

APPELLATE CIVIL.

Before Chatterjea and Duval JJ.

1919

June 24.

GOBINDA CHANDRA BHATTACHARJEE

v.

UPENDRA CHANDRA BHATTACHARJEE*.

Hindu Law—Joint family property—Co-sharers—Minor reversioner—Suit for recovery of possession by, on attaining majority—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 141.

Where a Hindu plaintiff within 3 years of attaining majority sued to recover possession of a two annas share in an alleged joint family property claiming through his mother and grandfather :—

Held, that the first thing the Court had to decide was whether the properties were joint and whether the plaintiff's grandfather or mother had been in possession as a co-sharer.

Article 141 of the Limitation Act would apply only if the plaintiff's mother was dispossessed ; in that case the plaintiff as the reversioner would have twelve years from the date of the death of his mother, and the question whether the suit was brought within 3 years of his attaining majority would then arise.

If the property, as stated, was a joint property, it would be a case between co-sharers and in such a case it must be shown that there was exclusion or ouster of the plaintiff's grandfather or mother more than 12 years before the suit.

“In order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that must be for the statutory period. . . .

What is sufficient evidence of exclusion must depend upon the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession ; but such non-participation or non-possession may, in the circumstances of a particular case,

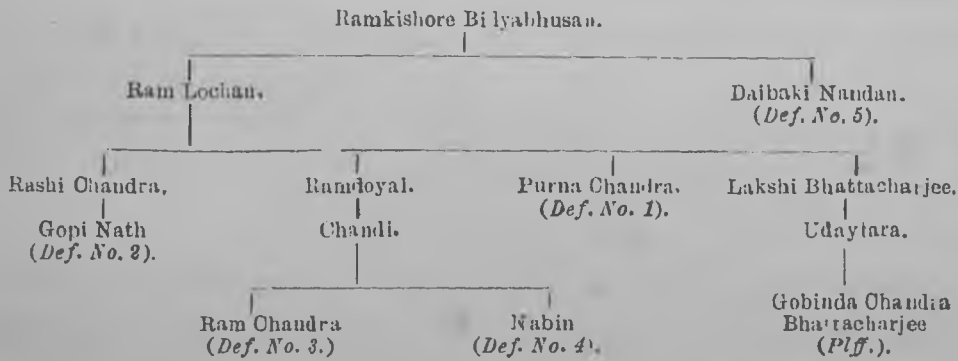
* Appeal from Appellate Decree, No. 215 of 1918, against the decree of J. C. Twidell, District Judge of Chittagong, dated June 6, 1917, confirming the decree of Sarat Chandra Sen, Subordinate Judge of Chittagong, dated Feb. 18, 1916.

amount to an adverse possession. Regard must be had to all the circumstances and a most important element is the length of time."

Ayenussa Bibi v. Sheikh Isuf (1) followed.

SECOND Appeal by Gobinda Chandra Bhattacharjee, the plaintiff.

The following genealogical table shows the relationship between the parties:—



In the suit under appeal the plaintiff claimed a two annas share in certain property which he alleged to be joint family property belonging to various descendants of one Ramkishore Bidyabhusan. This suit was for recovery of possession of the same with mesne profits. It was alleged that the plaintiff's mother, Udaytara, inherited the two annas share of the properties left by her father Lakshi and she was in possession of her share by receiving profits from defendant No. 1 and also by living occasionally with that defendant and enjoying the profits of the properties. The plaintiff was born on the 31st March 1893, and his mother died on the 6th August 1897; and the defendant No. 1 stopped paying the profits of the properties to the plaintiff after his mother's death. The plaintiff was permitted to sue as a pauper. The trial Court decided most of the issues, at any rate partially, in favour of the plaintiff, but dismissed his suit as time-barred under Article 141 of the 1st Schedule of the Limitation Act. On appeal, the learned District Judge

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of Chittagong also dismissed the appeal. Thereupon the plaintiff preferred this second appeal to the High Court.

Babu Bipin Behari Ghose (with him *Dr. Sarat Chandra Basak, Babu Khitish Chandra Sen, Babu Panchanan Ghose, Babu Chandra Sekhar Sen, Babu Pramatha Lall Dutt* and *Babu Nripendra Chandra Das*), for the appellant. Joint title has been found in my favour. There is no evidence whatever as to any ouster to the knowledge of the plaintiff. Article 141 of the first schedule to the Limitation Act does not apply to the present case; Article 144 applies. To constitute adverse possession as between tenants in common there must be an exclusion or an ouster; see the judgment of Jenkins C. J. in *Gangadhar v. Parashram Bhalchandra* (1). The last case on the point is *Hardit Singh v. Gurmukh Singh* (2).

Babu Kshitis Chandra Chakravarti, for the respondents. The last case regarding the proposition stated by my learned friend on the other side is *Chintamani Pramanik v. Hriday Nath Kamila* (3). But that proposition of law is of no help to the other side. The plaintiff has failed to prove his subsisting title. The burden of proof is on the plaintiff to show that he has not only title but a subsisting title. See *Dokari Joddar v. Nilmani Kundu* (4). Article 141 of the Limitation Act applies to the case. Limitation runs from the time that the last male owner died: *Lokenath Singh v. Dhakeswar Prosad Narayan Singh* (5).

The appellant was not called upon to reply.

CHATTERJEA AND DUVAL JJ. This appeal arises out of a suit for establishment of the plaintiff's right

(1) (1905) I. L. R. 29 Bom. 300.

(3) (1913) 29 C. L. J. 241.

(2) (1918) 28 C. L. J. 437.

(4) (1916) 26 C. L. J. 339.

(5) (1914) 21 C. L. J. 253.

to, and recovery of possession of a two annas share in, a certain estate which originally belonged to one Ram Kishore Bidyabhusan.

It appears that Ram Kishore had two sons Daibaki Nandan, defendant No. 5, and Ram Lochan. Ram Lochan had four sons of whom Lakshi Bhattacharjee was one. Lakshi left a daughter Udaytara, and the plaintiff is the son of Udaytara.

It was alleged by the plaintiff that Lakshi and, after him, Udaytara and, after her death, the plaintiff himself were in joint possession of the property with the defendants. In the plaint it was stated that the plaintiff was born on the 31st March 1893, that his mother died on the 6th August 1897, and that the plaintiff attained majority on the 31st March 1911. The suit was instituted on the 26th February 1913. There was no express denial of the date of the plaintiff's birth and of his attaining majority in the written statement.

The main defence, so far as it relates to the question raised in this appeal, was that the suit was barred by limitation.

The Courts below have apparently considered the question of limitation on the footing that Article 141 of the Limitation Act applied and, although there was no express denial of the date of the birth of the plaintiff and of his attaining majority as given in the plaint, the learned District Judge went into that question and came to the conclusion that the suit had been instituted more than three years after the plaintiff attained majority.

Now, Article 141 of the Limitation Act would apply only if Udaytara was dispossessed; in that case the plaintiff as the reversioner would have twelve years from the date of the death of his mother, and the question whether the suit was brought within three

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years of his attaining majority would then arise. The plaintiff, however, did not sue on the ground that his mother had been dispossessed. His case was that the properties were joint-family properties, that after Lakshi's death his mother was entitled to a two annas share and that on her death he was similarly entitled to that share. If the properties were joint, then it would be a case between co-sharers. The learned District Judge says: "There was indeed some mention of the suit being among co-sharers but how any question of co-sharers will affect limitation in this case, was not made out by any satisfactory argument."

If, however, as stated above, the property was a joint property, it would be a case between co-sharers and in such a case it must be shown that there was exclusion or ouster of Lakshi or of his daughter more than 12 years before the suit.

The principle upon which the question of limitation as between co-sharers is to be determined, has been laid down in various cases and we may refer to the case of *Ayenenussa Bibi v. Sheikh Isuf* (1) where Jenkins C. J. observed: "The law on the subject I take to be well settled. In order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that must be for the statutory period What is sufficient evidence of exclusion must depend upon the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession but such non-participation or non-possession may, in the circumstances of a particular case, amount to an adverse possession. Regard must be had to all the circumstances and a most important element is the length of time." Reference may also

be made to the cases of *Loke Nath Singh v. Dhakeswar Prosad Narayan Singh* (1), *Hardit Singh v. Gurmukh Singh* (2) and *Chintamani Pramanik v. Hriday Nath Kamila* (3).

It has been contended before us by the learned pleader for the respondent that the defendant's case was that Lakshi himself had no right or possession of these properties.

Now, the questions whether these properties were joint properties and whether Lakshi or Udaytara was in joint possession, have not been gone into by the learned District Judge. He observed in his judgment that the Subordinate Judge's decision on the question whether the properties were joint or not was not exhaustive, and it would probably have been necessary to remand the case for findings on that point had not the question of limitation disposed of the case. There is no doubt, that the first thing the Court had to decide was whether the properties were joint and whether Lakshi or Udaytara was in possession as a co-sharer. The learned pleader for the respondent says that some of the properties were sold away more than 12 years before the suit. None of these questions has been gone into by the Courts below.

The decrees of the Courts below must, therefore, be set aside and the case sent back to the Court of first instance in order that the questions mentioned above may be gone into and the case decided according to law.

Costs to abide the result. •

G. S.

Appeal allowed; case remanded.

(1) (1914) 21 C. L. J. 253.

(2) (1918) 28 C. L. J. 437.

(3) (1913) 29 C. L. J. 241.

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