

PALANIAPPA
v.
LAKSHMANAN.

For the respondents it is next contended that out of the amount paid into Court by Father Laberthère, the appellant himself was paid Rs. 3,000 and that he is not entitled to charge the whole of the balance due under B-1 upon Rs. 28,600. This contention appears to us to be entitled to weight. Under exhibit B-1, the amount due under it was a first charge upon the thirteen-fifteenths share of the amount paid into Court by Father Laberthère. Out of that amount Rs. 28,600 was paid to respondents 1 to 3, Rs. 7,000 and odd to the appellant himself and Rs. 2,000 and odd to the decree-holder in original suit No. 13 of 1887, and the appellant is entitled to a refund of what was due to him under B-1 from each of those who shared in the amount deposited in Court in proportion to the amount drawn by them. The fund, on which the appellant had a charge, was intercepted by them all, and each is liable to replace it only in proportion to the extent to which he intercepted it.

The appellant is, therefore, entitled to a decree for refund of Rs. 1,938-13-6 and four-fifths of the costs incurred in the Lower Court and in this Court, the respondent being entitled to one-fifth the costs. The decree of the Subordinate Judge will be set aside, and a decree will be passed in appellant's favor for the amount indicated above with interest at 6 per cent. per annum from date of this decree, inclusive of costs.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Best.*

VIGNESWARA (PLAINTIFF No. 2), APPELLANT,

v.

BAPAYYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1892.
December 6.
1893.
April 6,
May 4.

*Limitation Act—Act XV of 1877, ss. 7, 8—Disability of one of two joint-claimants—
Transfer of Property Act—Act IV of 1882, s. 99—Usufructuary mortgage.*

In a suit by the two sons of a usufructuary mortgagor (deceased) to set aside the sale of the mortgage premises, which had taken place in execution of a money decree obtained by the mortgagee, it appeared that the suit, if brought by the first

* Second Appeal No. 335 of 1892.

plaintiff alone, would have been barred by limitation, but that it would not have been so barred if it had been brought by second plaintiff alone, who had not attained his majority three years before the suit :

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Held, that the sale in execution sought to be set aside was illegal under Transfer of Property Act, s. 99, but that the suit to set it aside was barred by limitation.

SECOND APPEAL against the decree of C. Sury Ayyar, Subordinate Judge of Cocanada, in appeal suit No. 163 of 1890, reversing the decree of O. V. Nanjundayya, Acting District Munsif of Cocanada, in original suit No. 434 of 1889.

The father of plaintiffs executed in favour of the first defendant a usufructuary mortgage, dated 14th March 1878, which contained no covenant for repayment of mortgage money, and put the mortgagee in possession under it. Subsequently, in 1884, the mortgagee obtained a money decree against the mortgagor, and in execution attached and brought to sale the mortgage premises, which were purchased by defendant No. 2, his undivided son. The plaintiff now sued to have the sale set aside. The District Munsif passed a decree as prayed, holding the sale to be invalid under Transfer of Property Act, s. 99. With reference to a plea of limitation, the District Munsif said that an action by the first plaintiff alone would have been time-barred, but that the suit of his brother, plaintiff No. 2, was within the period of limitation; and consequently he overruled the plea. The Subordinate Judge reversed this decree on the grounds that the Transfer of Property Act was not applicable to a mortgage of 1878, and farther that section 99 of that Act could not be applied to usufructuary mortgages, because a usufructuary mortgagee is not entitled to sue under section 67.

Plaintiff No. 2 preferred this second appeal:

Subramanya Ayyar for appellants.

Ramachandra Rau Saheb for respondents.

ORDER.—Section 99 of the Transfer of Property Act is wide enough to include all mortgages. Section 67 only prohibits a suit for sale by a usufructuary mortgagee “as such.” The suit contemplated by section 99 is not by a usufructuary mortgagee as such, but by a decree-holder, who also happens to be a mortgagee. The sale must, therefore, be held to have been illegal under section 99. It is contended, however, on behalf of the respondents (defendants) that the suit is barred under the Limitation Act. There is no finding by the Lower Appellate Court on this point,

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The Subordinate Judge will be asked to submit a finding on the issue "Is the suit barred by time?" The return to this order will be submitted within four weeks from date of its receipt, and seven days after the posting of the same in this Court will be allowed for filing objections.

[In compliance with the above order, the Subordinate Judge submitted his finding, which was in the negative.]

Rajagopala Ayyar for appellant.

Ramachandra Rau Saheb for respondents.

JUDGMENT.—The issue sent for trial by our order of 6th December last was "Is the suit barred by time?"

The Subordinate Judge has found on this issue in the negative, being of opinion that the suit is saved by the latter part of section 8 of the Limitation Act. That section is as follows: "When one of several joint-creditors or claimants is under any such disability (*i.e.*, is a minor or insane or an idiot at the time from which the period of limitation is to be reckoned—see section 7) and when a discharge can be given without the concurrence of such person, time will run against them all; but when no such discharge can be given, time will not run as *against any of them until one of them* becomes capable of giving such discharge without the concurrence of the others."

As has been observed in *Anando Kishore Dass Bakshi v. Anando Kishore Bose*(1), the latter part of this section applies only to a case of all the joint-creditors or claimants being under a legal disability. The present is not such a case, for it is admitted that first plaintiff was not under any such disability. Then the question resolves itself into this—whether, notwithstanding the fact of one of two brothers of a Hindu family being capable of instituting a suit to set aside a sale and his omission to do so within the time allowed by the law of limitations, the fact of the other brother's minority is sufficient to save the suit from being barred, if instituted within the time allowed by section 7 after minority has ceased.

If the Calcutta case above referred to is to be followed in its entirety, this question would have to be answered in the affirmative, for it was there held that section 7 of the Limitation Act saved the suit from being barred as against the applicant who

(1) I.L.R., 14 Cal., 50 at p. 53.

had but recently emerged from minority, and that the remedy as against him was not barred, and he "being one of the two joint decree-holders" should be allowed to execute the whole decree, because as against the other joint decree-holder it was the remedy only that was barred, but his right was not extinguished. It has, however, been held by a Bench of this Court (Muttusami Ayyar and Parker, JJ.) in *Seshan v. Rajagopala*(1) that section 7 of the Limitation Act applies only to "cases in which there is either one decree-holder and he is a minor, or in which all the joint decree-holders are minors or labour under some other disability, but that it does not seem to be intended to apply to cases in which the minor's interest can be protected by joint decree-holders, who are also interested in the subject-matter of the decree." Such was also the construction placed on the corresponding section of the English Statute by Lord Kenyon in *Perry v. Jackson*(2), and that such was the intention of the framers of the Indian Act is apparent on reading sections 7 and 8 together. Section 7 having dealt with the case of the person or persons (all of them) entitled to sue or make an application being under a legal disability, section 8 provides (i) that section 7 will not be applicable where there are joint-creditors or claimants capable of giving a valid discharge, and (ii) where, all being originally incapable, any one of them becomes capable of giving such discharge.

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Section 7 of the Limitation Act is, therefore, not applicable to the present case nor is the latter part of section 8. There remains then only the first part of section 8. For the appellant the words "when a discharge can be given without the concurrence of such person" are referred to as taking the case out of this section. It is contended that if appellant's brother had instituted a suit during appellant's minority, he could not have compromised the same so as to bind the minor and that consequently the case is one in which discharge could not have been given without the minor's concurrence. This contention is not of much force. The elder brother could have sued, making his younger brother a co-plaintiff, when any compromise (if any there were) could only have been made with the leave of the Court obtained under section 462 of the Code of Civil Procedure. The present case is analogous to

(1) I.L.R., 13 Mad., 236.

(2) 4 T.R., 519.

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that of *Surju Prasad Singh v. Khwahish Ali*(1), in which the suit was held to be barred. To hold otherwise would be to allow first plaintiff to get done for himself indirectly through the second plaintiff that which the Limitation Act forbids first plaintiff from doing directly.

We think, therefore, that the suit must be held to be time-barred, and on this ground we affirm the Lower Appellate Court's decree dismissing the suit, and direct the appellant to pay the respondents' costs of this appeal.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Parker.*

RAMASAMI (PLAINTIFF), APPELLANT,

v.

VENKATESAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Hindu law—Succession—Divided brothers of the full blood—Son of a reunited
half-brother.*

In 1872 a partition took place between the members of a joint Hindu family, being three brothers of the full and three of the half blood. Two of the brothers, being the sons of different mothers, subsequently reunited. The elder took the plaintiff in adoption and died during the infancy of the plaintiff. The reunited half-brother retained possession of their joint property till his death when the present suit was instituted to recover his share in the property. The two uterine brothers of the deceased resisted the plaintiff's claim :

Held, that the plaintiff was entitled to a one-third share.

SECOND APPEAL against the decree of H. G. Joseph, Acting District Judge of Ganjam, in appeal suit No. 290 of 1890, reversing the decree of P. Gopala Rau, Acting District Munsif of Chicacole, in original suit No. 350 of 1890.

The plaintiff sued to recover certain land with mesne profits, claiming to be the sole surviving member of a joint Hindu family constituted by his adoptive father and one Narayana Doss, both deceased. The adoptive father of the plaintiff was the brother of defendant No. 1 and the half-brother of defendants Nos. 2 and 3

(1) I.L.R., 4 All., 512.

* Second Appeal No. 1926 of 1891.