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existence of the relationship of mortgagor and mortgagee. No doubt that in general is so, but I do not at present myself wish to express any opinion whether supposing a plaintiff brings a suit for redemption and abandons it, he would then have, or would not have, a right to bring a fresh suit for redemption. The particular matter before us can be disposed of, I think, without expressing an opinion on that point. I agree that the case should be remanded to be determined by the Court of first appeal on its merits. Costs costs in the cause.

Decree reversed and case remanded.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1920. January 7.

KALLANGOWDA BIN NANGANGOUDA PATIL AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS v. BIBISHAYA KOM SHAH MAHOMED KHAN ALIAS APPASAHEB JAHAGIRDAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), Schedule I, Articles 123 and 144—Mahomedan law—Joint property—Property devolving on sons on death—One of the sons selling his share to a third person—Suit for partition—Property held by sons as tenants-in-common—Time to run when one co-tenant excludes the other from joint property.

Two Mahomedan brothers M and G succeeded to their father's property according to Mahomedan law. G mortgaged his share in the property to plaintiffs and eventually sold the equity of redemption to them. The plaintiffs sued to recover possession of G's share by partition. The trial Court dismissed the suit as time-barred under Article 123 of the Indian Limitation Act, 1908.

Held, that the proper article applicable would be Article 144 of the Limitation Act, as the plaintiffs' suit was in terms a suit to have partitioned property which the two persons were holding as tenants-in-common.

* First Appeal No. 108 of 1918.

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FIRST appeal against the decision of V. M. Ferrers, Assistant Judge of Dharwar in Suit No. 30 of 1915.

Suit for partition of property.

The property in suit originally belonged to one Kashimkhan. On his death, it devolved on his two sons Ghauskhan and Shah Mahomed. These brothers enjoyed the property jointly for several years. Ghauskhan then mortgaged his share, or the property representing his share, to the plaintiffs and eventually sold the equity of redemption to them on 15th October 1903.

Some years later, the plaintiffs sued for the possession of property falling to Ghauskhan's share. That suit was dismissed on the ground that there was no partition between Ghauskhan and Shah Mahomed, and hence the plaintiffs could have no right to the property sold to them by Ghauskhan. The Court observed: "Plaintiffs may if they chose bring a suit for partition."

On 15th October 1915, plaintiffs again sued for partition of the estate of Kashimkhan, the suit being brought on the last day of the twelfth year of the sale to them by Ghauskhan.

The Assistant Judge dismissed the suit as barred by limitation under Article 123 of the Limitation Act, observing that the suit was a suit for distributive share of the estate of a Mahomedan dying intestate and that time began to run from the death of Kashimkhan.

The plaintiffs appealed to the High Court.

Nilkant Atmaram, for the plaintiff:—The lower Court's view that Article 123 of the Limitation Act governs the present case is clearly wrong. Having regard to the facts of the case the article which is applicable is Article 144. I admit that when a Mahomedan dies, his heirs are not joint tenants, but they are tenants-in-common and so long as they live in community no limitation runs as against any of them. It would only begin to run against one tenant-in-common when the other tenant-in-common did some act the effect of which was either to exclude his co-tenant from the enjoyment of the property or deny his right to share in such property. That has never been done here. The Full Bench case of *Abdul Kader* v. *Aishamma*[1], is in point.

Jahagirdar, for the respondents :—As the case of *Isap Ahmed* v. *Abhramji Ahmadji*[2], has recently decided that Article 127 does not apply to the case of Mahomedans, the only Article of the Limitation Act under which the present case can fall is Article 123. For this is a suit for a distributive share of the property of an intestate and period of twelve years runs from the time when the share became payable or deliverable and that was on the death of defendant No. 3's father which was long before 1903. The decision of the lower Court is right and it should be upheld.

MACLEOD, C. J. :—Defendant No. 1's husband and defendant No. 3 were entitled to succeed to their father's property according to Mahomedan law. The defendant No. 3 mortgaged his share, or the property representing his share, to the plaintiffs, and eventually sold the equity of redemption to them. The plaintiffs, therefore, are entitled to the share in the estate to which defendant No. 3 was entitled. They are endeavouring now to get possession of that share by partition. They are being resisted by the 2nd defendant who is a tenant of the 1st defendant. The lower Court dismissed the suit on the ground that it was barred by limitation. The learned Judge seems to have thought that Article 123 applied with this startling result. Supposing

(1) (1892) 16 Mad. 61. (2) (1917) 41 Bom. 588.

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the heirs of a deceased Mahomedan chose to live in community, as is certainly often done in Bombay, and even more often up-country, for several generations, the rights of each of the sharers to a partition would be barred twelve years after the death of the original head of the family. We do not think that that can be the case. We do not think that Article 123 can apply to the facts of this case where two Mahomedans continued to own as tenants-in-common the estate of their deceased father. The ordinary law would apply that time would begin to run against one tenant-in-common when the other tenant-in-common did some act the effect of which was either to exclude his co-tenant from the joint property, or to deny his right to share. It may then be said that time begins to run from the date of such exclusion or denial, and the Article which would be applicable would be 144. It was admitted that even if time began to run in 1903 the suit which was originally filed on the 15th October 1915 will be in time. I think, therefore, that the decree of the lower Court must be set aside and a preliminary decree for partition should be passed. The plaintiffs will be entitled to the costs of the appeal.

HEATON, J.:—It is contended that this suit falls under Article 123 of the Schedule to the Indian Limitation Act. If it does, then no doubt the suit is time-barred. If it does not, then it is not shown that the suit is time-barred, and there is every reason to suppose that it is not. In my opinion Article 123 does not apply. The present suit is certainly not in terms a suit for a distributive share of the property of an intestate. It is in terms a suit to have partitioned property which two persons are holding in common and to have the partition made so that each of these two persons shall be allotted his proper share. The suit is not based on the circumstance of anybody's intestacy, or of rights immediately

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arising out of an intestacy, so I think that in substance also the suit does not come under Article 123. We have here the very common case of Mahomedans who succeed to the property of a deceased relative, and by agreement amongst themselves instead of distributing that property by shares, hold it in common. They are entitled under our law to do this. They are not under an obligation to at once divide the property according to their shares. They can hold, and continue to hold, it in common, and having done so they hold it under an agreement. They can continue to do so for an indefinite period, but when they wish they can put an end to this common holding, and ask that there shall be a partition. The ground for asking for a partition in such a case is not that described in Article 123, but it is that one of the parties to the agreement by which hitherto they have held the property in common desires to put an end to that agreement and have the property partitioned. When he desires to do that he has a right to come to the Court to get the Court to do it for him. I think, therefore, the decision that this suit was barred by time was wrong and a preliminary decree for partition should be made as proposed.

Decree reversed

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1920. January 12.

MIR ISUB WALAD MIR INUS MALCHIKAR (ORIGINAL DEFENDANT No. 2), APPELLANT v. ISAB AND OTHERS, HEIRS OF THE DECEASED SHABAJI WALAD BAWASAHEB BALBALE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Mahomedan Law—Widow as sole heir—Share taken by her—Return—Escheat.

* Second Appeal No. 511 of 1917.