1893
OCT. 16.
ORIGINAL CIVIL.
18 B. 189.

acting for the trustees in this case must be regarded as acting for the charity, and we think the Court has jurisdiction in the matter.

[197] We have also been referred to the rule by which it is ordered that all bills of costs are to be taxed. The existence of this rule no doubt adds force to the argument for the respondent; but, quite independently of that rule, the Court in a case like the present would, in our opinion, have power to enforce taxation.

We are asked to add words to this order to the effect that it is made without prejudice to the rights of the solicitors to claim in respect of certain items of charge which they have omitted from these bills of costs. I do not think we ought to add anything to this order. No case of error or omission has been argued before us, and the affidavits which have been filed do not deal with the subject. Under these circumstances we shall leave the order as it stands.

Order affirmed.

Attorneys for the appellants :—Messrs. *Ardesir, Hormasji and Dinsha.*
Attorneys for the respondent :—Messrs. *Chalk, Walker and Smetham.*

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18 B. 197.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KRISHNABAI (*Original Defendant*), *Appellant v.* KHANGOWDA (*Original Plaintiff*), *Respondent.** [27th February, 1893.]

Hindu law—Partition—Minor—Partition effected without taking into account a minor co-parcener—Such partition invalid—Limitation.

A partition effected without reserving any share for a minor member of the family, and without the consent of some one authorized to act on his behalf, is invalid as against the minor.

Three brothers S. L. and K. were members of a joint Hindu family. In 1862, S. and L. divided the whole of the family property between them without reserving any share for their brother K. who was then a minor. K. lived with L. as a member of his family. L. died in 1867 leaving a childless widow with whom K. continued to live till his death in 1876. K. left an infant son (the plaintiff), only a year old. Subsequently S. died in 1887, leaving two widows without issue. In 1889 the plaintiff, being still a minor, sued by his next friend to recover either [198] the whole or one-third of the family property in the possession of the widows of L. and S. The principal defences to this suit were (1) that it was time-barred, and (2) that the plaintiff was not entitled to claim more than one-third of the property in suit.

Held, that the partition made by S. and L. in 1862 was invalid, as it was made without reserving any share for their minor brother K. and without taking him into account. K's son was, therefore, entitled to recover the whole of the ancestral property as the sole surviving male member of the family.

Held, also, that the suit was not barred by limitation either under Act IX of 1871 or Act XV of 1877 in the absence of any evidence showing that K. ever demanded partition and was refused, or that he was excluded to his knowledge from all participation in the family property.

[F., 22 B. 259 (261); Appr., 31 C. 262 (P.C.)=6 Bom.L.R. 1=8 C.W.N. 146=31 I.A. 10=14 M.L.J. 8 (12).]

APPEAL from the decision of Rao Bahadur Gopalrao Vinayek Bhanap, First Class Subordinate Judge of Belgaum, in suit No. 416 of 1889.

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* Appeal No. 24 of 1891.

1893
FEB. 27.
APPELLATE CIVIL.
18 B. 197.

The property in dispute belonged to one Khangowda, who died about thirty years ago. Khangowda left behind him three sons, namely, Shidgowda, Linggowda and Kalgowda.

In 1862 Shidgowda and Linggowda divided the whole ancestral property between themselves without giving any share to Kalgowda, who was then a minor.

Kalgowda lived with Linggowda as a member of his family. On Linggowda's death without issue in 1867, he continued to live with Linggowda's widow Krishnabai (defendant No. 3). She got him married and he and his wife lived with her till his death in 1876.

At Kalgowda's death in 1876 his son (the plaintiff) was an infant, only one year old.

In 1887 Shidgowda died, leaving two childless widows (defendants Nos. 1 and 2).

In 1889 the plaintiff, who was still a minor, sued by his next friend to recover possession of the immoveable property in the defendant's possession, alleging that his father and uncles were members of a united family; that on the death of Shidgowda the whole of the ancestral property passed to him by right of survivorship, and that even if it were held that the family property was divided, he was at least entitled to one-third share of the property in dispute.

Defendants Nos. 1 and 2 did not contest the suit.

[199] Defendant No. 3 (the widow of Linggowda) pleaded that the plaintiff's father had been dedicated to a *math*, that after his dedication his brothers Linggowda and Shidgowda had, in 1862-63, divided the whole family property into two equal shares, and that since then they had been in separate possession and enjoyment of their respective portions as absolute owners, and that the suit was, therefore, time-barred.

The Subordinate Judge held that the alleged dedication of plaintiff's father was not proved; that the suit was not time-barred; that the partition made by Linggowda and Shidgowda was not binding on plaintiff's father, as he was not a party to it, and as, moreover, it was effected in fraud of his right; that there being no valid partition the family remained joint and, that the plaintiff as the sole surviving member of his family was entitled, to the whole of the family property. He, therefore, passed a decree awarding possession of the whole property to the plaintiff.

Against this decree the defendant No. 3 appealed to the High Court.

Inverarity (with him *Mahadev B. Chaubal*) for appellant (defendant No. 3):—We contend, in the first place, that the claim is barred by limitation. There was an actual division of the family property. It took place so far back as the year 1862. Ever since then both Linggowda and Shidgowda have dealt with the portions in their possession as their own absolute property. Their possession has been clearly adverse to the plaintiff and his father for more than twelve years. Plaintiff's father attained majority in 1876. He was then entitled to sue for partition. The present suit was not filed till 1889. The suit is, therefore, barred by limitation. Even if the claim be not time-barred, the plaintiff is not entitled to more than one-third of the property in suit.

Jardine (with him *Ganpat Sadashiv Rao*), for the respondent:—Where there are three brothers, two of them cannot divide the family property without consulting the third. In this case Linggowda and Shidgowda divided the ancestral property without reserving any share for their minor brother. The division is, therefore, invalid and cannot bind the minor. That being

1893
FEB. 27.
APPELLATE CIVIL.
18 B. 197.

the case, so far as the minor is concerned, he is entitled to regard the [200] family as still a united family. And as a matter of fact the minor Kalgowda lived with his brothers as a member of a joint family. He came of age in 1873, when the *Limitation Act* IX of 1871 was in force. Under that Act, and until there was a demand for partition and a refusal, limitation did not begin to run against a co-heir seeking partition. In this case there is no evidence to show that Kalgowda ever demanded partition and was refused. He died within three years after attaining majority, leaving behind him a minor son, the plaintiff in this case, who is still a minor. The suit is, therefore, not barred by limitation. Refers to *Kazi Ahmed* v. *Moro Keshav* (1); *Kane Bable* v. *Antaji Gangadhar* (2).

JUDGMENT.

CANDY, J.—In this case, in my opinion, the question as to the right of the plaintiff to claim one-third share or the whole of the ancestral property does not arise. For the plaintiff's right to obtain possession of the family property which was in the possession of the widows of Shidgowda is admitted. The only question is as to the property which has been for many years in the exclusive possession of Krishnabai, the widow of Linggowda. If limitation had not begun to run against plaintiff's father Kalgowda as regards this property, when he died in December, 1876, then there can be no bar; because, admitting Krishnabai's adverse possession since December, 1876, up to the present time, the present plaintiff was one year old only when Kalgowda died, and the present suit has been filed by his mother and guardian, he being still a minor. It is evident, on the facts established by the evidence, that limitation was not running against Kalgowda when he died as regards the property which was managed by Linggowda after the partition in 1862, till his death in 1867, and after his death by his widow Krishnabai. Whatever may have been the motives of Shidgowda and Linggowda in entirely ignoring their infant brother Kalgowda in the partition of 1862 (possibly they then thought that he would be dedicated to the service of the *math*), it is clear that Kalgowda when he came back from the *math* lived with Linggowda as a member of his family. After Linggowda's death in 1867 he continued to live with Krishnabai; she got him married in her house, and he and his wife were united in food and [201] residence with her till the day of his death in December, 1876. He allowed her to continue in management of the lands, but his existence as a member of the family and co-parcener in the property was recognized. On two mortgage bonds of 1871 his formal assent was taken. How far he was, and his son now is, bound by the acts of Krishnabai, who was allowed to exercise the rights of managership in respect of the property, need not now be considered. But it is evident, that Kalgowda could, at any time, have claimed possession of the property, and thus the present claim is, in no way, barred. Under this view of the facts, it is clear that the decree of the Subordinate Judge must be confirmed with costs.

FULTON, J.—The only points urged by the learned counsel for the appellant were:—(1) Whether on the facts found proved by the Subordinate Judge the plaintiff was entitled to recover more than one-third of the property in dispute? (2) Whether the suit was not time-barred? On both questions the answer must, in my opinion, be in favour of the respondent.

(1) P. J. (1878) 120. (2) P.J. (1886) 315=11 B. 455.

1893
FEB. 27.
APPELLATE CIVIL.
18 B. 197.

There were three brothers, Shidgowda, Linggowda and Kalgowda, of whom the first two divided the property between themselves, in 1862, without reserving any share for their minor brother Kalgowda, or apparently taking him into any account. Possibly, the reason for this action was their belief that he had been dedicated to a *math*; but it has been found that there was, in fact, no such dedication, and the finding is not disputed. In these circumstances, it seems clear that, so far as Kalgowda was concerned, the partition was not binding on him. Whatever may be the right of the father of a Hindu family to effect partition among his sons without their consent by the exercise of his own will, and whether or not a fair partition among the adult male co-parceners with the reservation of a minor's proper share may be binding on the minor, there seems no authority for the proposition that a partition, such as was here effected which did not consider the minor at all, could have any effect whatever on his position or leave him otherwise than a member of (what so far as he was concerned remained) an undivided family. Hindu law recognizes the equal rights of brothers in ancestral property, and [202] its authority cannot be relied on to uphold a partition manifestly inconsistent with its provisions. Apart from Hindu law, it was not suggested that two joint owners could, without the consent of the third, or of some person legally authorized to consent on his behalf, alter his position as joint owner of the whole property.

The only question, then, remaining for consideration is whether the plaintiff's claim to recover the whole property is time-barred. Linggowda died about 1867; Kalgowda, the father of the plaintiff, in 1876; and Shidgowda in 1887. The exact date at which Kalgowda came of age is not quite certain, but probably he attained the age of majority under the Hindu law then in force about nine years before his death or in 1867 (*vide* Ex. 50). This is the view put forward by the appellant's counsel, and for the sake of argument I accept it as the one most favourable to his case. It is clear, however, that Kalgowda's rights in the property were not extinguished either by Act XIV of 1859 or by Act IX of 1871. The former Act did not remain in force for twelve years after the partition of 1862, and it is not alleged that there was ever any demand for partition by Kalgowda such as would render applicable art. 127 of Act IX of 1871. We have then to consider whether time had begun to run against him under art. 127 of the present Act. The burden of proving the fact of Kalgowda's exclusion to his knowledge rests on the defendant, and it does not seem to me that there is anything in the evidence to establish such exclusion. It was urged that he must have known of the third defendant's enjoyment of a part of the family property, but I do not think it is shown that he was aware of an intention to exclude him from his rights when he chose to assert them. He was a party to her mortgage (Ex. 50); but the fact that it was thought necessary to make him a party, indicates rather an acknowledgment than a denial of his rights. According to Krishnabai's evidence he lived principally with Shidgowda, but he died in the house of Krishnabai, with whom he was evidently on good terms (1). No attempt was ever made to allot him any separate share whatever, and it cannot be assumed that he ever assented to the partition made [203] during his minority; for it would require very strong evidence to show an assent to his own entire exclusion from his rights. Exhibit 50 shows that he was aware of the

(1) *Cf.* P.J. (1886), 315=11 B. 455.

1893
FEB 27.
APPELLATE CIVIL.
18 B. 197.

partition deed of 1862, but the omission to allot him any share indicates that the matter was allowed to rest, and that no attempt was made to define his interest in the property. Under these circumstances, I do not consider that limitation ever began to run against him, nor has it ever begun to run under art. 127 against the present plaintiff, who is still a minor. Consequently, up to the death of Shidgowda in 1887, the plaintiff still retained his right to sue for partition, and the appellant's tenure of the property, in her possession, is not proved to have been adverse to him up to that period. On the death of Shidgowda, plaintiff's right to sue to enforce his right to share in the property probably ceased, and his right to sue for possession of the whole property commenced. To such a suit art. 144 would apply, but as less than twelve years have elapsed since Shidgowda's death, and as, moreover, the plaintiff is a minor, his right to sue is clearly not barred under this article.

The decree must accordingly be confirmed with costs.

Decree confirmed.

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18 B. 203.

APPELLATE CIVIL.

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

SAKHALCHAND RIKHAWDAS AND ANOTHER (*Original Plaintiffs*), *Appellants v.* VELCHAND GUJAR AND OTHERS (*Original Defendants*), *Respondents.** [28th February, 1893.]

Decree—Execution—Limitation—Appeal—Appeal against part of decree—Decree affirmed in appeal—Decree to be executed is the appellate decree, and limitation runs from date of that decree.

In a suit for the value of goods and damages, the Court allowed the claim with respect only to a portion of the plaintiffs' claim, and rejected the rest. The plaintiffs appealed against the latter part of the decree. The decree was confirmed in appeal. The plaintiffs applied for execution of the decree after the expiration of three years from the date of the original decree, but within three years from the date of the appellate decree. The lower Court rejected the application as time-barred [204] being of opinion that the original decree still existed, there having been no appeal against that part of the decree which allowed the claim.

Held, discharging the order of rejection, that when the appellate Court confirms the decree of the Court below, the latter becomes incorporated in the decree of the appellate Court, which is thenceforth the only decree to be executed.

[F., 19 B. 258 (260); 22 B. 500 (502, 506); 23 C. 876 (883); 26 M. 91 (93); Appl., 23 M. 60 (67); Appr., 16 Bom. L.R. 778; R., 18 B. 542 (545); 11 C.P.L.R. 115 (116).]

THIS was an appeal from an order passed by Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Poona, in execution of a decree.

The plaintiffs sued the defendants to recover certain ornaments and clothes or their value, namely, Rs. 1,332-8-0. They also claimed Rs. 5,001 for damages. On the 24th July, 1889, the Subordinate Judge passed a decree for the plaintiffs with respect to some of the ornaments and clothes, or their value, Rs. 940-4-0. The rest of the plaintiffs' claim

* Appeal No. 164 of 1892.