

1883
 DIGUMBER ROY CHOWDHRY
 v.
 MOTI LALL BUNDO-PADHYA.

The learned Judges who have referred this question to a Full Bench are also of this opinion. The reference was made in consequence of a contrary ruling in *Kashee Mohun Roy v. Raj Gobind Chuckerbutty* (1). It appears to us that in that case the learned Judges held that a *sākulya* relative was a preferable heir to a cognate *sepinda*. That decision is therefore clearly opposed to the rule of law laid down by the author of the *Dayabhaga* in the passages cited above.

The result is that this appeal fails. It is accordingly dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

1883
 January 24.

MOHUN CHUNDER KURMOKAR AND ANOTHER (DECREE-HOLDERS)
 v. MOHESH CHUNDER KURMOKAR AND OTHERS (JUDGMENT-DEBTORS).*

Limitation—Act XV of 1877, Sch. II, Art. 179.—Execution of Decree—Partition—Joint Decree—Decree for Partition.

A consent decree for partition made between three parties contained a provision that if the plaintiffs should not have the property partitioned within two months from the date thereof, any one of the other parties to the suit might obtain partition by executing the decree. One of the parties sued out execution and obtained partition and possession of his own share. More than three years after the date of the decree, but less than three years from the date of the application just mentioned, another of the parties applied for partition under the decree.

Held, that the application was not barred by limitation under the provisions of the Limitation Act, Act XV of 1877, Sch. II., Art. 179, cl. 3, exp. 1.

THE facts of this case are stated as follows in the judgment appealed from: "The parties in this case were originally

* Appeal from Appellate Order No. 316 of 1882, against the order of F. W. D. Peterson, Esq., Judge of Jessore, dated the 12th July 1882, reversing the order of Baboo Monmoth Nath Chatterjee, First Munsiff of Baghat, dated the 20th May 1882.

plaintiffs and defendants in a partition suit, which was decided in accordance with the terms of a compromise on the 30th of January 1877. The decree showed that each of three sets into which the owners of the whole property were divided, was entitled to one-third of the property in suit, and it was decreed that if the plaintiffs did not have the partition of the lands carried out within the two months, any one of the parties, whether plaintiff or defendant, might 'execute the decree and take possession after partition.' The owners of one-third accordingly executing the decree obtained their share: then some four years after the date of the decree, another set, the respondents 1 and 2, applied for separation of their share: thereupon certain of the defendants pleaded that this second application was barred by limitation, the execution by one set of the owners not being a proceeding which kept alive the decree of all. The Munsiff found that the application for execution of the first set of proprietors prevented the decree being barred. The reason given by him is that the decree was one which should be executed with reference to all the shares on the application of one of the parties, but, inasmuch as one set of proprietors had already succeeded in obtaining a separation of their one-third share, the Munsiff seems to have understood that his interpretation of the decree could not be acted on so long as the previous execution proceedings were not impugned, and he thereupon passed an order which was clearly *ultra vires*, namely, that the entire property should now be partitioned amongst all the shareholders. The present applicants for execution advanced no such claim as that the lands already separated should again be united with the lands of the other two shares and a fresh partition carried out; but manifestly the first execution proceedings were an obstacle which would have to be surmounted somehow before the present application could be granted. As the matter stood the successful execution of a fraction of the decree was for all practical purposes equivalent to three decrees, and, if so, the execution of a separate portion of the decree by those entitled to that portion could not keep alive the decree with reference to the other portion in which the first applicants for execution had no interest." The Subordinate Judge then cited and distinguished the case of

1888

MOHUN
CHUNDER
KURMOKAR
v.
MOHSE
CHUNDER
KURMOKAR.

1882 *Sheikh Khoorshed Hossein v. Nubees Fatima* (1), and allowed the appeal with costs.

MOHUN
CHUNDER
KURMOKAR
v.
MOHESH
CHUNDER
KURMOKAR.

Thereupon an appeal was preferred to the High Court, on the ground that the Subordinate Judge was wrong in holding that the decree was barred by limitation.

Baboo *Taruk Nath Palit* and Baboo *Baikant Nath Doss* for the appellants.

Baboo *Troylukha Nath Mitra* for the respondents.

The judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

CUNNINGHAM, J.—In this case there was a decree on compromise on the 30th January 1877, by which the parties were declared to be entitled to a partition, and it was ordered that, if the plaintiffs did not have the partition of the lands carried out within two months, any one of the parties, plaintiffs or defendants, might execute the decree and take possession after partition. The partition was not carried out forthwith, and an application was made by some of the plaintiffs to have the partition effected, and on that application, without dividing the entire property, one-third portion was separated. On the 15th March 1882 the present applicants applied for partition of the rest of the properties, that is, of the remaining two-thirds which were not partitioned. The question we have now to decide is, whether that application being made more than three years after the decree of the 30th January 1877 is kept alive by the application of some of the plaintiffs in January 1880. The lower Appellate Court has considered that it is not, inasmuch as the decree must be regarded as practically a separate decree in the interest of each of the parties. We are unable to concur in that view; we think on the whole that the proper view to be taken of the decree is that it was a joint decree, within the meaning of the second part of the explanation to Article 179 of the second schedule of the Limitation Act. We consider, therefore, that the application is not barred by limitation.

The Munsiff in passing orders on the application directed that the whole of the property should be partitioned, thus re-opening the

proceedings of January 1880. We concur with the lower Court in thinking that in doing this he was going beyond what the applicants had asked for. We think that the proper order to pass in the case is that the execution should now issue as prayed by the applicants. The present appeal must be admitted with costs.

Appeal allowed.

1883

MOHUN
CHUNDER
KURMOKAR
v.
MOHESH
CHUNDER
KURMOKAR.

Before Mr. Justice Field and Mr. Justice Norris.

UMA SUNKUR SIRKAR (DEFENDANT) v. TARINI CHUNDER
SINGH (PLAINTIFF).*

1882.
July 26.

*Kabuliat, Construction of—Abatement of rent for land acquired by
Government for public purposes.*

In a suit for rent by a zemindar against a patnidar, the latter claimed abatement of the rent on the ground that part of the land included in the patni tenure had been acquired by the Government for public purposes.

The kabuliat executed by the patnidar contained a provision to the effect that, if any of the land settled should be taken up by Government for public purposes, the zemindar and the patnidar should divide and take in equal shares the compensation money, and a further provision to the effect that the patnidar should "make no objection on the score of diluvion or any other cause to pay the rent fixed or reserved by this kabuliat."

Held that the patnidar was entitled to abatement of the rent.

In this suit the plaintiff (zemindar) sued the defendant (patnidar) for rent calculated at the full rate fixed by the patni settlement. The defendant's claim for abatement having been rejected by both the lower Courts, the defendant appealed to the High Court.

Baboo *Kashi Kant Sen* for the appellant.

Baboo *Bhowany Churn Dutt* for the respondent.

The following judgments were delivered :—

FIELD, J.—The question in this case is concerned with the construction of a patni kabuliat.

Some land included in the patni was taken up by Government

* Appeal from Appellate Decree No. 478 of 1881 against the decree of Baboo Amrito Lal Chatterjee, Subordinate Judge of Nuddea, dated the 29th December 1880, affirming the decree of Baboo Bahari Lal Banerjee, Second Munsiff of Kooshtea, dated the 1st August 1879.