

of the *math*, and we must, therefore, send down the following issues for determination :—

1. Was the assessment on the *inam* estate collected by Baxarbai or the defendant during the three years preceding the suit ?

[513] 2. If not so collected, was it due to the default of Baxarbai or his alienee, the defendant, or on the contrary to "obstruction" caused by the manager of the *math* that the assessment on the *inam* estate was not collected by Baxarbai or the defendant during the three years preceding the suit ?

The findings to be sent to this Court within two months, and the parties to be allowed to give fresh evidence.

Issues sent down.

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APPELLATE CIVIL.

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

HANMANTA KOLAJI (*Original Plaintiff*), *Appellant v. MAHADEV KONDAJI (Original Defendant), Respondent.** [29th August, 1893.]

Limitation—Limitation Act (XV of 1877), sch. II, arts. 127, 144—Suit for possession of land alleging a previous partition—Partition—Co-sharers—Adverse possession—Burden of proof—Evidence.

The defendant had purchased the land in question at a sale in execution of a decree obtained by him against cousins of the plaintiff. The plaintiff claimed to recover the land, alleging that it was his share of ancestral property which had been allotted to him on partition four or five years before suit, and of which he had actually been in separate possession. The lower Court upon these allegations rejected the plaintiff's claim, holding that the suit was not one for partition and did not fall within art. 127 of the Limitation Act (XV of 1877), but that art. 144 applied, and that the plaintiff had failed to show that the defendant's adverse possession had begun within twelve years preceding the suit. On appeal to the High Court,

Held (reversing the decree and sending back the case) that under art. 144 it was for the defendant to prove adverse possession for twelve years before suit.

[R., L.B.R. (1893—1900) 860 (361).]

THIS was a second appeal from the decision of S. Hammick, District Judge of Ahmednagar.

Suit to recover certain land.

The defendant was in possession of the land in question as purchaser at a sale held in execution of a decree obtained by him against one Rama and his brothers. The plaintiff was Rama's cousin and he alleged that the land was ancestral, and that it had been partitioned equally between himself and Rama's branch of [514] the family four or five years before suit. He claimed to recover his half share.

The defendant (*inter alia*) pleaded limitation.

The lower Court rejected the plaintiff's claim as barred, being of opinion that as the plaintiff alleged that he had been in separate possession of his share after the division, the suit was not one for partition under art. 127 of the Limitation Act, but that the burden of proof was on the plaintiff to show that the defendant's adverse possession had begun

* Second Appeal, No. 186 of 1892.

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within twelve years before suit. He dismissed the suit. The following is an extract from his judgment:—

"The plaintiff-appellant's pleader has contended that art. 127 of the Limitation Act is the article which is applicable to the appellant's claim. Article 127 prescribes the period of limitation for a suit brought by a person excluded from joint family property to enforce a right to share therein. The plaint in this suit, however, does not exhibit a claim of this nature, and the plaintiff's evidence asserts repeatedly that the field in question was divided by the plaintiff and Rama four or five years before the suit, and that the plaintiff entered into separate possession and separately cultivated the moiety which fell to his share. The suit, therefore, is not a suit to enforce a right to share in joint family property, and art. 127 of the Limitation Act does not apply to it.

"The plaintiff was, therefore, bound to show under art. 144 of the Limitation Act that the adverse possession of the defendant had begun within twelve years of the institution of the suit. I have gone through the evidence, and find that he has failed to discharge this obligation. I concur with the Subordinate Judge in not being satisfied that the plaintiff was ever in possession of the field before suit. His claim is, therefore, time-barred."

The plaintiff appealed to the High Court.

Goverdhanlal M. Tripathi, for appellant:—The suit is really one for partition and falls within art. 127. It is a suit to carry out a partition arranged and agreed to four or five years ago. In no case, moreover, could the possession of the defendant or his predecessor have been adverse to plaintiff further back than the [515] partition, as a co-sharer's possession is not adverse. The burden of proof lay on the defendant—*Faki Abdulla v. Babaji Gungaji* (1).

Ghanasham N. Nadkarni, for the respondent (defendant).

JUDGMENT.

SARGENT, C. J.—The District Judge has not recorded any finding as to the plaintiff's title to the land, but has proceeded at once to dispose of the plea of the Limitation Act, on the assumption that the plaintiff's title to the land was, as stated by him in his plaint, *viz.*, that the land being ancestral property had been divided between him and Rama four or five years before the suit: that this was, therefore, not a suit for partition, and that art. 144 and not art. 127 applied, and that the plaintiff must fail, because he had not proved that defendant's possession had become adverse within the twelve years preceding the suit. It was not, however, for the plaintiff to prove this under art. 144, but for the defendant to prove his adverse possession for twelve years before suit; see *Faki Abdulla v. Babaji Gungaji* (1). Moreover, if the plaintiff's case is to be accepted, the possession of the family property by Rama and Jaba previously to the division cannot be taken as having been adverse to the plaintiff, and it is clear, therefore, that defendant's possession cannot be treated as adverse further back at any rate than the date of the division.

Under these circumstances, we must reverse the decree of the Court below and send back the case for a fresh decision after recording a finding on the first issue raised by the Subordinate Judge. Costs to abide the result.

Decree reversed and case sent back.