

APPELLATE CIVIL

Before Mr. Justice Jackson and Mr. Justice Tottenham.

1880
Feb. 5.

SARODA SOONDURY DOSSEE AND ANOTHER (PLAINTIFFS) v. DOYAMOYEE DOSSEE AND ANOTHER (DEFENDANTS).*

Limitation—Exclusion from share of Joint Property—Right to Possession on death of Hindu Widow—Limitation Acts (IX of 1871), sched. ii, arts. 127, 142; and (XV of 1877), sched. ii, arts. 127, 141.†

Article 127, sched. ii of Act IX of 1871 pre-supposes the existence of joint family property, and that there has been an exclusion from participation in the enjoyment of such property.

Semble.—The word 'excluded' in that article implies previous inclusion.

The right of a Hindu to the possession of immoveable property on the death of a Hindu widow, to which art. 142, sched. ii, Act IX of 1871, refers, must be one *in esse* at the time of the death of the widow. The determination, therefore, of such right during her lifetime extinguishes also the right of the reversioner on her death.

THIS was a suit for recovery of possession of a two-third share of certain lands and a shop standing thereon.

The plaint, *inter alia*, alleged that the plaintiffs were two of the daughters of one Kristo Mohun Kundu, who died some time in the year 1854-55, leaving him surviving his widow Hurimoni Dossee, and, besides the present plaintiffs, a stepdaughter Doyamoyi, the first defendant; that, during her lifetime, the said Hurimoni Dossee was in possession and enjoyment of all the property, ancestral and acquired, of her deceased husband, including the land and shop, the subject of the present suit; and that, in accordance with the arrangement made by her husband during his lifetime, the said Hurimoni Dossee continued to

* Appeal from Appellate Decree, No. 517 of 1879, against the decree of A. G. C. Brett, Esq., Judge of Jessore, dated the 17th December 1878, reversing the decree of Baboo Kadaressur Roy, Roy Bahadur, Subordinate Judge of that district, dated the 31st December 1877.

† The corresponding articles in the present Limitation Act (XV of 1877) are practically of precisely similar import.

entrust the management of the said house and shop to one Lukhun Chunder Daw, the husband of the first defendant; that Hurimoni Dossee died in Bhadro 1276 (August-September 1869); that, on her death, the plaintiffs and the said first defendant entered into, and continued in joint possession of, the property, receiving the proceeds according to their respective shares; that Lukhun Chunder Daw died in Kartik 1283 (October-November 1876); that the institution of the present suit had been necessitated by the conduct of the said Doyamoyi, the first defendant, who, acting in collusion with the second defendant, had deprived the plaintiffs of their respective shares in the property.

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The plaint was filed on the 21st May 1877. The defendants in their respective written statements alleged that the property in suit had been bequeathed to the said Lukhun Chunder Daw, the husband of the first defendant, by the will of the said Kristo Mohun Kundu; that, after the death of the said Kristo Mohun Kundu, neither the plaintiffs, nor their mother Hurimoni, had ever been in possession and enjoyment of the property, and their rights, if any, were therefore barred by limitation.

The Court of first instance declared the will invalid, and having found that Kristo Mohun predeceased his wife, leaving no son, was therefore of opinion that, all the property of the deceased had vested in her, and that the present suit having been brought within twelve years of the death of Hurimoni Dossee, was not affected by the law of limitation. The lower Appellate Court found that there was no evidence to show possession in the plaintiffs or their immediate predecessor in title, at any time within twelve years of the institution of the present suit, and therefore, overruling the decision of the lower Court, declared the suit barred by limitation.

The plaintiffs appealed to the High Court.

Baboo *Mohiny Mohun Roy* for the appellants.

Baboo *Rash Behary Ghose* and Baboo *Bunghidhur Sen* for the respondents.

The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

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JACKSON, J. (who, after stating the facts, proceeded as follows):—
 Now, the plaintiffs, on appeal before us, have relied ultimately upon art. 127 and art. 142 of the Limitation Act (IX of 1871), both of which are referred to in the grounds of special appeal. It appears to me that art. 127 clearly cannot apply. That relates to suits by a Hindu excluded from joint family property to enforce a right to share therein, and in order to bring the suit within that description, it will have to be shown that there had been joint family property, and that the plaintiffs have been excluded from the enjoyment of it, and therefore desire to enforce their right to share therein. I should be inclined to hold that the word 'excluded' implies previous inclusion, and that such a suit as this could not be maintained by a person who had never had any portion of the joint family property; but at any rate it would be necessary to show that there had been joint family property. Now, from the finding of the Judge, it is clear that that is not the state of things in the present suit, because, as the Judge finds that the widow had no possession or enjoyment of this property, it did not descend to her three daughters, and therefore never became joint family property. Now we turn to art. 142. Under that article, it is clear that only so much of the suit as relates to possession of immoveable property could be included. This will not comprise the stock, debts of the shop, or business, or anything but the bare ground and the premises standing upon it. But let us consider whether even so far the present suit is maintainable. The description of that article is 'like suit,' that is, a suit for possession of immoveable property, "by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow." Now, it appears to me that the person entitled to the possession of immoveable property on the death of a Hindu widow means a person who succeeds to a certain right which is in being on the death of the Hindu widow, and that if the title which would have enabled that widow to hold the estate as a widow had become barred before her death, the reversioner, who would be the next taker, is not to be entitled to possession

of the property on the death of the widow. Consequently, it appears to me that this is not a suit which in any sense will come under the words of art. 142, and that frees us from the necessity of considering how far this article and the Act of 1871 would operate, regard being had to the time of the widow's death, because it appears to me that the plaintiffs are not persons entitled to possession of the property on the death of the widow. I think, therefore, this appeal fails, and must be dismissed with costs.

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Appeal dismissed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

LOOTFULHUCK (PLAINTIFF) v. GOPEE CHUNDER MOJOMDAR
(ONE OF THE DEFENDANTS).*

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April 13.

Co-Sharers of Land—Arrangement for Separate Payment of Rent—Separate Suit for Arrears of Rent—Liability of Tenant acquiescing in arrangement for separate payment.

Where, on the consent of all the shareholders, landlords, a tenant in an undivided property has agreed to pay the different sharers the rent of the tenur, in proportion to their respective shares, and can be and has been sued for the rent of a particular share, it is not open to such tenant to cease from paying the proportionate fraction of the rent due in accordance with his agreement, except on the consent of the owner of that particular share.

Where co-sharers in an undivided property acquiesce in a decision declaring one of their number the owner of a recognized share in such property, it is not open to a tenant (who had previously agreed to pay his rent in accordance with the shares of the respective part-owners) to refuse payment of the proportionate share of the rent claimed by such co-sharer as the owner of the recognized share, simply on the ground that he had never before paid rent so proportioned to such co-sharer.

THIS was a suit to recover the sum of Rs. 1,612-3-6, being arrears of rent due for the years 1874 to 1876 (1281 to 1283 B. S.)

* Appeal from Appellate Decree, No. 2266 of 1878, against the decree of F. McLaughlin, Esq., Officiating Judge of Noakhally, dated the 20th August 1878, reversing the decree of Baboo Mathura Nath Gupta, Subordinate Judge of that district, dated the 23rd March 1878.