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regularly adopted, and those who came before him as heirs to Bhowani Kishore out of the way, should not, in that state of things, take the inheritance which the mother gives up to him, and should not, to use the words of Mr. Mayne, be rewarded by the estate for the services which he renders to the deceased?

We think not. He had been adopted many years back, and, Chundraboli declared, had been performing the *sradhs, turpun, parban,* and *debsevas,*" and there was "no other man but him to offer oblation of cake and libation of water to her husband and his paternal ancestors and to herself;" and it seems to us, that although as heir to Gour Kishore, he could not displace the widow and heir of a subsequent full owner, and as heir to Bhowani he came after the widow and the mother, he might, without objection, succeed when, by their successive deaths or surrender, he united *in himself* the capacities of heir of Gour Kishore and heir to Bhowani.

This conclusion answers the other question. The case is anomalous, but is reducible to rule. The adoption made Ram Kishore brother to Bhowani, and as a brother he would succeed in his proper place and order.

On all grounds, therefore, and every principle of equity and justice, we think the defendant was entitled to the judgment of the Court.

We consequently affirm the decision of the Subordinate Judge, and dismiss this appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.* 1879 *Nov.* 13 & 14.

DIWAN MANWAR ALI (PLAINTIFF) *v.* ANNODAPERSAD RAI (DEFENDANT).

[On appeal from the High Court of Bengal.]

Limitation Act (IX of 1871), sched ii, art. 145.

The plaintiff and two other members of his family, *M.* and *S.*, held a zemindari in the following shares, *viz.*:—the plaintiff ten annas, *M.* two annas, and *S.* four annas. Having first held the land ijmali, or joint, they agreed, in

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

the year 1839, to effect a batwara, or private partition, and of this the result was, that parcels of land representing his ten-annas share were allotted to the plaintiff, and other parcels representing their shares, which together made six annas, were allotted to *M.* and *S.*, who held jointly. *M.* died in 1842, and his share came to the plaintiff. The four annas share of *S.* was sold in execution of a decree against him in 1856, and the purchaser of it, not accepting the fact of partition, sued both *S.* and the plaintiff in 1858, to have it declared that there had been no partition, and for a declaration of his right to possession of a four-anna share of the whole estate. A decree was made to that effect in 1860; and in 1863, an appeal by *S.* alone, against this decree, was dismissed by the High Court. The purchaser's heirs, he having died, obtained possession of land representing the four annas share under the decree of 1860. *S.* then set up a title to hold part of the lands, allotted under the batwara of 1839, to the six annas share, on the ground that they were lakhiraj lands, and distinct from the revenue-paying villages in which his interest had passed under the execution-sale.

The plaintiff sued, in September 1873, the defendant who had purchased this last alleged interest of *S.* at another sale in execution of a decree against him, claiming that the partition having been set aside and a four-annas share of the whole estate obtained by the purchasers under the decree of 1860, a right accrued to him to have his share, now twelve annas, declared upon the lands which had fallen within the six annas share. He also claimed to have it declared that the parcels alleged to be lakhiraj were not so.

On the question of limitation it was held, that the 145th article of the second schedule of Act IX of 1871 was applicable; and that even if, technically, the lands now in question remained in the possession of *S.* pending the appeal against the decree of 1860, there was no possession adverse to the plaintiff, rendering it necessary for him to assert his right until the dismissal of the appeal in 1863.

APPEAL by special leave from the decree of a Divisional Bench (Mr. Justice Macpherson and Mr. Justice Morris) of the High Court of Bengal (25th February 1876), reversing that of the Subordinate Judge of Tipperah (7th September 1874).

This suit was instituted on the 17th September 1873 to obtain possession of a share of villages and cultivated lands forming a zemindari, which was itself part (described as amounting to three annas and eight gandas) of a larger zemindari, known as Parganna Surail, in Tipperah. The plaintiff was a member of a family which had held this fractional part of Surail, the defendant was the zemindar of the residue of Surail, who had purchased the share, as to which the contest in this suit had arisen, at a sale in execution of a decree.

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Before the year 1839, the plaintiff, his father Masnad Ali, and Samdal Ali, his stepmother's son, were the joint proprietors of the three annas eight gandas estate, holding it ijmali, or dividing the profits of the whole in proportion to their shares, which were the following, *viz.*:—ten annas to the plaintiff, two annas to Masnad Ali, and four annas to Samdal Ali. In 1839, some steps were taken towards a *batwara*, or private partition, and according to it, lands were allotted representing the plaintiff's ten annas share, and other lands representing the shares of Masnad Ali and Samdal Ali, which together were six annas. How far the partition was carried into effect was questioned in these proceedings; but the lands now in question fell entirely within the six annas allotment. Masnad Ali and Samdal Ali remained in undivided possession of the latter down to the death of Masnad Ali in 1842, but after his death the plaintiff, partly by purchase, and partly in other ways, acquired the two-annas share of Masnad Ali. Then Samdal Ali got into difficulties, and at a sale in execution of a decree against him, one Nasiruddin purchased his four annas share on the 1st December 1856.

Nasiruddin, declining to accept the fact of the alleged partition, brought a suit in 1858 against both the plaintiff and Samdal Ali, to have his right to the possession of an undivided four annas share on the whole three annas and eight gandas zemindari declared; in effect to get rid of the result of the partition upon the interest which he had purchased. On the 3rd December 1860, a decree was given by the Principal Sudder Ameen of Tipperah, whereby Nasiruddin was declared "entitled to take a four-anna share, joint, out of the three annas eight gandas zemindari, part of the Parganna Surail, regarded as sixteen annas, under the auction-purchase of the right of Samdal Ali."

Against this decree Samdal Ali (but not the plaintiff) appealed to the High Court; and, on the 19th January 1863, this appeal was dismissed with costs.

In February 1864, Nasiruddin's heirs, he having died, obtained an order for the possession of the four annas share under the decree of 3rd December 1860. But Samdal Ali did not relinquish possession, and he brought forward a claim to hold lakhi-

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raj lands in the Kismat, or lot, Konda and Kismat Maslanpur, which had fallen within the six annas share at the family division of 1839. In these lots he claimed that there were lands distinct from the "*khalisha*," or rent-paying villages, in which his interest had passed under the execution.

On the 2nd November 1868, Manwar Ali, the present plaintiff, filed a plaint against Samdal Ali, alleging that this assertion of a lakhiraj tenure was false. This suit, however, when it had gone as far as the settlement of issues, and the taking of some of the evidence, was, by leave of the Court, withdrawn under s. 97 of Act VIII of 1859.

About the time of the institution of the last-mentioned suit, some of Nasiruddin's heirs, entitled to part of his estate, sued Samdal Ali, his sons, and wife, and Manwar Ali also. The object of this suit was to prevent the allegation of the lakhiraj tenure from defeating their interests under the execution. These heirs of Nasiruddin claimed lands which they asserted to represent their joint share of the four annas interest of Samdal Ali (purchased by Nasiruddin) within Konda and Maslanpur, which Samdal Ali alleged to be lakhiraj. An issue was framed on the question whether the lands so claimed were lakhiraj or not; and on the 28th November 1868, the Subordinate Judge of Tipperah decided that "the lands were not lakhiraj," but "before the auction-purchase by Nasiruddin were in the possession of Samdal Ali as included in khalisha." This decision was upheld by the Civil Judge on the 13th August 1869.

Thereupon these heirs of Nasiruddin obtained, on the 27th January 1870, an order for the possession of the lands described as "*khodkast khalisha* zemindari," and afterwards signed a dakhalnama, or order for possession. But, having still a claim as to certain unsatisfied costs on the 4th April following, they applied to the Subordinate Judge of Tipperah for execution of their decree, as to these costs, by the sale of the remainder of the "right, title, and interest" of Samdal Ali. Then it was that the defendant, a proclamation of sale issuing, purchased the interests of Samdal Ali, his sons and wives, in the "lakhiraj lands of Kismat Konda and Maslanpur," and obtained possession through the Court, on the 9th September 1871.

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On the 19th September 1873, the plaintiff instituted this suit, seeking to recover his twelve annas share of the parcels assigned in 1839 to Masnad Ali and Samdal Ali as representing their joint share, which was six annas of the whole three annas eight gandas estate.

The defendant having, in his written answer, relied on the defence of limitation, and having alleged that the lands were held lakhiraj by Samdal, issues on those points were fixed, and judgment was given by the Subordinate Judge of Tipperah to the effect that the suit was not barred by time, and that the lakhiraj tenure had not been proved.

This judgment was reversed by the High Court, which, in effect, decided that the plaintiff not having sued within twelve years from the 3rd December 1860, the date of the judgment giving the plaintiff the right on which he relied, was barred by time.

In giving judgment, Mr. Justice Macpherson said :—"The case made by the plaint is substantially this, that, from the partition in 1839, the plaintiff and Masnad and Samdal held separately the lands assigned to them on the partition; that this continued for many years; that the purchaser, Nasiruddin, having got the partition set aside, and obtained possession in 1864 of a four-anna share of all the lands of the three annas eight gandas estate, a right accrued to the plaintiff (from the date in 1864 on which Nasiruddin's heirs actually got possession) to have twelve annas of the whole lands of the three annas eight gandas estate, which, of course, would include the lands in suit: that Samdal, ever since the decree setting aside the partition, &c., has claimed to hold these lands as lakhiraj, and has retained possession of them as against the plaintiff, and that the defendant having, in 1871, purchased the remaining rights, &c., of Samdal in these lands, and having got possession, the cause of action has accrued since the dates above referred to. The plaint also seeks a declaration that the lands are rent-paying, and not lakhiraj lands.

"The defendant's first plea is, that the plaintiff's suit is, on the face of it, barred by the law of limitation, and it is clear that neither he, nor any one through whom he claims, has been in possession for more than twelve years prior to the institution of the suit.

"I think there is no doubt that this is so. The plaint states expressly that the lands, twelve annas of which are now sued for, were in the six annas share, and were held by Samdal and Masnad as such: it does not allege that the plaintiff has ever had possession of any portion of these lands, but it says that when the partition was declared invalid, and the appeal against that declaration was dismissed, Samdal *retained* possession, alleging the lands to be lakhiraj, &c. The plaintiff's case, as stated in the plaint, in fact is, that the plaintiff has been out of possession since the partition in 1839; but that when the partition was set aside, and Nasiruddin's heirs actually got possession of four annas of the whole three annas eight gandas estate (*i.e.*, in 1864), a right to have twelve annas of this property accrued to the plaintiff; that he even thereafter never got actual possession of any part of these twelve annas, but that as the defendant purchased the interest of Samdal's heirs in 1871, a right of suit accrued against him then.

"Notwithstanding that the plaintiff was out of possession for many years prior and up to the date on which the partition was declared invalid, a right did certainly accrue to him, when the partition was set aside, to obtain possession of a twelve-anna share of these lands, though, no doubt, in enforcing that right, he would have had to give up a four-anna share of the lands which he himself held. But then, that right accrued on the 3rd of December 1860, on which day the Subordinate Judge made his decree declaring the partition bad, and ordering possession of four annas of the whole three annas eight gandas estate to be given to Nasiruddin's heirs. And if the plaintiff desired to assert the right, it was necessary for him to do so within twelve years from that date. He failed to do so however, for the present suit was not commenced until the 19th of September 1873. Therefore his suit is out of time."

From this judgment the plaintiff appealed to Her Majesty in Council.

Mr. *Doyne* for the appellant.

Mr. *Leith*, Q. C., and Mr. *C. W. Arathoon* for the respondent.

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Mr. *Doyne* argued, that there was no possession adverse to the plaintiff before the 19th of January 1863, when Samdal's appeal was dismissed, if indeed before Nasiruddin's heirs got possession in 1864. No lakhiraj tenure had been proved. The proceedings commenced in 1868 were in affirmance of the state of things on which the plaintiff based his right, and on the question whether the defendant could, in regard to the source of his own title, disaffirm what had been then decided, the principles indicated in the judgment in *Shaha Makhan Lal* v. *Baboo Srikishen Singh* (1) were cited.

Mr. *Leith*, Q. C., and Mr. *C. W. Arathoon* contended that the twelve years' limitation was to be calculated from the date of the decree of 1860.

Mr. *Doyne* was not called on to reply.

Their Lordships' judgment was delivered by

SIR J. W. COLVILE.—The facts of this case are complicated, but when fully stated and explained, they do not appear to their Lordships to present any great difficulty. The first, if not the only question, on the appeal, is, whether the plaintiff's right to sue has been barred by the Statute of Limitation. That was the only question decided by the High Court, and their Lordships may at once say that if that has been improperly decided, they can see no ground whatever for doubting the correctness of the decision of the lower Court, which, upon the other material issue in the suit, held that there was no pretence for saying that the lands in dispute were not *khalisha* lands, that is, lands appertaining to the zemindari, but lakhiraj lands held under some title other than that of the zemindars.

The facts are shortly these: The estate in question, which is a fractional part of Parganna Surail, was derived from a Mahomedan lady by her husband and two sons, and was held by them in the following proportions; the plaintiff, who was one of those sons, had a ten-anna share, his father had a two-anna share, and his brother, or half-brother Samdal, had a four-anna share. Their enjoyment of the property was, up to the year

(1) 12 Moore's I. A., 157.

1839, what has been termed ijmali, or joint, that is, they divided the rents of each village in proportion to their above-mentioned shares in the estate. In 1839 the family arrangement, which has been called a batwara, is said to have taken place. Their Lordships see no reason to doubt that such a transaction did take place. Under it the different villages constituting the estate were divided,—the plaintiff taking solely certain specified villages as his ten annas share, and his father and Samdal taking jointly certain other villages, which were allotted to them as representing a six-anna share. That state of things seems to have continued, and to have been acted upon up to the year 1856. In 1856, Samdal being in embarrassed circumstances, an execution issued against his four annas of the estate at the suit of one Nasiruddin. It should be mentioned, however, that before this, Masnad Ali, the father, had died in February 1842, and that, in different ways, his two annas had come to be vested in the plaintiff, so that, at the time of the execution, the elder brother, the plaintiff, had a twelve-anna share, and Samdal only a four-anna share in the zemindari. There seems to have been the usual resistance to execution on the part of Samdal, and a suit was brought by Nasiruddin, who was execution-purchaser as well as judgment-creditor, in the year 1858, to enforce his rights. The first judgment in that suit was pronounced on the 3rd of December 1860. It was a judgment of a somewhat peculiar character. Nasiruddin had brought the suit, not only against Samdal and certain persons in whom Samdal alleged his four annas had become vested prior to the execution, but also against the present plaintiff, the owner of the twelve annas share; and it was decided not only that the four annas share had continued to be the property of Samdal at the date of the execution, and had passed under the sale in execution, but further, that the family arrangement, or batwara, which had been acted on so long, and had been pleaded by the plaintiff, had not been proved against, and was not binding upon, Nasiruddin, and that he was accordingly entitled to hold the four annas of Samdal, purchased by him in ijmali enjoyment with the plaintiff. The High Court has held that the right of the plaintiff to assert the rights which he has asserted in this suit accrued to him at the date

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of this decree, and that therefore the decree having been passed in 1860, the present suit, which was instituted on the 17th of September 1873, is out of time.

It appears that Samdal, but not the plaintiff, appealed against this decree, and that his appeal was not finally disposed of until the 19th June 1863. Execution was then taken out by Nasiruddin against Samdal, but there were fresh delays, and the heirs of Nasiruddin, who had died in the meantime, did not obtain constructive possession of Samdal's four annas until July 1864. Samdal then set up a title to hold as lakhiraj the lands in question in this suit, which had formed part of the villages allotted by the batwara, as the six annas share, treating them as no part of the *khalisha* lands, his interest wherein had passed under the execution.

It appears to their Lordships that this, or, at all events, the date of the dismissal of the appeal, is the earliest at which it can be said that the title of the plaintiff to the relief which he seeks in the present suit accrued. The effect of the decree in Nasiruddin's suit, in so far as it set aside the partition, was to give to him a right to take from the plaintiff four annas of the rents of all the villages previously allotted to him, and to give to the plaintiff a corresponding equity or right to have the twelve annas of the rents of the villages which had formerly belonged to Samdal. It cannot, their Lordships think, be said that the plaintiff was bound to assert this right in 1860, because, Samdal having appealed against the decree, there was of course a possibility of its being reversed or altered, and of Nasirnddin's suit being dismissed altogether. It was therefore uncertain against whom the right to receive the twelve annas share of the villages in question was to be asserted; nor did it follow that because the batwara, or family arrangement, had been declared to be of no effect as between Nasiruddin and the present plaintiff, it was of no effect as between the plaintiff and his brother, who were co-defendants in Nasiruddin's suit. Again, it appears that no attempt was made by Nasiruddin to take out execution pending the appeal, and it may fairly be supposed that, by arrangement between the brothers, there was an agreement that the property should continue to be enjoyed

as it had been under the partition. In these circumstances it seems to their Lordships that even if, technically, the lands now in question remained, pending the appeal, in Samdal, there was no necessity or duty lying upon the plaintiff to assert his rights in those lands until Nasiruddin's heirs were put into possession, or, at all events, until the rights of the parties had been finally determined by the dismissal of the appeal. These considerations are alone sufficient to bring the plaintiff's suit within the twelve years, and to dispose of this question of limitation. The provision of the Act of 1871, which seems to their Lordships to govern the case, is the 145th article of the 2nd schedule, which says, that the time from which the period of twelve years is to be calculated, is that, when the possession of the defendant or of some person through whom he claims became adverse to the plaintiff. Their Lordships think, for the reasons above stated, that there was no possession adverse to the plaintiff before 1863. A question has been raised at the bar whether the possession adverse to the plaintiff did not really begin when Samdal, driven to his last shift, and unable to resist the execution on the part of Nasiruddin against his zemindari interest, first set up the claim to the lands in question in this suit as lakhiraj lands held by a title other than his zemindari title, and therefore capable of being held by him, although all his interest in the zemindari had passed away. There is some evidence on the part of the plaintiff that the ijaradars of his two annas interest in those lands were then actually and forcibly dispossessed under colour of this title. It is not, however, necessary to decide this question. It is sufficient to say that their Lordships cannot concur with the High Court in thinking that the twelve years are to be calculated from the 3rd December 1860, or from any time previous to the year 1863.

It has already been intimated that, in their Lordships' opinion, the defendant has wholly failed to establish a title as lakhirajdar to the lands in question. Their Lordships must, therefore, humbly advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and in lieu thereof to order that the appeal to that Court be dismissed, and the decree of the Subordinate Judge affirmed with costs.

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The appellant will also be entitled to the costs of this appeal.

Agents for the appellant: Messrs. *Bailey, Shaw,* and *Gillett.*

Agent for the respondent: Mr. *T. L. Wilson.*

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

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THE BANK OF BENGAL (PLAINTIFFS) *v.* MENDES (DEFENDANT).

Theft of Negotiable Instrument—Title—Purchaser of stolen Security.

In the month of October 1878, a Government promissory note for Rs. 10,000 was sent from the *A* treasury to the Public Debt Office for enfacement. The note was duly received at the office, and its receipt was entered in the proper book. The business of the Public Debt Office is carried on by certain officers of the *B* Bank. The note was stolen from the office, and endorsed over by the thief to a person, who sold it to *C* for full value. The note bore two blank endorsements prior to that of the thief. In the same month *C* applied to the *B* Bank for a loan, which the Bank agreed to make upon the security of *C's* promissory note, and the deposit of Government notes. The form of application for the loan specified by their numbers the notes which were to be deposited. One of these was the stolen note. Before finally agreeing to the advance, the officers of the Bank in charge of the Loan Department sent the application, showing the numbers of the notes to the Public Debt Office, and received it back with a memorandum upon it to the effect that the notes were not stopped. On the 23rd October the loan was made, and the securities were given. Shortly afterwards the theft was discovered, and the note was stopped. In November the Bank, at the request of *C*, sent the note to the Public Debt Office for payment of interest, and the note was detained by the superintendent. The Bank then required *C* to repay the amount of his loan. This he refused to do unless all his securities were handed over to him. In a suit by the Bank against *C* upon his promissory note:

Held, that he was not entitled to refuse payment until the stolen note was given up to him.

Per GARTH, C. J.—The Public Debt Branch of the *B* Bank is as much a Government office as if it were carried on separately under the management of Government officers. The note was, therefore, stolen whilst virtually in the hands of the Government, and was, when detained