in all suits except suits for immoveable property, it would have clearly expressed the change intended by embodying it in the new Procedure Code. I think the provision in the Contract Act is only permissive.

1877. November 5.

RAMASAMI v. THERUVENGADASAMI.

Suit remanded.

APPELLATE CIVIL.

Before Mr. Justice Innes and Mr. Justice Busteed.

MANALLY CHENNA KÉSAVARÁYA (PLAINTIFF) APPELLANT *v.* MANGÁDU VAIDELINGA (DEFENDANT) RESPONDENT (1).

1877. November 10.

Suit for dharmakartaship of pagoda—Account—Act IX of 1871, *Schedule II, Article* 123—*Act IX of* 1871, *Section* 29.

X., the founder of two pagodas, died in 1795 leaving six sons of whom two were named C. and T., respectively. T., the younger, died in 1834 leaving two sons of whom one who died in 1853 was the father of the plaintiff. The founder's elder son C. died in 1816 leaving two sons, M. who died in 1840 and L. who died in 1847, and two daughters, A. and the defendant's mother. The office of Dharmakarta descended from the founder to C. After his death a Manager was appointed by the Collector, and C.'s son M. was dispossessed by his uncle T. and in 1834 M. brought a suit in equity against T. and his sons. Pending the final decree M. was appointed by the Supreme Court to act as Dharmakarta. A decree was never passed and the suit abated on M.'s death in 1840. M. was succeeded in the office of dharmakarta by his brother L. who held it till 1847 when he died leaving it by will to his sister A. and her husband R. jointly. R. died soon after and A. in 1872, leaving the office by will to her sister's son, the defendant.

In a suit by plaintiff, as eldest surviving male member of the founder's family, claiming the office of dharmakarta, or that, if he were not entitled, some proper person might be appointed to it, and praying that an account might be taken of the pagoda property against the defendant as dharmakarta and also as executor of A. *Held* on appeal (confirming the decision of the Court of First Instance) on the first question that the suit was barred by the Limitation Act IX of 1871, Schedule II, Article 123 : that whatever might be the effect of the possession by M. and L. the will left by L. in 1847 bequeathing the office to his sister A. and her husband R. was an act unequivocally hostile to the rights of the male members of the family, and as the will was at once acted upon they must have had notice of this invasion of their rights. *Held* also that plaintiff was precluded from setting up a fresh right as accruing to him on the death of A. as the only male survivor of the founder's family, by the provisions of Section 29 of the Limitation Act IX of 1871.

Held on the second question that plaintiff having no longer any title to the property was not in a position to treat defendant as a trespasser and to call upon

(1) Appeal No. 16 of 1877, from the decree of Mr. Justice Kindersley, dated 11th July 1877.

1877. November 10.

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him for an account of the past administration of the trust upon that footing, and further that the suit being substantially one to remove the defendant from the trust, and to establish plaintiff's title to the hereditary office or, on failure of this, to secure the appointment of a fit and proper person to fill defendant's office, the account was only prayed for on that understanding, and, therefore, the plaintiff was not entitled to call for an account of the past administration of the trust, as a person interested in the religious trust.

THIS was an appeal from the decree of Kindersley, J., made in Original Suit No. 3 of 1875. The facts of the case are fully set forth in the judgment of the Court of First Instance, which was as follows:—

"The facts in this case are generally admitted. Múttukristna Mudaliar, the founder of the pagodas in question, died in 1795, leaving six sons, of whom two were named Chinnaya and Tambiappa, respectively. Tambiappa, the younger, died in 1834 leaving two sons of whom one named Apparáu who died in 1853 was the father of the plaintiff. The founder's other son Chinnaya died in 1816 leaving two sons, Múttukristna who died in 1840 and Lakshmana who died in 1847, and two daughters Ammani Ammál, and Rájammál, the defendant's mother. The office of Dharmakarta appears to have descended from the founder to his son Chinnaya who died in 1816, after which a manager was appointed by the Collector, and Chinnaya's son Múttukristna seems to have been dispossessed by his uncle Tambiappa, and in 1834 he, Múttukristna, brought a suit in equity against Tambiappa and his sons. A reference was made to the Master upon which no report was ever made; and pending further proceedings the Supreme Court made an order to the effect that Múttukristna was to exercise the functions of dharmakarta subject to his accounting under the final decree. That final decree was never passed, and the suit seems to have abated on the death of Múttukristna, the plaintiff, in 1840. I can find no reason for holding that any one continued the suit until 1866, when an order was made dismissing certain old suits. Múttukristna was succeeded in the office of dharmakarta by his brother Lakshmana who held it until 1847, when he died leaving it by will to his sister Ammani Ammál and her husband Rámasámi jointly. Rámasámi died soon afterwards and Ammani Ammál died in 1872, leaving the office by will to her sister's son, the defendant.

The plaintiff, as eldest surviving male member of the founder's family, claims the office of dharmakarta, which he says could not be disposed of by the will of Ammani Ammál. He further prays that if he is not entitled to the office, some proper person may be appointed to it, and that an account may be taken of the pagoda property and

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also against the defendant as executor of Ammani Ammál of whatever may be due by her estate to the pagodas.

The defendant, at the trial, pleaded that the plaintiff and his branch of the founder's family had been out of possession for more than 12 years, and I am of opinion that this plea must be allowed, and that so much of the plaintiff's suit as seeks for the office of dharmakarta must be dismissed as barred by the Act for the limitation of suits (1), 2nd Schedule, Article 123. It is conceded that Chinnaya's branch of the family have been in possession for many years, but it is contended that the Court gave to Múttukristna only a qualified possession subject to further proceedings. Now Múttukristna, when he was placed in possession instead of the plaintiff's father and uncle, was a party engaged in actively contesting the claims of the plaintiff's branch, and he appears to have been put in by the Court as the party *primâ facie* entitled. But if his possession was qualified the same objection cannot be taken to the possession by his brother Lakshmana who claimed in his own right from 1840, and was not appointed by the Court. On the death of Lakshmana in 1847, Chinnaya's descendants in the male line became extinct, and the plaintiff's right to the succession, if any, accrued. Ammani Ammál and her sister had married into other families, and the will of Lakshmana was as much open to objection as the will of Ammani Ammál. The plaintiff's claim to the office is, therefore, barred. It has not been alleged that the plaintiff was a worshipper at the pagodas in question; and the fact is denied. The plaintiff not suing as one of the worshippers, I am unable to see that he has any right as a member of the founder's family who does not appear to have taken an interest in the pagodas for many years, to call upon the defendant to account, either as dharmakarta, or as executor of Ammani Ammál's will, the defendant not being charged with misconduct of any kind. The suit must, therefore, be dismissed with costs."

The plaintiff preferred an appeal on the grounds, among others, that the suit was not barred by the Act of limitation; that the plaintiff had a right to the dharmakartaship of the pagodas in question by virtue of his being the surviving senior male member of the family of the late Muttukristna Mudaliar, deceased, the original founder of the pagodas; that the plaintiff was a worshipper in the pagodas and interested therein; that the defendant was bound to account in his individual capacity and as executor of the will of the late Ammani Ammál; and that the will of the said

1) Act IX of 1871.

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Ammani Ammál should have been declared invalid so far as it appointed a dharmakarta of the pagodas in question.

The *Advocate-General* (Mr. *O'Sullivan*) for the Appellant.

Mr. *Miller* and Mr. *Johnstone* for the Respondent.

The judgment of the Court was delivered by

INNES, J.—On the first question I am of opinion that plaintiff's suit is barred. The founder had six sons. He died in 1795. Chinnaya and Tambiappá, the two sons who last survived him, died respectively in 1816 and 1834.

In 1834, before Tambiappa's death, the younger Múttukristna, one of the two sons of Chinnaya, in an equity suit contested with Tambiappa the right to hold the office,—a decree was made directing certain inquiries to be entered upon by the Master, and pending his report, Múttukristna was placed in management of the office. Tambiappa died in 1834, and in 1840 Múttukristna died. Tambiappa's two sons, Apparáu and Rájagopál, survived him. Plaintiff was also then in being, and about 13 years old. Lakshmana, the younger brother of Múttukristna, took possession of the property without opposition from any of the members of Tambiappa's branch, and held the office till his death in 1847. He left a will in favor of his sister Ammani Ammál and her husband. They entered upon possession and management of the office. In 1848 the husband died, but Ammani Ammál continued in enjoyment of the office till her death in 1872.

An office of this kind not being in its nature partible, it is not only not unusual, but it is in accordance with general practice for some one member of a family to hold it for life. Instead of several members of the family holding the property in common, one takes it in its entirety, and the common law rights of the others who would be co-parceners of partible property are reduced to rights of survivorship to the possession of the whole. But such a possession, though not necessarily implying the exclusion of the other members of the family from rights of survivorship in the property as joint family property (see as to this *Srí Rájah Venumula Gavuridévamma Gáru* v. *Srí Rájah Venumula Rámandora Gáru* (1) the language of which is applicable to all impartible joint family property) may become hostile, and exclusive, and the question is whether it did not become so in this case.

(1) 6 Mad. H. C. Rep., 93, at p. 105.

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The Court, as a temporary measure, had, in 1834, placed Múttukristna in possession, and this may have been regarded by Tambiappa and his sons as an *ad interim* decision in favor of his brother Chinnaya's branch. And on Múttukristna's death it may be that the possession taken by Lakshmana may have been acquiesced in on the understanding that it was in accordance with the intermediate decision of the Court in the proceedings in the Equity Suit which was still pending, and Lakshmana may have taken, and may have been regarded as having taken and held possession with the acquiescence of the family, on this footing, that is, subject to the final order of the Court in the Equity Suit. Lakshmana died in 1847, leaving a will, whereby, ignoring the rights of the surviving male members of Tambiappa's branch who were the only male survivors of the family, he bequeathed this hereditary office to Ammani Ammál and her husband, a stranger to the family of the founder. This was an act of a character unequivocally hostile, and as the will was acted upon at once by the devisees, the survivors of Tambiappa's branch, including plaintiff, who was then about 20, must have had full notice that exclusive possession had been taken of the office to the prejudice of their rights. Rámasámi (Ammani's husband) died in 1848, but Ammani continued to hold possession until 1872. Whatever right to the office a female, married and estranged from the founder's family, might have after the exhaustion of the male co-parceners, it is contrary to all known principles of Hindu rights of property that a female should take possession in preference to male survivors who are also co-parceners, and Ammani's holding up to her death was clearly a holding hostile to the rights of the male survivors. It was suggested that there were certain benefits accruing to the hereditary office through the bequest made by Lakshmana, which would be lost to it if the survivors of Tambiappa's branch refused to recognize the will; and that if the inactivity of the survivors be attributed to this cause the holding by Ammani and her husband need not be regarded as hostile. But this suggestion is so decidedly opposed to the probabilities of the case, that to render it of any weight it should be very clearly established. It is not established at all, but rests upon mere conjecture without a particle of evidence to support it.

Then Ammani died in 1872, leaving a will in favor of defendant, a son of a sister of Ammani. He entered upon possession at

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once, and it is not, of course, contended that his possession was not hostile. The suit was brought in January 1875. Twelve years from the date of the defendant's possession, or that of some one through whom he claims, is the period within which a suit must be brought. And, as defendant claims through Ammani, and she took possession in 1847, the suit is unquestionably barred.

But it was said that although plaintiff's right might have been barred in the life time of Ammani, still on her death a fresh right would accrue to plaintiff as the only male survivor of the founder's family, and that, consequently, he may be entitled to succeed to the office as against defendant, who holds only under a will left by Ammani, which having regard to the limited power of disposition possessed by Hindu women can confer no valid title. This might possibly be so were it not for Section 29 of the Limitation Act of 1871, which absolutely extinguishes the right after the determination of the period limited for instituting a suit of this kind, and it is clear that long before the death of Ammani plaintiff's right must have been absolutely extinguished.

The only remaining question is as to whether plaintiff is in a position to call upon defendant for an account. It was objected that as the nature of the prayer for relief in this respect imputes a misfeasance to Ammani as trustee, the suit cannot be brought without leave of the Court first obtained. It seems clear, however, that it was not necessary to obtain leave, as the provisions of Act XX of 1863, to which we were referred in support of this position, are confined in their application to the case of misfeasance by an existing trustee, and have no reference to a suit in which, as in the present case, the only misfeasance charged is that admitted by Ammani Ammál in her will to have been made by her.

Plaintiff having no longer any title to the property is not in a position to treat defendant as a trespasser, and to call upon him for an account of the past administration of the trust upon that footing. But there is still the question—whether, as a person interested in the religious trust, he may not be in a position to call upon defendant to account for the misfeasance in the time of Ammani, and to refund, as her executor, and as directed by her, the funds which she misappropriated.

I think, however, that the suit is substantially a suit to remove defendant from the trust, and to establish plaintiff's title to the

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hereditary office, or (in failure of plaintiff to establish the title) to secure the appointment of a fit and proper person to fill defendant's office, and that the account is only prayed for on that understanding.

If it were clearly shown that defendant is contemplating a breach of trust, or the charity appeared likely to suffer ultimately from Ammani's misfeasance, there might be ground for granting relief beyond the obvious limit of the purpose for which the suit was instituted. But there is no ground for presuming that defendant will abuse his position as trustee or that he will not do his duty as executor.

I think the appeal should be dismissed, and with costs.

BUSTEED, J., concurred.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir W. Morgan, C. J., and Mr. Justice Kindersley.

1877. December 7.

VENKITTARÁMA PATTAR (PLAINTIFF) APPELLANT *v.* KAMBARATH KE'SHAVA MENON (DEFENDANT) RESPONDENT (1).

Unconscionable bargain—Indian Contract Act, Sec. 74.

Plaintiff sued to recover Rupees 643-10-6, value of 1,230 paras of paddy, due under an account dated 8th September 1876. The account, on a cadjan, was for Rupees 315 payable with 12 per cent. interest within 15 days, and in default plaintiff to be paid, on 14th November 1876, paddy for the amount due calculated at the rate of 4 Annas 7 Pies per para. Immediately after the execution of this agreement the price of rice rose, the defendant did not pay within the 15 days, and in the plaint in this suit the price of rice was calculated at 8 Annas per para. *Held* that the bargain was unconscionable. Under the Contract Act, Sec. 74, in a case falling within its terms only reasonable compensation could be given, which in the present case would be interest at a somewhat high rate. The contract in effect was that, if principal with 12 per cent. were not paid on 22nd September, double the amount should be payable on the 15th November. Such a contract a Court of Equity would not enforce.

THE plaintiff sued to recover Rupees 643-10-6, being the value of 1,230 paras of paddy which he alleged to be due under an account dated 8th September 1876. The account was written on a

(1) Second Appeal No. 603 of 1877 against the decree of H. Wigram, Officiating District Judge of South Malabar, dated 14th September 1877, modifying the decree of the District Munsif of Temalprom, dated 14th June 1877.