

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.

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

Decree reversed and case remanded.

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.

* Second Appeal, No. 958 of 1889.

1890
SEP. 15.
—
APPEL-
LATE
CIVIL.
—
15 B. 145.

This action was instituted by Manyaba, and Rama, widow of Babaji, to redeem certain lands from mortgage.

Manyaba died shortly after the institution of the suit, and his son, Ravji, was allowed to continue the suit in his place.

Rama also died pending suit. Thereupon Vithu, claiming as the adopted son, and Bhima, as daughter of the deceased, made separate applications under s. 365 of the Code of Civil Procedure (Act XIV of 1882) to be entered on the record. The Subordinate Judge ordered both the rival claimants to be put on the record in place of the deceased plaintiff, and proceeded with [146] the suit. He raised issues, first, as to the *factum* of Vithu's adoption, and, secondly, as to the relationship of Bhima to the deceased. He found that Vithu's adoption was proved, and that he, and not Bhima, was the heir of Rama. He, therefore, passed a decree for redemption jointly in favour of Vithu and Ravji.

Against this decision Bhima appealed to the District Court, making Vithu alone the respondent.

The District Judge held that Vithu's adoption was not proved, and that Bhima was the daughter and heir of the deceased Rama. He amended the decree of the Subordinate Judge by declaring that Bhima, and not Vithu, was entitled to redeem jointly with Ravji.

Against this decision Vithu preferred a second appeal to the High Court.

Ganesh Ramchandra Kirloskar, for appellant.—The District Court ought not to have allowed one plaintiff to appeal against the other. It is not merely an irregular, but illegal, procedure: see *Bhaghirthibai v. Baya*(1). The whole proceeding in appeal must, therefore, be quashed.

Daji Abaji Khare, for respondent.—No objection was taken to this procedure in the Court below. It is too late, therefore, to object to it here. If no appeal lies as between co-plaintiffs, then this Court in second appeal has no power to interfere in the matter—*Har Narain Singh v. Kharag Singh* (2).

JUDGMENT.

BIRDWOOD, J.—On the death of the plaintiff Rama, applications were separately made by Vithu and Bhima under s. 365 of the Code of Civil Procedure (Act XIV of 1882). The Subordinate Judge admitted both the rival claimants to be the legal representatives of the deceased for the purpose of prosecuting the suit. This order is opposed to the plain provisions of s. 367 of the Code. After hearing the suit, the Subordinate Judge came to the conclusion that Bhima had no right to the property in suit, as she was not the legal heir of Rama, and he made a decree in favour of Vithu only. Against this decree Bhima appealed, making Vithu alone the respondent, and the lower appellate [147] Court amended the Subordinate Judge's decree and made a decree in favour of Bhima and against Vithu. Vithu now appeals to this Court against this decree.

We think that the second appeal is admissible, and that in the appeal we can deal with any illegal order that may have been made by either of the lower Courts (see *Har Narain Singh v. Kharag Singh* (2)). The Subordinate Judge was clearly wrong in adjudicating by his decree between the rival claims of the two co-plaintiffs on the record, who, if

(1) 5 B. 264.

(2) 9 A. 447.

successful as against the defendant, were entitled to a joint decree, which would leave it open to them to adjust their respective claims subsequently. And the District Judge ought not to have allowed one plaintiff to appeal against the other, or to have decided the rights of different plaintiffs *inter se* (see *Bhagirihbai v. Baya* (1)). As these erroneous proceedings had their origin in the illegal order of the Subordinate Judge in admitting on the record two rival claimants as the legal representatives of the deceased plaintiff, instead of either staying the suit until the matter in dispute had been determined in another suit, or deciding at or before the hearing of the suit who should be admitted to be the legal representative for the purpose of prosecuting the suit, it is necessary that the case should be reconstituted on a legal basis.

1890
SEP. 15.
—
APPEL-
LATE
CIVIL.
—
15 B. 145.

We, therefore, reverse the decrees of both the lower Courts and the order admitting Vithu and Bhima as the legal representatives of Rama, and remand the case to the Court of first instance, in order that it may adopt the procedure laid down in s. 367 of the Code of Civil Procedure, and re-hear the case according to law. Costs to abide the result.

Decree reversed and case sent back.

15 B. 148.

[148] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

VISHVANATH GOVIND DESHMANE (*Original Plaintiff No. 2*), Applicant v. RAMBHAT (*Original Defendant*), Opponent.* [17th September, 1890.]

Civil Procedure Code (Act XIV of 1882), ss. 539 and 622—Suit by trustees to eject persons in wrongful possession of trust property—High Court's powers of revision—Jurisdiction—Practice.

Section 539 of the Code of Civil Procedure (Act XIV of 1882) has no application to a suit brought by the trustees of a religious endowment to eject persons in wrongful possession of the trust property.

The plaintiffs sued, as trustees of a temple, to recover certain trust property from defendants, who were alleged to be in wrongful possession. The defendants pleaded that they were owners of the property in dispute and applied the income thereof for the purposes of the temple. They disputed the plaintiff's title to the management or possession of the same. The Subordinate Judge, who tried the case in the first instance, held that the defendants were trustees with respect to the property in their possession, and that the suit was one of the nature contemplated by s. 539 of the Code of Civil Procedure (Act XIV of 1882). He, therefore, returned the plaint for presentation to the District Judge. This order was confirmed on appeal.

Held, that the Subordinate Judge had jurisdiction to entertain the suit.

Held, also, that the High Court had power, under s. 622 of the Code of Civil Procedure, to interfere in this case, the Subordinate Judge having failed to exercise a jurisdiction vested in him by law.

Held, also, that the suit was not one falling under s. 539 of the Code of Civil Procedure.

[F., 24 B. 170 (181) = 1 Bom.L.R. 649; 36 B. 29 = 13 Bom.L.R. 989 = 12 Ind. Cas. 577; 33 C. 789 = 10 C.W.N. 581; Rel., 16 M. 31 (32); R., 21 B. 537; 35 B. 470 = 13 Bom.L.R. 690 = 12 Ind. Cas. 30; 18 Ind. Cas. 555 = 24 M.L.J. 112 = 13 M.L.T. 60; 3 O.C. 299 (302); 8 O.C. 257 (259).]

* Application No. 96 of 1890 under Extraordinary Jurisdiction.

(1) 5 B. 264.