plaintiffs can always recover arrears for the three years prior to their suit. This is the effect of the ruling of this Court in *Chhaganlal* v. *Bapubhai* (1), explained by the subsequent ruling of *Harmukhgauri* v. *Harisukhprasad* (2).

In the latter case it was also ruled that art. 132 applies to suits which are brought by a '*hakdar*' against the person originally liable for payment of the '*hak*,' and not to suits by one sharer in a *watan* against another sharer or alleged sharer who has improperly received (? retained) the plaintiff's share of the '*hak*.' This disposes of the mention made by the Subordinate Judge in the present suit of art. 132, and there is no reason to differ from the ruling in the case just quoted, or to follow the decision of the Calcutta High Court in *Hurmuzi Begum* v. *Hirdaynarain* (3), where the point was summarily disposed of without argument.

In *Keshav Jagannath* v. *Narayan Sakharam* (4), it was remarked that "in *Chhaganlal* v. *Bapubhai*, which was a suit against co-sharers, art. 131 was applied, and we think rightly, in determining whether the claim to share in the *hak* was barred." This is not a strictly accurate description of what was done in *Chhaganlal's case*. For, in that case the plaintiff had previously obtained a declaratory decree establishing his right to a share in the allowance. Melvill, J., said (p. 71) : " Article 131, sch. II of Act IX of 1871 requires a plaintiff, who seeks to establish a periodically recurring right, to bring his suit within twelve years from the date when he was first refused the enjoyment of his right. If such plaintiff were to allow this period to elapse, without suing to establish his right, he could not be allowed indirectly to accomplish the same object by bringing a suit for [142] arrears falling due within the period of limitation. But while this is the rule, which must be applied to cases in which a plaintiff must establish his title, before he can ask for arrears accruing due under such title, it does not appear to us that the same rule applies, when, as in the present case, the plaintiff has already in a former suit obtained a decree declaratory of his title. It is no longer necessary for him to establish his periodically recurring right against any person who is bound by that decree ; and this being so, we find nothing in the law of limitation which can be construed into a restriction of the plaintiff's right to recover the arrears falling due within the period of limitation "—held in that case to be twelve years, but shown in the subsequent case of *Harmukhgauri* v. *Harisukhprasad* to be three years.

The question as to the applicability of art. 131 of sch. II of the Limitation Act to such a case as the present one has never before been expressly decided. In *Chhaganlal's case*, as shown above, the plaintiff merely claimed arrears, having established his title in a previous suit. In *Keshav Jagannath* v. *Narayan Sakharam* (4) the suit, as originally framed, was simply for arrears. By amendment of the plaint a declaration of title was asked for ; but the Subordinate Judge held that this was unnecessary, and gave a decree for the arrears only. On appeal the

(1) 5 B. 68.
(2) 7 B. 191.
(3) 5 C. 921.
(4) 14 B. 236 (241).

1890
JULY 3.
APPELLATE CIVIL.
15 B. 135.

District Judge held that title must be proved; but he rejected the claim under art. 123, sch. II, Limitation Act of 1877. On second appeal to this Court the sole question argued was the applicability of art. 123; and as this was found in the negative, the decree of the Subordinate Judge was restored. In *Harmukhgauri's case* (1) the suit was filed for declaration of title and for arrears. But the question as to what article of the schedule would apply in regard to the claim for declaration of title was never really raised, and the final decision of the High Court dealt solely with the claim to arrears. In *Desai Maneklal Amratlal* v. *Desai Shivlal Bhogilal* (2) in the head-note to the report it is stated that the plaintiff brought this suit to establish his right to his share of the allowance. A reference to the record, [143] however, shows that the suit was simply to recover the share for certain years. In *Dulabh Vahuji* v. *Bansidharrai* (3) and in *Morbhat's case* (4) the plaintiff had previously (as in *Chhaganlal's case*) obtained a decree establishing his title.

Thus the question is whether the opinion expressed in *Chhaganlal's case* and repeated in the case of *Keshav Jagannath* v. *Narayan Sakharam* (5), though not necessary to the decisions in those cases, as to the applicability of art. 131, is correct, that is, whether in the case of a claim, to which the Limitation Act of 1877 is applicable, made by a co-sharer to establish his title to a share in an annual allowance, it being found as a fact that within twelve years he has enjoyed no possession of the right claimed, the claimant can rely on art. 131 of sch. II, and can contend that his claim is not barred, so long as it is not shown that he was first refused the enjoyment of the right more than twelve years prior to the institution of the suit.

In one view of the question, no doubt, art. 127 may be said to be applicable, and under Act IX of 1871, the point would not be of much importance, for under both articles (127 and 131) in the Act of 1871 limitation began to run from the time when the plaintiff was refused his right or share. But in the Act of 1877 an important change was made in art. 127, and limitation was made to run from the time when the exclusion became known to the plaintiff. Were this article applicable to the present case, then possibly under the findings of fact recorded by the lower Courts, we should be bound to hold that plaintiffs had been excluded to their own knowledge for more than twelve years.

But art. 127 provides for a suit "to enforce a right" (not "to establish a right"), and by this phrase is intended a claim to obtain actual possession: *cf.* the terms of art. 132. Thus art. 127 is meant to apply to suits for partition, whether the whole family property has remained joint, or whether on a partition one portion has been left undivided. What would bar the operation of art. 127 in the latter case would be a possession [144] of that portion conceded to and taken by one of the sharers as the common property of himself and the other sharers. (*Cf.* remarks of this Court in *Ramchandra* v. *Narayan* (6) quoting *Dadoba* v. *Krishna* (7)). Such a description does not apply to the present case. The receipt of the allowance from Government by defendant and by defendant's father would not be an enjoyment implying the joint right. The property in its very nature cannot be joint. If the plaintiff's title is proved, all that can be said is, that defendant

(1) 7 B. 191. (2) 8 B. 426. (3) 9 B. 111. (4) 8 B. 234.
(5) 14 B. 236. (6) P.J. for 1886, p. 325. (7) 7 B. 34.

1890
JULY 3.

APPELLATE CIVIL.

15 B. 135.

receives the allowance every year under an obligation, which amounts to an implied contract, to pay over a certain share to the plaintiffs. As the Subordinate Judge remarked, " this is not a partition suit." There may be many cases of such allowances, in which by alienation or otherwise some shares are held by persons not members of the joint family. Article 131 is, therefore, applicable to the present case ; and in this view of the matter a distinct finding is necessary by the District Judge as to whether the plaintiffs have been refused the enjoyment of the right and, if so, when were they first refused. Mere absence of enjoyment is not enough. There must be an express repudiation of the claim. Long exclusion from enjoyment may be an evidentiary fact of great importance in considering the question whether title is proved ; but as regards art. 131 of Limitation Act, 1877, it has no force, unless it is shown that the exclusion is the result of refusal made upon a demand. I concur, therefore, in an order remanding the case to the District Judge for a finding on the issue whether the claim is barred under art. 131 of the Limitation Act of 1877.

Decree reversed and case remanded.

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15 B. 145.

[145] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

VITHU *(Original Plaintiff No. 3), Appellant v.* BHIMA *(Original Plaintiff No. 2), Respondent.** [15th September, 1890].

Civil Procedure Code (Act XIV of 1882), s. 367—Procedure when rival parties claim to be the representatives of deceased plaintiff—Rival claimants cannot all be admitted on the record as legal representatives of a deceased plaintiff—Appeal—Appeal by one plaintiff against another—Practice—Procedure.

Pending a suit for redemption, one of the plaintiffs died. Thereupon A., claiming as the adopted son, and B., as the daughter of the deceased, made separate applications, under s. 365 of the Code of Civil Procedure (Act XIV of 1882), to be placed on the record. The Subordinate Judge ordered both claimants to be entered on the record as legal representatives of the deceased plaintiff, and proceeded with the suit. At the hearing, he found that A.'s adoption was proved, and that B. was not the legal heir of the deceased. He, therefore, passed a decree for redemption in A.'s favour.

Against this decree B. appealed, making A. alone the respondent in the appeal. The appellate Court held that B., and not A., was the heir of the deceased. It, therefore, passed a decree in B.'s favour and against A. On second appeal to the High Court,

Held, that the Subordinate Judge could not, under s. 367 of the Code of Civil Procedure (Act XIV of 1882), admit on the record both the rival claimants as legal representatives of the deceased plaintiff, or adjudicate by his decree between their rival claims.

Held, also, that the appellate Court ought not to have allowed one plaintiff to appeal against the other, or to have decided the rights of different plaintiffs *inter se.*

[F., 13 Ind. Cas. 564=51 P.R. 1912=139 P.W.R. 1912; R., 16 B. 119; 27 B. 162.]

SECOND appeal from the decision of M. H. Scott, District Judge of Satara, in appeal No. 159 of 1888 of the District File.

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* Second Appeal, No. 958 of 1889.