

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

BOO FATMA (ORIGINAL DEFENDANT 1), APPELLANT, v. BOO GHISANBOO AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 2 AND 3), RESPONDENTS.*

1909.

July 26.

Limitation Act (XV of 1877), Schedule II, Article 127—Suit by a Mahomedan daughter to recover her share in her deceased father's property—Limitation.

Article 127, Schedule II of the Limitation Act (XV of 1877) applies to a suit by the daughter of a deceased Mahomedan to recover her share in his property.

Sayad Gulam Hussein v. Bibi Anvarnisa(1), followed.

SECOND APPEAL against the decision of N. R. Majmudar, First Class Subordinate Judge of Ahmedabad with Appellate Powers, confirming the decree of M. M. Bhutt, Additional Joint Subordinate Judge of Ahmedabad.

The plaintiff sued to recover separate possession of her five-sixteenth share in the houses in suit by partition, alleging that as the daughter of her deceased father she was entitled to such share according to Mahomedan Law. The plaintiff further alleged that she and the other persons interested in the properties had all along the use and enjoyment of the properties.

Defendant, plaintiff's cousin, contended that the claim was time-barred, that the plaintiff had not the use and enjoyment of the properties as alleged in the plaint and that the plaintiff never got a share in the rents of the houses.

Defendants 2 and 3 were absent though duly served.

The Subordinate Judge found that the suit was in time and that the plaintiff was entitled to one-fourth share in the houses. He passed a decree accordingly.

On appeal by defendant 1 the Appellate Court confirmed the decree. On the point of limitation the Court observed:—

The first point that arises is what Article of the Limitation Act is applicable to the present case. For the plaintiff it is alleged that the appropriate article

* Second Appeal No. 286 of 1908.

(1) P. J. 1885, p. 170.

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is Article 127 of Schedule II. It is unquestionable that so far as this Presidency is concerned the Article in question applies to Mahomedans as well as to Hindus (*Bavasha v. Masumsha*, I. L. R. 14 Bom. 70). But as pointed out in (*Molvi Abdul Kadir v. Haji Mahomed Ibrahim*, 5 Bcm. L. R. 355) to attract the applicability of this Article it is necessary for the plaintiff to show that there had been previous joint possession. She has given evidence herself (exhibit 22) and has also examined five witnesses, Kabir, exhibit 26; Gulab, exhibit 25; Purbhai, exhibit 27; Chand, exhibit 28 and Fakir, exhibit 29. This evidence shows that the plaintiff, after the death of her husband which took place more than 20 years ago, left her husband's house and came to reside with her cousin Chandbhai and that she left it at the earliest only four years ago.

Defendant 1 preferred a second appeal.

T. R. Desai for the appellant (defendant 1):—The question is what Article of the Limitation Act is applicable, whether Article 123 or 127. The suit was brought by a Mahomedan female to recover her share in the family estate of her grandfather. The estate is in the possession of defendant 1 who is plaintiff's cousin. The plaintiff's father died admittedly 30 years ago. So the suit is *prima facie* time-barred under Article 123 of the Limitation Act. Article 123 applies because the plaintiff sued to recover a distributive share in the estate of a deceased intestate. Both the lower Courts held that the suit was governed by Article 127 of the Limitation Act and finding that the plaintiff was not excluded from the property to her knowledge over 12 years, they allowed the claim as not time-barred. In coming to that conclusion they have followed the rulings of this High Court: *Sayad Gulam Hussein v. Bibi Anvarnisa*⁽¹⁾, *Bavasha v. Masumsha*⁽²⁾, *Abdul Rahim v. Kirparam Daji*⁽³⁾, *Abdul Kadar v. Bapubhai*⁽⁴⁾.

But the other three High Courts in India have unanimously dissented from the view of this Court. We therefore submit that the question may be referred for consideration to a Full Bench. The other High Courts have held that Article 127 of the Limitation Act does not apply to suits by Mahomedans and that such suits are governed by Article 123. The Full Bench of Allahabad has in *Amme Raham v. Zia Ahmad*⁽⁵⁾ laid down that the

(1) P. J. 1885, p. 170.

(3) (1891) 16 Bom. 186 at p. 189.

(2) (1889) 14 Bom. 70.

(4) (1898) 23 Bom. 188.

(5) (1890) 13 All. 283.

words "joint family property" cannot cover the property of a Mahomedan family which cannot be said to be a joint family. Those words contemplate the property of a joint family and not joint property of any family. A joint family is unknown to Mahomedan Law. The view of the Allahabad Full Bench is confirmed by the High Court of Madras in *Patcha v. Mohidin*⁽¹⁾. The ruling of the Calcutta High Court in *Mahomed Akrami Shaha v. Anarbi Chowdhurani*⁽²⁾ adopts the view of the Allahabad and Madras High Courts.

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In the Bombay cases the suits were brought by male members. Females cannot claim to occupy the position of males. A Mahomedan female cannot be said to be a member of a joint family.

[SCOTT, C. J.:—The claim in *Sayad Gulam Hussein v. Bibi Anvarnisa*⁽³⁾ was at the instance of a Mahomedan daughter as in the present case.]

That ruling is, no doubt, against our contention and is hard to be distinguished. In a recent decision of this Court an attempt has been made to reconcile the authorities. *Abdul Kadir v. Mahomed*⁽⁴⁾.

M. N. Mehta for respondent (plaintiff) was not called upon.

SCOTT, C. J.:—The question in this case is whether Article 127 of the Limitation Act applies to a suit by the daughter of a deceased Mahomedan to recover her share in his property. It was decided under the Act of 1877 by an Appellate Bench of this Court in 1885 in *Sayad Gulam Hussein v. Bibi Anvarnisa*⁽³⁾ that it did so apply, and that decision, so far as we are aware, has been followed in Bombay for the last 23 years. It is a decision which is binding upon us and we therefore hold that the suit falls within Article 127. Upon this point, therefore, the judgment of the lower appellate Court is confirmed.

Decree confirmed.

G. B. R.

(1) (1891) 15 Ma.L. 57.

(2) (1895) 22 Cal. 954.

(3) P. J. 1885, p. 170.

(4) (1903) 5 Bom. L. R. 355.