APPELLATE CIVIL.

Before Mukherjea and Roxburgh JJ.

1939

July 27, 31 ; *Aug.* 11.

ABU SHABID

v.

ABDUL HOQUE DOBHASH*.

Accounts—*Suit for accounts by one joint-owner of a property against another —Partition of the joint property, if must be claimed in such a suit— Limitation—Indian Limitation Act (IX of 1908), Sch. I, Arts. 120, 62.*

If one of two joint owners of a property receives rents and profits of such property in excess of his share in such rents and profits, the other can, unless he has been ousted from the property, sue the former for accounts, without at the same time claiming a partition of the property.

Balvantrâv Oze v. *Ganpatrâv Jádhav* (1) relied upon.

A suit by one joint owner of a property against another, for accounts, is governed by Art. 120 of the Indian Limitation Act, 1908, and not by Art. 62.

J. Subba Rao v. *J. Rama Rao* (2) followed.

Thomas v. *Thomas* (3) referred to.

APPEAL FROM APPELLATE DECREE preferred by the plaintiff.

The material facts and arguments in the appeal appear from the judgment.

S. M. Bose, Acting Advocate-General of India, *Narendra Krishna Das*, *Chandra Sekhar Sen* and *Durgesh Prasad Das* for the appellant.

Sarat Chandra Basak, Senior Government Pleader, and *Imam Hossain Chowdhury* for the respondent.

Cur. adv. vult.

*Appeal from Appellate Decree, No. 164 of 1939, against the decree of G. B. Synge, District Judge of Chittagong, dated Dec. 10, 1938, reversing the decree of Upendra Chandra Majumdar, First Subordinate Judge of Chittagong, dated June 30, 1938.

(1) (1883) I. L. R. 7 Bom. 336. (2) (1916) I. L. R. 40 Mad. 291.
(3) (1850) 5 Exch. 28 ; 155 E. R. 13.

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MUKHERJEA J. The appeal is on behalf of the plaintiff and arises out of a suit for accounts. The plaintiff's case is that in the town of Chittagong there was a market known as Feringibâzâr which was held at a place close to the land described in the schedule to the plaint and was run by certain persons who may be called the Shahas. The Mitras, who are the owners of the schedule land, wanted to establish a rival market on the same, but, being unsuccessful themselves, they allowed the plaintiff and the two defendants to start a market on that land and use the structures that stood upon it for that purpose. On August 26, 1935, the Mitras granted a lease of the land and structures to the plaintiff and the two defendants, for a period of nine years only, with an option of renewal for the same period after its termination. From the very beginning, the management of the market was left to defendant No. 1 by his co-lessees and it was he who realised tolls from the vendors and stall-holders and paid the rents and taxes due to the landlord and the municipality. Although the market became a profitable concern, and its income went on increasing year after year, the defendant No. 1, it was said, did not pay anything to the plaintiff as his share of the profits. When the plaintiff asked for accounts, the defendant No. 1 prepared certain false accounts, and filed a money suit against the plaintiff, which was still pending when the present suit was commenced. The plaintiff was, under these circumstances, obliged to institute the present suit, and he prayed that defendant might be ordered to render accounts of the profits of the market from August 26, 1935, to January 7, 1937, and that the plaintiff might be given a decree for such sum of money as may be found due to him for his share on the taking of account.

The suit was contested by defendant No. 1 alone. His contentions *inter alia* were that neither the plaintiff nor any of the defendants were the real

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lessees in respect of the lands and structures, nor had they any beneficial interest in the market or its profits. It was said that the lease was actually taken by a Committee known as *Bâzâr* Committee, who organised the removal of the market place to its present site, and as the landlords did not like to recognise a fluctuating and an indeterminate body of persons as lessees, the document was executed in the name of the plaintiff and the two defendants.

It was this committee who were running all the affairs of the market, collecting tolls and paying rent and taxes. The defendant No. 1 did not make any profit out of the market, nor was it intended that any of the ostensible lessees should have any share in its income. It was further contended that the suit was not maintainable in its present form, and it was barred by the law of limitation.

The trial Court overruled all these defences and gave the plaintiff a decree. It held *inter alia*, that the lease was really granted by the Mitras to the plaintiff and the two defendants and that there was no truth in the story of defendant No. 1 that they were mere *benâmdârs* for a committee known as the *Bazâr* Committee. It found also that defendant No. 1 was placed in charge of the management of the market since it was started, with the consent of his co-owners, and he was all along realising the rents and profits. The result was that a preliminary decree for accounts was passed and the defendant No. 1 was directed to file all his accounts within one month, after which a commissioner would be appointed to examine them.

Against this decision there was an appeal taken by the defendant No. 1 to the Court of the District Judge at Chittagong. The learned District Judge, who heard the appeal, set aside the judgment of the

trial Court and dismissed the plaintiff's suit. The District Judge concurred in the findings of fact arrived at by the trial Court, but dismissed the suit on the grounds that the suit was not maintainable in law and that it was barred by the law of limitation.

According to the lower appellate Court, the plaintiff ought to have, on the allegations made in the plaint sued for joint possession, and he was not entitled to accounts unless he claimed joint possession or partition. As regards limitation, the District Judge did not discuss the matter in detail, as he was going to dismiss the suit on the other ground, but he held that the suit would be time-barred, whether Art. 62 or Art. 89 of the Indian Limitation Act, 1908, be held to be the proper Article applicable.

It is against this decree of dismissal, that the present Second Appeal has been preferred, and Mr. S. M. Bose, the Acting Advocate-General of India, who appears in support of the appeal, has assailed the propriety of the decision of the District Judge on both these grounds. Dr. Basak, who appears on behalf of the respondent, has, besides supporting the decision upon the grounds upon which the lower appellate Court rested it, put forward an additional ground, *viz.*, that on the plaintiff's own case, the defendants were not co-owners but co-partners with him in the market business and he could demand account only on a dissolution of the partnership.

The first question that falls for determination in the appeal is, as to whether the parties to the suit were co-owners or co-partners, and whether a suit for accounts *only* is maintainable, without a prayer for partition in one case or dissolution of the partnership in the other.

I do not think that it would be right to say, as Mr. Basak contends, that the parties to this suit

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are partners in a business and not joint-owners of a property. No such case was made by defendant No. 1 in his written-statement, and the lower appellate Court had come to the definite finding that the parties were not partners but co-owners. "Partnership" is the relation subsisting between persons, who have agreed to share the profits of a business carried on by all or any of them acting for all: Indian Partnership Act, 1932, s. 4. We do not know what the agreement between the parties was in the present case. All that we find is that they took a joint lease of the property in suit upon which a market was started. There can be no doubt that there could be a partnership in respect of the business of the market, but no foundation for such a case was made either in the pleadings or in the evidence. The mere fact that in para. 4 of the plaint the market was said to have been opened a few days before the lease was actually granted does not justify the inference that it was a partnership business. Accepting, therefore, the finding of the lower appellate Court that the parties were joint-owners of the market and its site, the question that we have to decide is whether one co-owner can sue another for accounts, in case the latter receives rents and profits of the joint property in excess of his share, without instituting a suit for partition.

There is no specific provision in the Indian Acts on this point, and the question has to be answered on general principles of equity, justice and good conscience. According to English common law, if one tenant-in-common occupied the entire property held in common and took the entire profit, the other had no remedy against him whilst the tenancy in common continued, unless he was actually dispossessed, in which case, he might sue for ejectment. The only case where an action of account could be maintained was where one co-owner had expressly appointed the other his bailiff as to his undivided moiety. This was remedied by a Statute of Queen Anne, *viz.*, 4 &

5 Ann., c. 16 which by s. 27 provided that an action of account could be maintained "by one joint tenant "and tenant in common, his executors and adminis- "trators, against the other as bailiff for receiving "more than comes to his just share or proportion". This statute would apply whenever it was found that one co-tenant had received rents, money or other kinds of payment from third persons in respect of the tenancy, more than his proportionate share. It had no application where one co-tenant was himself in exclusive occupation or enjoyment of the common property, or when he employed his capital and industry in cultivating the whole of a piece of land in a mode in which the money and labour spent greatly exceeded the value of the rent or compensation for the mere occupation of the land, or where it was not possible, having regard to the circumstances of the case, to say that he had received more than his just share: vide *Henderson* v. *Eason* (1). As was observed by Parke B. in this case (1):—

> The statute .... includes all cases in which one of two tenants-in-common of lands leased at a rent payable to both, or of a rent charge, or any money payment or payment in kind, due to them from another person, receives the whole or more than his proportionate share according to his interest in the subject of the tenancy. There is no difficulty in ascertaining the share of each, and determining when one has received more than his just share: and he becomes, as to that excess, the bailiff of the other, and must account.

This was the principle underlying the Statute of Anne. Quite apart from this statute, the Courts of Equity in England, entertained bills for account by one co-sharer against another on the same equitable grounds: *Denys* v. *Shuckburgh* (2); and, in fact, these Courts, by reason of their offering superior facilities for accounting, were often resorted to in preference to tribunals of law. Neither in equity nor, under the Queen Anne's Statute, it was necessary for the co-owners to apply for partition or

(1) (1851) 17 Q. B. 701 (719); 117 E. R. 1451 (1458).

(2) (1840) 4 Y. & C. (Ex.) 42; 160 E. R. 912.

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sale of the property before he could get accounts. As was observed by the Lord Chief Baron, in *Bentley* v. *Bates* (1) :—

> It is hard to say that the joint ownership of a colliery must be put an end to by dissolution, before an account can be taken. I do not agree that in a case between joint tenants, or tenants in common, of a colliery, one party can *compel* another to sell his share, and dissolve the concern previously to taking the account. That was not the meaning of the statute which gave the account between them, or of Courts of Equity which had the jurisdiction over such accounts previously to the statute.

The Queen Anne's Statute itself cannot, of course, apply to India, and it has now been repealed in England, but the principle which was embodied in this statute, and which was given effect to by Equity Courts in England, can, I think, be applied as a rule of equity, justice and good conscience in India, in the absence of any statutory provision on the point. It would be inequitable, if a co-owner is forced to have a partition of the property, and cannot otherwise get his share of the profits which is actually being received by his co-owner, even though the effect of a partition may be a practical destruction of the property, or a deterioration of its value. This principle was applied by the Bombay High Court in *Balvantráv Oze* v. *Ganpatráv Jádhav* (2), where West J. observed as follows :—

> This principle has in England been embodied in a Statute 4 & 5 Anne, c. 16, s. 27, but it is one enforceable by equity.....as resting on natural right, and, therefore, by the Indian Civil Courts.

Dr. Basak laid much stress on the decision of this Court in *Mahesh Narain* v. *Nowbat Pathak* (3). But the learned Judges, who decided that case, nowhere said that the principle underlying the Queen Anne's Statute was inapplicable as being unsuitable to Indian circumstances. On the other hand, they expressly followed the decision in *Henderson* v. *Eason* (*supra*) mentioned above and held on the authority of that case that the plaintiff was not entitled to accounts on the principle embodied in the Queen Anne's Statute as there was no

(1) (1840) 4 Y & C. (Ex.) 182 (190); 160 E. R. 971 (974).

(2) (1883) I. L. R. 7 Bom. 336, 339-340.

(3) (1905) I. L. R. 32 Cal. 837.

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proof that the defendant had received more than his share.

Dr. Basak argues further that if that principle is applied, it would be open to a co-owner by leaving the property to the management of the other co-owner to impose upon the latter an obligation of a fiduciary character. I don't think that there is any substance in this contention. There is no fiduciary relation between co-owners of a property as such: *Kennedy* v. *De Trafford* (1); and, if one co-owner realises rents and profits, he does so in his capacity as an owner for which no agency from the other proprietor is necessary. But, for what he receives in excess of his share, he must be under an obligation to account to the other co-sharer. I cannot, therefore, accept the proposition of law formulated by Dr. Basak, that a suit for accounts is not maintainable by one co-owner against another unless there is a claim for partition. If, however, there is actual ouster by one co-sharer of another, different considerations arise. The remedy of the co-sharer who is dispossessed must be to sue the other for joint possession and he can claim, along with it, compensation or mesne profits. A pure action of account would not be an appropriate remedy under such circumstances. This is also the law in England: *vide* Freeman on Co-Tenancy, s. 290. The decision of the lower appellate Court would, therefore, be perfectly right, if the plaintiff was actually ousted from the common property by defendant No. 1 in the present case. To show ouster it must be found that there was an exclusive possession by one co-owner connected with some act amounting to a total denial of the rights of the co-owner who is out of possession. No such case was made by the defendant No. 1 in his written-statement, and although, he denied the title of the plaintiff, he denied his own title too and disclaimed that he was in possession of the property. The finding of the Court below is that he was a joint-owner with the plaintiff, and was in possession from

(1) [1897] A. C. 180.

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the beginning as a manager. It was necessary, therefore, for him to prove, as to when he repudiated his character as a managing co-owner and asserted a title hostile to the plaintiff. There is no such finding in the judgment of the lower appellate Court. What the District Judge says is that the plaintiff in his plaint practically alleged ouster, and that is why it was necessary for him to sue for joint possession. I do not think that this view is right. The plaintiff states very clearly that the defendant No. 1 was in possession of the market as a manager. It is indeed said in para. 10 of the plaint that he refused accounts, but the mere refusal of a manager to render accounts cannot amount to an ouster.

The only point that remains for determination is whether the plaintiff's suit is barred by limitation. In England such an action of account against a co-tenant is not considered as an action for money had and received: *Thomas* v. *Thomas* (1); and, in my opinion, that is the correct view to take. I do not think, therefore, that Art. 62 of the Indian Limitation Act, 1908, is the proper Article to apply. In *Banoo Tewary* v. *Doona Tewary* (2) there were some joint debts left undivided after separation of a *Mitâkshará* family. Some of the co-sharers realised these debts and in a suit by the other co-sharers to realise their share of the same, it was held that Art. 62 applied. On the other hand, under very similar circumstances, it was held by the Madras High Court in *Yerukola* v. *Yerukola* (3), Art. 120 would be the proper Article, unless agency was proved, in which case the suit would be governed by Art. 89.

As I have said above, according to the principle of the Queen Anne's Statute, the co-sharer is only entitled to accounts, which means that the defendant is entitled to all just allowances and all the rights and indemnities of a receiver. If it was an action for money had and received the defendant's liability would be absolute.

(1) (1850) 5 Exch. 28; 155 E. R. 13. (2) (1896) I. L. R. 24 Cal. 309.
(3) (1922) I. L. R. 45 Mad. 648.

There is no specific Article in the Limitation Act to regulate a case of accounts between one co-owner and another and it seems that it would not be improper to apply Art. 120 to such a case. This view was taken in *J. Subba Rao* v. *J. Rama Rao* (1). But even if Art. 89 is held to be the proper Article, I do not think that the plaintiff's suit can be held to be time-barred. The suit has been brought within three years from the date when the demand for accounts was refused by defendant No. 1. Dr. Bysak lays stress upon the fact that the plaintiff speaks of the last demand in his plaint, which implies that there must have been previous demands, and if these were refused the cause of action must have arisen earlier. But as to that, there is no evidence and no finding, and the defendant No. 1 nowhere attempted to show that there was any previous demand prior to 1936. Under these circumstances, I cannot hold that the plaintiff's suit is barred by limitation.

The result, therefore, is that the appeal is allowed. The judgment and decree of the lower appellate Court are set aside. The plaintiff will have a preliminary decree for accounts as given by the trial Court, and the accounts would be taken by a commissioner appointed by the Court. The accounts would be taken on the footing of what has been actually received by defendant No. 1, and he would be entitled to all just allowances as a receiver, including the remuneration paid to servants and clerks in the matter of realizing rent and profits, and would be able to show losses in his business. These directions would be embodied in the preliminary decree. The plaintiff would be entitled to cost of this appeal.

ROXBURGH J. I agree.

Appeal allowed.

P. K. D.

(1) (1916) I. L. R. 40 Mad. 291.