APPELLATE CIVIL.

Before Derbyshire C. J. and R. C. Mitter J.

HEMENDRANATH RAY CHAUDHURI

v.

JNANENDRAPRASANNA BHADURI.*

1935
May, 8, 14.

Hindu Law—Adoption—Ante-adoption agreement by natural father—Suit for possession—Dispossession—Onus—Limitation—Indian Limitation Act (IX of 1908), Arts. 140, 141, 142.

G, a Hindu, governed by the *Dâyabhâga*, died without issue in 1846, possessed of certain estates and leaving him surviving a widow J. Shortly afterwards J adopted B, who became the full owner of the estates. In 1865, by an *ekrârnâmâ*, B created a life-estate in favour of her adoptive mother J. B having predeceased J, on J's death in 1900, B's widow D came into possession of the estates. In 1914, D, under the authorisation of her late husband, adopted the plaintiff, then a minor. By an ante-adoption agreement, however, with the plaintiff's natural father, D retained possession of the estates as a life-tenant postponing the plaintiff's possession till her death in 1918. In 1930, within 12 years of D's death, the plaintiff sued for possession of certain immoveable properties belonging to G's estates, alleging them to have been dispossessed after 1865 during J's life-tenancy. The defendants contended that the dispossession was prior to 1865 when B was the last full owner. Neither the plaintiff nor the defendants succeeded in proving their respective contentions.

Held that *prima facie* the plaintiff was in time under Articles 140 and 141 of the Limitation Act and he was entitled to possession. To avoid it, the onus lay on the defendants to prove that dispossession took place when B was the last full owner, in which case the suit would be barred under Article 142 of the Limitation Act.

Held, further, that an ante-adoption agreement with the natural father postponing the possession of an adopted son is supported by well established custom in India and is valid in law.

Panchanon Majumdar v. *Binoy Krishna Banerjee* (1) and *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar* (2) relied on.

APPEAL by the plaintiff.

The facts of the case and the arguments in the appeal appear sufficiently from the judgment.

*Appeal from Appellate Decree, No. 84 of 1933, against the decree of Jateendrakumar Basu, Third Subordinate Judge of Mymensingh, dated July 20, 1932, reversing the decree of Shahabuddin Ahmad, First Munsif of Tangail, dated Sept. 7, 1931.

(1) (1916) 27 C. L. J. 274.

(2) (1927) I. L. R. 50 Mad. 508; L. R. 54 I. A. 248.

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Atulchandra Gupta and *Gunendrakrishna Ghosh* for the appellant.

Saratchandra Basak, Senior Government Pleader, and *Jateendranath Sanyal* for the respondents.

Cur. adv. vult.

R. C. MITTER J. This appeal is against the judgment and decree of the Subordinate Judge, Third Court, Mymensingh, dated the 20th July, 1932, by which the judgment and decree passed by the Munsif, First Court, Tangail, on the 7th September, 1931, have been reversed.

The plaintiff, who is the appellant before us, sued for possession of some plots of land, his case being that they form parts of his estates bearing *touzi* Nos. 1624, 1644 and 1647 of the Mymensingh Collectorate. The defendants claim the said lands to be parts and parcels of their estates bearing *touzi* No. 1646 of the aforesaid collectorate. Both the courts below have found that portions of the lands in suit surrounded by red lines in commissioner's map fall within the plaintiff's estates, but on the question of limitation the courts below have differed.

For the purpose of deciding the question of limitation it is necessary to consider the following facts. Golaknath Ray was the proprietor in the past of the estates claimed by the plaintiff. He died on the 10th May, 1846, without any issue, but survived by a widow Jahnavi Chaudhurani. He had given his wife power to adopt a son to him. Shortly after his death, his widow, Jahnabi Chaudhurani, adopted Baikunthanath Ray Chaudhuri, who on his adoption became the full owner of the properties left by Golaknath. On the 6th September, 1865, Baikunthanath, however, executed an *ekrârnâmâ* (Exhibit 3) in favour of his adoptive mother, Jahnabi Chaudhurani. It is not disputed that, by the said document, a life-estate was created in favour of Jahnabi Chaudhurani, in respect of the properties left by Golaknath, and Baikunthanath was to get possession on her death. Jahnabi

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Chaudhurani died on the 24th February, 1900. Baikuntha died on the 27th April, 1887, leaving him surviving a widow, Rani Dinamani. He left no son, but gave Rani Dinamani power to adopt a son to him. On the death of Jahnabi Chaudhurani, Dinamani went into possession of the estate, in which, according to Hindu law, she had a widow's estate till the 3rd August, 1914, when she adopted the plaintiff. Ordinarily the estate would have vested in the plaintiff in absolute right from the date of the adoption and he would have been entitled to take possession, but a few days before the adoption his natural father, he being a minor then, entered into an agreement with the adoptive mother, Rani Dinamani, by which Rani Dinamani was to remain in possession of the estate as a life-tenant, and on her death the plaintiff was to get possession. The deed of agreement was executed on the 17th July, 1914, and has been marked Exhibit 3(a). Rani Dinamani died on the 9th September, 1918, and the suit was filed on the 8th September, 1930 and registered on the 10th September, 1930. The plaintiff contends that his suit is in time, Articles 140 and 141 of the Limitation Act being the Articles applicable to the case.

It is well settled that if a life-tenant be dispossessed the reversioner or remainderman is in time if he institutes the suit for possession of immoveable property within twelve years of the death of the life-tenant, and if successive life estates had been created the remainderman or the reversioner will be in time if he institutes the suit for possession within twelve years of the death of the last life-tenant. Adverse possession against a life-tenant will not be adverse possession against the reversioner or the remainderman. This has been settled by the decision of the Judicial Committee of the Privy Council in the case of *Runchordas* v. *Parvatibai* (1) and whatever doubts had been raised after that decision in India in regard to suits for possession of immoveable property by a

(1) (1899) I. L. R. 23 Bom. 725; L. R. 26 I. A. 71.

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reversioner succeeding on the death of a Hindu widow has been removed by the later decision of the Judicial Committee in the case of *Jaggo Bai* v. *Utsava Lal* (1). It is also well settled that if the cause of action arose during the life-time of the last full owner, the subsequent interposition of a life estate or a widow's estate would not bring into operation either Article 140 or Article 141 of the Limitation Act on the principle formulated in section 9 of the said Act. Article 142 of the Limitation Act would apply, time running from the date of the dispossession. This has been laid down in the case of *Sesha Naidu* v. *Periasami Odayar* (2). The same principle is involved in the judgment of Lord Atkin in the case of *Skinner* v. *Naunihal Singh* (3). In the case before us the plaintiff alleged that Jahnabi Chaudhurani had been dispossessed in the year 1878, when she was holding the estate as a life-tenant. He satisfied the learned Munsif, but the learned Subordinate Judge has held that he has failed to prove the said fact. The learned Subordinate Judge has held further that the defendants had taken possession of the lands in suit before 1865, that is, at a time when Baikuntha was the absolute owner, but we do not consider that his said finding is based on evidence. The learned Subordinate Judge first observed that oral evidence adduced by the parties was unconvincing. He then referred to the evidence of defence witness No. 3. He then referred to the defendants' *chitâs* (Exhibit A series), the earliest of which is of the year 1871 and came to the conclusion that the defendants were in possession through tenants from before the year 1865. We have gone through the evidence of the said witness which is vague to a degree, and does not carry the defendants' possession to a period prior to 1865. The *chitâs* also do not carry the defendants' possession to a period earlier than 1870 or 1871. Feeling this difficulty the learned Subordinate Judge made the following

(1) (1929) I. L. R. 51 All. 439; L. R. 56 I. A. 267.

(2) (1921) I. L. R. 44 Mad. 951.

(3) (1929) I. L. R. 51 All. 367; L. R. 56 I. A. 192.

observations: "It gives a clear indication that the "*jotes* of Gagan and Ashraf (defendants' tenants on "the lands in suits) were old tenancies and were "created before the landlords' (defendants) survey of "1278 B. S. (1871). In the circumstances it would be "a quite proper thing to presume possession *retro* in "favour of the defendants". It is on this observation that he based his finding that the defendants' possession began before 1865. We do not consider that this is the proper way of deciding the said question. There is a presumption that a state of things found to exist at a particular point of time continues but there is no rule of evidence by which one can presume backwards: *Manmatha Nath Haldar* v. *Girish Chandra Roy* (1). For these reasons, we hold that the finding of the learned Subordinate Judge that the defendants' possession began before 1865 is not binding on us. It must, therefore, be taken that the plaintiff has failed to prove that the dispossession was after 1865 and that the defendants have also failed to prove that they began to possess before 1865. The question therefore turns upon the question of *onus*. The plaintiff came to court on the allegation that the estate was in possession, firstly, of a life-tenant (Jahnabi Chaudhurani), then in the possession of Rani Dinamani as the holder of a widow's estate up to the date of the adoption of the plaintiff, and then in her as the holder of a life-estate under the ante-adoption agreement, Exhibit 3 (a), with the natural father of the plaintiff till her death on the 9th September, 1918. He brings his case *prima facie* under Articles 140 and 141 of the Limitation Act. If the defendants want to avoid the operation of these Articles they must prove the necessary facts, namely, that limitation began to run from the time when Baikuntha was the full owner, that is to say he was dispossessed when he was the full owner. Dr. Basak has urged that the *onus* is on the plaintiff to prove that the dispossession was after 1865 on the authority

(1) (1934) 38 C. W. N. 763.

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of the case of *Mahendra Nath Biswas* v. *Shamsunnessa Khatum* (1), and has laid emphasis on a sentence to be found at page 164 of the report. We do not think that the learned Judges in that case intended to decide the question of *onus*. In that case the last full owner, Satyakinkar Ghoshal, died in the year 1833. The defendants proved by documentary evidence that their predecessors had been in possession since the 17th August, 1831, at least they carried their possession to the year 1834. Mr. Justice Mookerjee pointed out that there was no Article in the Limitation Act then in force corresponding to Article 141 of the Act of 1908, a corresponding Article being first introduced in the Limitation Act of 1871. It was also pointed out that the law in force till 1873, when the Limitation Act of 1871 came into force, was that adverse possession which extinguished the title of a female heir taking a limited estate under the Hindu law also extinguished the title of the reversioner, and that if the possession of the defendants began before 1861 the title of the plaintiffs would have been extinguished before the Limitation Act of 1871 came into force, and once the title was extinguished while the Limitation Act of 1859 or Regulation III of 1793 or II of 1805 was in force it could not have been revived by the introduction of Article 141 in the Limitation Act of 1871. These facts and observations, in our judgment, considerably weaken the force of the observations made by the said learned Judge at page 164 that "before the plaintiffs "can rely on Article 141 they must consequently prove "that their predecessor, Satyakinkar Ghoshal, was "in possession at the time of his death on the 5th "November 1833".

Dr. Basak has taken a further point before us which was not taken in either of the courts below. He says that there is evidence that the defendants had taken possession in the year 1871. The *chitâs* Exhibit A series certainly prove the defendants' possession in 1871. He says that the suit would have

(1) (1914) 19 C. W. N. 1280.

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been in time if brought within twelve years of Jahnabi Chaudhurani's death. This position he is bound to concede, for in two cases decided by this Court brought within twelve years of that lady's death Article 140 was applied. See *Promotha Nath Ray Chaudhuri* v. *Dinamani Chaudhurani* (1) and *Secretary of State for India in Council* v. *Wazed Ali* (2). But he says that a suit brought beyond that time is barred. The basis of his contention is that the ante-adoption agreement, Exhibit (3a), is void and conferred no estate on Rani Dinamani. He says that an ante-adoption agreement by which the possession of an adopted son is postponed is invalid under the law but can be held valid only if there is custom to support it, and as no custom is alleged or proved in this case, the plaintiff was from the date of his adoption the full owner entitled to possession and he not having sued within twelve years from the date of his adoption or within three years of his attaining majority the suit is barred. For supporting his main proposition that such an ante-adoption agreement is void, unless there is a custom, he relies upon the case of *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar* (3). In that case Viscount Dunedin examined the Bombay and Madras cases in detail and summarised the various reasons given in them for upholding an ante-adoption agreement postponing the enjoyment of the adopted son. He held that the real ground on which such agreements could be supported was custom, and his observations indicate that such a custom had grown up in India and has been recognised repeatedly by the courts. No Calcutta case was considered there but there are decisions of this Court upholding such agreements [see for instance *Panchanon Majumdar* v. *Binoy Krishna Banerjee* (4)]. Apart from the question as to whether Dr. Basak will be allowed to raise the point for the first time here, which involves investigation of facts not put in issue in the court of first instance,

(1) (1907) 34 C. L. J. 129.
(2) (1921) 34 C. L. J. 141.
(3) (1927) I. L. R. 50 Mad. 508; L. R. 54 I. A. 248.
(4) (1916) 27 C. L. J. 274.

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we do not consider the point to be of any substance, for, as Lord Dunedin observed in the case of *Rama Rao* v. *Raja of Pittapur* (1)—

When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the courts of a country, the courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleadings.

We, accordingly, allow the appeal, set aside the judgment and decree passed by the learned Subordinate Judge and restore those of the learned Munsif. The appellant will have his costs of this Court and of the lower appellate court.

DERBYSHIRE C. J. I agree.

Appeal allowed.

G. K. D.

(1) (1918) I. L. R. 41 Mad. 778 (785); L. R. 45 I. A. 148 (154).