Before Sir R. Garth, Kt., Chief Justice and Mr. Justice Mitter.

OBHOY CHURN GHOSE AND ANOTHER (DEFENDANTS) *v.* GOBIND CHUNDER DEY (PLAINTIFF).* 1882 *May* 22.

Hindu law—Joint family property, Suit to recover—Onus of proof—Limitation Act, 1877, Arts. 127, 144.

The plaintiff sued for a share in certain property on the allegation that his ancestor *K* and the defendants' ancestor *R.* were uterine brothers who, while they were living in commensality, purchased the property in question with their joint funds in the name of *R;* and that subsequently *K* left his home, and then his daughter, the plaintiff's mother, enjoyed the property jointly with *R* until her death, when the plaintiff succeeding to his right and interest applied to have his name registered as a joint proprietor, but his application was refused; hence this suit.

The defence was that *R* bought the property in question with his own funds after he and his brother *K* had separated; that Radha Mohun, and afterwards the defendants, had been in exclusive possession for more than twelve years; and that the suit was barred by limitation. *Held* (reversing the judgment of FIELD, J.) that the onus was on the plaintiff to prove that the property was joint property.

Before a plaintiff can bring his case within Art. 127 of schedule II of the Limitation Act, 1877, it is incumbent on him to show that the property in which he seeks to recover a share is "joint property."

THE plaintiff's case was that his maternal grandfather Krishto Mohun Raout, and Radha Mohun Raout the maternal grandfather of the first defendant, were two uterine brothers, living together in commensality; that whilst so living they purchased with the joint funds a 6-anna share of a talook called Lobohai Runjeet in the name of the elder brother Radha Mohun; that subsequently to this purchase Krishto Mohun went away and was not heard of for a long time, and during that time his wife messed together with Radha Mohun and was in possession of a moiety of the 6-anna share of the above talook; that on her death the plaintiff's mother was in possession of the said moiety and received rent from the ryots; and that on the death of the

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Field, dated the 11th January 1882, in Appeal from Appellate Decree No. 2186 of 1880.

1882

OBHOY CHURN GHOSE v. GOBIND CHUNDER DEY.

plaintiff's mother, he succeeded to the right, title and interest of Krishto Mohun in the said moiety, and was in possession thereof, but on his applying to the revenue authorities for registration of his name under the Land Registration Act, as proprietor of the said moiety, his application was refused, and he consequently brought the present suit to establish his right to, and for possession of, the said share.

The defence was that the suit was barred by limitation; that the disputed property had not been purchased whilst the brothers were living in commensality, but was bought by Radha Mohun alone with his own money long after his separation with Krishto Mohun in food; and that neither Krishto Mohun, nor his wife, nor the plaintiff's mother, nor the plaintiff himself, were ever in possession of the share claimed.

The Munsiff found on the evidence that Radha Mohun alone, and after his death the defendants, had been in possession of the disputed share, and that the suit was barred by limitation. He therefore dismissed the suit.

The plaintiff appealed on the ground (*inter alia*) that, as it was admitted that Radha Mohun and Krishto Mohun lived in commensality, it was for the defendants to prove that the property was acquired by Radha Mohun with his own funds, and this had not been proved.

The Judge agreed with the Munsiff in his findings as to possession and limitation, and as to the ground of appeal above mentioned he found that, though it was admitted the brothers lived in commensality, yet it was not admitted that they were so living at the time the talook was acquired, and that it was consequently for the plaintiff to show that the talook was purchased when Radha Mohun and Krishto Mohun were living together, or that it was acquired with funds partly supplied by Krishto Mohun, which he had not done. He therefore dismissed the appeal. The plaintiff appealed to the High Court, and the case came before FIELD, J., the material portion of whose judgment was as follows:—

"As to the view of the Judge that, although it was admitted by the defendants that the brothers were at one time joint, still it lay upon the plaintiff to prove that they were joint at the time when this property was acquired, it is to be observed that this

view is not supported by authority. The normal state of a Hindu family is that of coparceners, and it lies upon the person who alleges separation to prove it. Now here it was admitted that a coparcenary existed, and it must be presumed that this coparcenary continued until there was evidence of a separation. The burden of proof was, therefore, on the defendants to prove that there was a separation, and at a time antecedent to the acquisition of this property. Having disposed of the presumption of Hindu law in the manner just indicated, the District Judge proceeded to deal with the question of limitation. He says: 'As the defendants have succeeded in proving to the Munsiff's satisfaction and to mine that they have been in exclusive possession of the talook for more than twelve years, it is quite clear that the plaintiff cannot succeed in this suit.' This is not correct as the law now stands. If the property was joint property twelve years, exclusive possession alone will not have the effect of barring the present claim. Article 127 of sch. II of the Limitation Act provides that in a suit by a person excluded from joint family property to enforce a right to share therein, the time from which the twelve years begin to run is when the exclusion becomes known to the plaintiff. If, therefore, this were found to be joint property, it would be necessary to enquire when the exclusion of the plaintiff, or those under whom he claims, became known to him or them. The decree of the District Judge must be set aside, and the case remanded in order that he may come to a fresh decision with reference to the observations above made."

Baboo *Aukhil Chunder Sen* for the appellants.

Baboo *Sreenath Banerjee* for the respondent.

The following judgments were delivered by the Court (GARTH, C.J., and MITTER, J.)

GARTH, C.J.—I am unable to agree in the view which the learned Judge has taken of this case.

There is no doubt, of course, that as a general principle, when a Hindu family is proved to have been joint, that state of things is presumed to continue, until the contrary is shewn. The question is, how far that principle can properly be applied in this case.

1882

OBHOY CHURN GHOSE v. GOBIND CHUNDER DEY.

The plaintiff sues to recover an undivided share in certain land, which is now, and has been for many years past, in the defendants' exclusive possession, and his case in this.

He says that his maternal grandfather Krishto Mohun, and the maternal grandfather of the defendant No. 1, were uterine brothers; and that whilst they were living in commensality they purchased the property in question with their joint funds in the name of Radha Mohun; that subsequently Krishto Mohun left his home, and then his daughter (the plaintiff's mother) enjoyed the property jointly with Radha Mohun till her death, when plaintiff succeeded to his right, and applied to the revenue authorities to have his name registered, but that having failed in this application, he sues to establish his right and to recover possession.

The defendants' case is that Radha Mohun bought the property himself with his own money, after he and his brother had separated; that Radha Mohun, and afterwards the defendant No. 1, under Radha Mohun's will, have been in exclusive possession; and that the plaintiff and those under whom he claims never had anything to do with it.

Both Courts have found in favor of the defendants. They say that the plaintiff has entirely failed to show that at the time when the property was purchased the two brothers, Radha Mohun and Krishto Mohun, were living in commensality, or that the property was purchased with their joint funds, or that Krishto Mohun had anything to do with it. It was purchased in Radha Mohun's name; it was left by his will to the defendant No. 1, and the defendants have been in exclusive possession of it for upwards of twelve years, so that the plaintiff is barred by limitation.

But the learned Judge of this Court has held that, as this is a suit brought by a Hindu to recover possession of joint family property, and as it is admitted that Radha Mohun and Krishto Mohun were at one time joint, the presumption is, till the contrary is shewn, that the property in suit was purchased during the time that the brothers were living joint, and that it was incumbent on the defendants to prove that the property was purchased after the separation.

He considers, moreover, that the ordinary rule of twelve years',

limitation does not apply; and that the case comes under s. 127 of the Limitation Act; so he has remanded the case for the further enquiry, at what time his exclusion from this property became known to the plaintiff.

Now it seems to me that before a Hindu plaintiff can bring his case within Article 127, he must prove that the property in which he seeks to recover a share is "*joint family property*;" and that it is not enough for him merely to call it joint family property, and to show that 30, 50 or 100 years ago his ancestors, and the defendant's ancestors, were joint; leaving the Court to presume from this, that any property of which the defendant may be possessed at the time of suit brought is joint family property.

In this case, the property in suit is found to have been *in the exclusive possession of the defendants for upwards of twelve years*; and I consider that under s. 144 they have a *primâ facie* right to that property by force of the twelve years' limitation rule against all the world. If the plaintiff wants to bring himself within Article 127, which places him in a more advantageous position than other claimants, he is bound to show that the property which he seeks to recover *was at some time joint family property*. In this he has entirely failed.

The doctrine, which the respondent's pleader has advanced, and which has apparently been acted upon by the learned Judge in this Court, appears to me a very dangerous one. If that doctrine were well founded, it would seem to follow that however long a Hindu may have been in the exclusive possession of property, movable or immovable, he would always be subject to have his title to it questioned by any distant member of his family, who could prove that at some prior period, even 100 years before, their common ancestors were members of a joint family; and not only so, but that in all such cases the onus of proving that the property was not joint would lie upon the defendant.

I should be sorry to think that this was the law. I consider that in this case these defendants having a twelve years' statutory title to the property claimed, have a *primâ facie* case of separate ownership, and that as the plaintiff has given no evidence that the property was ever joint, his suit was properly dismissed. As my brother Mitter is also of this opinion, the judgment of the Dis-

1882

OBHOY CHURN GHOSE v. GOBIND CHUNDER DEY.

triot Judge will, therefore, be restored, with the costs of both hearings in this Court.

MITTER, J.—I am also of the same opinion.

The plaintiff seeks to recover possession of a share in a property which the defendants claim as the exclusive property of their predecessor in title, Radha Mohun. The plaintiff is the daughter's son of Krishto Mohun, Radha Mohun's brother.

The plaintiff alleged that this property was a joint family property of Radha Mohun and Krishto Mohun. The lower Courts found that the plaintiff had utterly failed to establish that it was at one time their joint family property. They also found that the defendants and their predecessor in title have been in possession of this property for more than twelve years. Upon these findings the lower Courts dismissed the plaintiff's suit on the ground of limitation, as well as on the ground that the plaintiff's title was not made out.

On the second appeal the learned Judge in this Court held that the decisions of the lower Courts were erroneous in law. He is of opinion that the plaintiff's suit ought not to be dismissed as barred by limitation upon the finding that the defendants were in exclusive possession of the property in dispute for more than twelve years. He thinks that Article 127 of the second schedule of the Limitation Act is applicable to the facts of this case. As to the title of the plaintiff, the learned Judge is of opinion that it must be presumed in his favor, because the defendants failed to prove that the property in dispute belonged exclusively to Radha Mohun. He thinks that if two brothers are admitted or proved to have lived as members of a joint Hindu family at one time, it must be presumed that their joint status continued until the contrary was proved.

Acting upon this presumption he has come to the conclusion that at the time of the acquisition of the property in dispute Radha Mohun and Krishto Mohun were members of a joint Hindu family, because the defendants have given no evidence to shew that they had separated before that time.

Having thus arrived at the conclusion, that at the time of the acquisition of the property in dispute the brothers were joint, the learned Judge has thrown the onus of proving that it was the

exclusive property of Radha Mohun upon the defendants; because, according to another presumption of Hindu law, a property, purchased in the name of one member of a joint family, must be presumed to be the common property of the family until the contrary is shewn. As the contrary has not been shewn in this case, the learned Judge has come to the conclusion that the property in dispute belonged to the two brothers Radha Mohun and Krishto Mohun.

Now it seems to me that in this case there was no room for either of these presumptions. It was an admitted fact that at the time when the suit was brought the plaintiff and defendants were not members of a joint family; that being so, the case is brought within the ordinary rule, *viz.*, that the plaintiff must succeed on the proof of his title. He must prove that the property in dispute is his, by reason of its being a joint family property belonging to his ancestor, and the ancestor of the defendants. This view of the law is supported by the decision of the Judicial Committee in *Bannoo* v. *Kashee Ram* (1). There also it was admitted, as in this case, that when the dispute arose, the family was separate. The Judicial Committee held that in this state of things no presumption arises in favour of the plaintiff. Their Lordships say: "In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is that all that any one member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the onus of establishing the contrary is thrown on the member of the family who disputes it. Having regard, however, to the state of this family when the present dispute arose, their Lordships think that the presumption cannot be relied upon as the foundation of the plaintiff's case, and therefore, as he seeks to recover property which was in the possession of Ramdyal, and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, *viz.*, that the property was joint property, to which he and his brother Kashee Ram, as surviving members, were entitled."

(1) I. L. R., 3 Calc., 315.

1882

OBHOY CHURN GHOSE v. GOBIND CHUNDER DEY.

As regards the application of Article 127 of the Limitation Act, I fully agree with my Lord the Chief Justice, that it cannot be applied until the plaintiff proves that the subject-matter in dispute is joint family property.

In the opinion of the lower Courts the plaintiff has failed to prove that the property in dispute was at any time the joint family property of Radha Mohun and Krishto Mohun. This finding of fact must be accepted as correct in second appeal.

Appeal allowed.

Before Mr. Justice Mitter and Mr. Justice Norris.

1882 *July* 3.

MOHADEAY KOOER (PLAINTIFF) *v.* HARUK NARAIN AND OTHERS, (DEFENDANTS).*

Partition—Hindu Widow—Revenue-paying Estate—Beng. Act VIII of 1876, *s.* 10.

A Hindu widow who has succeeded to a share in a revenue-paying estate as heir to her deceased husband is not a person having a proprietary interest in an estate for the term of her life only, within the meaning of s. 10, Beng. Act VIII of 1876. Even if she were, a Civil Court would not be debarred from decreeing partition of a revenue-paying estate at her instance if a proper case for the passing of such a decree be made out by her.

Jadomoney Dabee v. *Sarodaprosono Mookerjee* (1); *Phool Chand Lall* v. *Rughoobuns Sahoy* (2); *Katama Natchiar* v. *The Rajah of Shivagunga* (3); and *Bhagbutti Daee* v. *Chowdhry Bholanath Thakoor* (4) referred to.

Principles on which Courts should order partition at the instance of a Hindu widow stated.

IN this case the plaintiff stated that she and the defendants were joint owners of a settled revenue-paying estate, her share in right of her deceased husband being 3 annas 10 gundas; that in order to remove all likelihood of future disputes she applied to the

* Appeal from Original Decree No. 102 of 1881, aginst the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Tirhoot, dated the 4th of March 1881.

(1) 1 Boulnois, 120.
(2) 9 W. R., 108.
(3) 9 Moore's I. A., 539.
(4) L. R., 2 I. A., 256.