

APPELLATE CIVIL.

Before Mukerji and Guha JJ.

RAMNATH RAY

v.

HARENDRAKUMAR RAY.*

1930

Dec. 15, 22.

Limitation—Partition suit, decree in—Execution by plaintiff, if saves defendant's application for execution from limitation—Indian Limitation Act (IX of 1908), Sch. I, Art. 182, expl.

A decree in a partition suit was made in 1916 and amended in 1918. In 1928, the plaintiffs applied for and obtained delivery of possession of their allotment. On the 21st August, 1929, some of the co-sharer defendants in that partition suit filed an application for execution.

Held that the defendant's application for execution was time-barred, as it was not saved by the plaintiffs' application of 1928.

The decree having specified portions of the subject-matter deliverable to each party or group of parties, an application by one party or group does not benefit the others within the meaning of the explanation to Article 182 of Schedule I to the Limitation Act.

Khoorshed Hossein v. Nubbee Fatima (1) and *Mohun Chunder Kurmokar v. Mohesh Chunder Kurmokar* (2) distinguished.

APPEAL FROM APPELLATE ORDER by the defendants.

The facts of the case, out of which this appeal arose, appear fully in the judgment under report herein.

Prakashchandra Pakrashi and *Birendranath Ghosh* for the appellant.

Surajitchandra Lahiri for the respondent.

Cur. adv. vult.

MUKERJI AND GUHA JJ. Some of the co-sharer defendants in a partition suit, in which a final decree was passed, under which they obtained an allotment, there having been a separate allotment in respect of each of the other sets of co-sharers, of whom the plaintiffs were one, applied for possession of their

*Appeal from Appellate Order, No. 193 of 1930, against the order of J. W. Nelson, District Judge of Dacca, dated Jan. 3, 1930, reversing the order of M. Ray, Munsif of Dacca, dated Sep. 10, 1929.

1) (1878) I. L. R. 3 Calc. 551.

(2) (1883) I. L. R. 9 Calc. 568.

allotment in execution of the decree. The decree was passed in 1916 and there was an amendment of it in 1918, but with that we are not concerned. The plaintiffs applied for and obtained delivery of possession of their allotment in 1928. On 21st August, 1929, the present application for execution was filed. Objection was taken on the ground of limitation. It was overruled by the Munsif, but has been upheld by the District Judge. The applicants for execution have then preferred this appeal.

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The Munsif held that the application of the plaintiffs decree-holders saved limitation. He relied upon the decisions of this Court in *Khoorshed Hossein v. Nubbee Fatima* (1) and *Mohun Chunder Kurmokar v. Mohesh Chunder Kurmokar* (2). The District Judge has held that the decree having specified portions of the subject-matter deliverable to each party or group of parties, an application by one party or group does not benefit the others within the meaning of the explanation to Article 182 of Schedule I to the Limitation Act.

In the case of *Khoorshed Hossein v. Nubbee Fatima* (1), the decree concerned was a decree of 1871, and there were only two sharers parties to the decree. It is possible to understand that decision as being based upon the conclusion of the learned Judges that it was impossible to hold that, in a case like that, execution proceedings, taken either by one share-holder or by the other, were anything but proceedings on account of both the share-holders. The learned Judges observed: "The necessary result of those proceedings was to "divide off the share of the defendant and, while this "was going on at the instance of the plaintiff, it would "have been merely superfluous for the defendant to "have put in an application to have the same thing "done at her instance." These remarks also applied to the decree of 1877, which formed the subject-matter of the decision in the case of *Mohun Chunder Kurmokar v. Mohesh Chunder Kurmokar* (2). In that case also, there were two sets of co-sharers, one

(1) (1878) I. L. R. 3 Cal. 551.

(2) (1883) I. L. R. 9 Cal. 568.

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set entitled to one-third and the other to the remaining two-thirds, and after the former set had obtained their one-third partitioned off, the latter set came in and made an application to have possession of their two-thirds, and in connection with the latter application the question of limitation arose. Such a decree was held to be a joint decree within the meaning of the Article 179 of Schedule II to the Limitation Act. Both these cases, again, were cases relating to what now stands for a preliminary decree, making joint declarations of the rights of the parties in the subject-matter of the suit. The character of those decrees was described in the judgment in the case of *Khoorshed Hossein v. Nubbee Fatima* (1) in these words: "A decree for partition is not like a "decree for money or for the delivery of specific "property, which is only in favour of the plaintiff in "the suit. It is a joint declaration of the rights of "persons interested in the property of which partition "is sought, and having been so made, it is unnecessary "for those persons who are defendants in the suit to "come forward and institute a new suit to have the "same rights declared under a second order made. It "must be taken that a decree in such suits is a decree, "when properly drawn up, in favour of each share- "holder or set of shareholders having a distinct "share." It is not clear why this decision was dissented from in the case of *Hikmat Ali v. Wali-un-nissa* (2), but, as in that case, the facts were entirely different, it is not necessary to examine the decision any further. The description of a decree for partition, when properly drawn up, as amounting to a joint declaration has been approved in the case of *Dost Muhammad Khan v. Said Begam* (3), *Parsotam Rao Tantia v. Radha Bai* (4), *Assan v. Pathumma* (5), *Ashidbai v. Abdulla Haji Mahomed* (6), but in none of these cases any question of limitation arose.

(1) (1878) I. L. R. 3 Calc. 551,
552.

(2) (1889) I. L. R. 12 All. 506.

(3) (1897) I. L. R. 20 All. 81.

(4) (1910) I. L. R. 32 All. 469.

(5) (1897) I. L. R. 22 Mad. 494.

(6) (1906) I. L. R. 31 Bom. 271.

In the case *Jeddi Subraya v. Ramrao* (1), which was not the case of a partition decree but in which a question of limitation arose, *Mohun Chunder Kurmokar v. Mohesh Chunder Kurmokar* (2) was referred to and distinguished with the observation that "the decree here is not like a partition decree which "though not in terms joint, enures equally for the "benefit of the defendant and of the plaintiff." On the question of limitation, it appears, the decision in *Khoorshed Hossein v. Nubbee Fatima* (3) has been followed in two cases, *Ramasami Aiyangar v. Narayana Aiyangar* (4) and *M. Vasudeva Muthu Shastri v. M. Vittal Sastri* (5). Of these two decisions, the former one was the case of a decree made under the Code of 1882 and was one declaring the rights of the plaintiffs and of the different defendants to one share each, to be ascertained thereafter. The date and exact nature of the decree in the case at page 456 does not appear from the report. Oldfield J. was a party to the decision in both these cases and he disposed of the question with these words: "No instance, in which the contrary view has "been acted on, has been shown. The question is one "of limitation and, therefore, of procedure, and the "course of authority must be the decisive "consideration."

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In our judgment, after the introduction of the distinction between a preliminary and a final decree, as emphasised by the provisions of the Code of 1908, it is impossible to contend that the final decree in so far as it may provide for separate allotments in favour of the different parties to a partition suit can, in any view, be regarded as a joint decree within the meaning of the second paragraph of explanation I to Article 182 of Schedule I to the Limitation Act. It is impossible, in our opinion, to take such a decree out of the words of the first paragraph of the explanation, "Where the decree or order has been "passed severally in favour of more persons than one,

(1) (1897) I. L. R. 22 Bom. 998.

(3) (1878) I. L. R. 3 Calc. 551.

(2) (1883) I. L. R. 9 Calc. 568.

(4) [1922] A. I. R. (Mad.) 327.

(5) [1922] A. I. R. (Mad.) 456.

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“distinguishing portions of the subject-matter as “payable or deliverable to each.” We, accordingly, think that the Judge below was right in holding that the application for execution was not saved by the plaintiffs’ application of 1928.

The appeal must be dismissed, but we will make no order as to costs.

Appeal dismissed.

G. S.