

the right of pre-emption, it is argued that '*chakdars*' have at least the same right among themselves within the limits of their '*chak*' that the pattidars have in the whole mahál. This again is an ingenious but untenable proposition.

"The pre-emptive clause applies to pattidars only; there is no provision for its extension to *chakdars* even within the limits of their *chak*. This appears to me to be too obvious to require further remark.

"The appeal is dismissed with costs."

The plaintiff appealed to the High Court, on the ground that the terms of the *wajib-ul-arz* were applicable to *chakdars*.

Munshi *Ram Prasad*, for the appellant.

Mr. *Amiruddin* and Maulvi *Abdul Majid*, for the respondents.

EDGE, C. J.—The judgment of Mr. Elliot is a very clear judgment. I approve of that judgment. I think Mr. Elliot's conclusions are correct. The appeal is dismissed with costs.

STRAIGHT, J.—I concur.

*Appeal dismissed.*

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

AHMAD ALI KHAN (PLAINTIFF) v. HUSAIN ALI KHAN (DEFENDANT). \*

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November 25.

*Act XV of 1877 (Limitation Act), sch. ii, Nos. 69, 127—"Joint family property"—  
"Exclusion" from such property.*

A Muhammadan family consisting of three brothers and their uncle jointly owned certain immoveable property which the uncle managed. Two of the brothers effected a settlement of accounts with the uncle, with reference to the profits of the estate; the share of the three brothers was appropriated; and the money representing that share was deposited with the uncle. Subsequently the two who had effected the settlement withdrew their portion of the common share, and the third brother sued the uncle to recover a sum of money as his one-third portion. He alleged that he had been deceived by the defendant into supposing that his portion was included in the amount withdrawn by his brothers; but he did not base his suit upon any allegation of fraud. It was contended that art. 127, sch. ii. of the Limitation Act (XV of 1877) applied to the suit, limitation running from a date whereon the defendant had denied all liability in respect of the plaintiff's demand.

\* First Appeal No. 216 of 1885 from a decree of Maulvi Muhammad Mahsud Ali Khan, Subordinate Judge of Saháranpur, dated the 17th August, 1885.

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*Held* that the amount claimed could not, under the circumstances, be regarded as joint family property, that the defendant's denial of the plaintiff's right to recover that amount was not an exclusion of the plaintiff from such property, and that consequently, art. 127 did not apply to the suit.

THE facts of this case were as follows :—The plaintiff Ahmad Ali Khan, his two brothers Asghar Ali Khan and Khurshaid Ali Khan, and his uncle the defendant Husain Ali Khan, held certain immoveable property jointly. This property was managed by the defendant. An agreement for partition of the estate having, in 1873, fallen through, on the 21st May, 1875, a settlement of accounts was effected between the plaintiff's two brothers and the defendant, with reference to the profits of the preceding thirteen years. Whether or not the plaintiff was an active party to that settlement was a matter of dispute. Upon the settlement of accounts, the plaintiff received Rs. 5,419 in cash, and a large sum of money (of disputed amount) was deposited by his brothers with the defendant. On the same date as the settlement of accounts and receipt of the Rs. 5,419, namely, the 21st May, 1875, the plaintiff joined with his brothers in executing in favour of the defendant a deed of acquittance, whereby they acknowledged having received all the money which was due to them by him for their share of the profits of the family property.

In 1876 the plaintiff brought a suit against his brothers Asghar Ali Khan and Khurshaid Ali Khan, in which the defendant Husain Ali Khan was subsequently added as a defendant by order of the Court. In that suit the plaintiff alleged that the money which on the taking of accounts in 1875 was ascertained to be the share of the three brothers was a sum of Rs. 88,531; that this amount less the Rs. 5,419 which he acknowledged having received had been deposited with Husain Ali Khan by his brothers; that they had dishonestly removed it from Husain Ali Khan's custody and deposited it elsewhere in their own separate account, and that out of it he was entitled to recover Rs. 24,091, being the balance of Rs. 29,570, which he alleged to be his one-third share of the Rs. 88,531. The defendant Husain Ali Khan pleaded in a written statement, dated the 18th August, 1877, that the accounts of thirteen years had been taken with the plaintiff's knowledge, that a deed of acquittance had been given by him, and that Rs. 83,111

odd which remained after payment to the plaintiff of Rs. 5,419 had been deposited with him by the plaintiff's two brothers, and had been withdrawn by one of them in June, 1875, and nothing remained in his hands on deposit. On appeal the High Court decided that the plaintiff was not entitled to share in the amount deposited with the defendant and afterwards withdrawn by Asghar Ali Khan and Khurshaid Ali Khan, and accordingly dismissed the suit.

On the 15th May, 1884, the plaintiff brought the present suit against Hasain Ali Khan. In his plaint he alleged that his brothers and the defendant, on the 21st May, 1875, had adjusted the account of the joint estate and found that Rs. 1,12,200 were due to the plaintiff and his brothers from the defendant in respect of the profits of the estate. He alleged also that a deed of acquittance was drawn out, which he, not being acquainted with the real facts, signed at the request of his brothers and the defendant. In para. 6 of the plaint he said:—"After the adjustment of account, the aforesaid amount was placed in deposit with the defendant; and two-thirds of it, namely Rs. 74,800, were realized by the plaintiff's brothers as their share from the defendant, and by deducting Rs. 5,419, the balance is due to the plaintiff." He proceeded to allege that a misunderstanding took place between the defendant and his brothers, and the defendant, seeing them ready to file a suit, gained over the plaintiff, who, according to his own account, was "a simpleton" and an inexperienced person, and that the defendant, by making use of the plaintiff's signature to some blank papers, caused a groundless suit in the name of the plaintiff to be brought against the plaintiff's brothers to the effect that they had his share in the money which they had realized, and that it should be paid to him by them. He further alleged that after that suit was determined the defendant put off from time to time paying the money to him, and at last he took measures to obtain his rights; and he stated in para. 11 that his cause of action arose on the 25th October, 1883. He alleged in para. 12 that he was deceived by the defendant, but he did not base his action on any allegation of fraud. In para. 13 he stated:—"As the plaintiff has no proper means for enquiring into the facts prior to the amicable settlement of 1875 and he finds it useless to repu-

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diate the adjustment of account and the matters irrelevant thereto, he is compelled to confine himself to one out of several reliefs, and he prays to obtain a decree for Rs. 31,981, being his share in the remaining amount held in deposit, with costs and future interest against the defendant. Suit valued at Rs. 31,981. All the papers relating to the case will be filed at the first hearing of the case."

In reply the defendant raised a number of pleas which it is unnecessary for the purposes of this report to mention. Para. 3 of the written statement was as follows:—"The allegation that at the adjustment of accounts the profits of the joint estate amounting to Rs. 1,12,000 were found due to the plaintiff and his brothers, and that they were deposited with the defendant, is quite false and contrary to the plaintiff's own repeated declarations. After the adjustment and settlement of the accounts, Rs. 88,531-11-9 only were found due to the plaintiff and his brothers, and with the exception of Rs. 5,419, which the plaintiff's brothers themselves got to be paid to the plaintiff, the whole of the balance of Rs. 83,111-11-9 which was deposited with the defendant by the plaintiff's brothers was paid to them by him, as has been invariably admitted by the plaintiff." Para. 5 was as follows:—"The suit is fit to be dismissed for this reason also, that the defendant had, on the 18th August, 1877, in distinct words totally denied his responsibility to the plaintiff, and computing the period of limitation from the said date, this suit is certainly beyond time; because, whatever may be the nature of the plaintiff's demand, the cause of action in respect thereof had accrued on that date."

The Court of first instance held that the plaintiff's cause of action accrued on the 18th August, 1877, the date of the defendant's written statement in the former suit, and that the suit was barred by limitation. The Court at the same time considered the case upon the merits, and coming to the conclusion that the plaintiff had not proved the allegations contained in his plaint dismissed the suit.

The plaintiff appealed to the High Court. In reference to the question of limitation, it was contended that either art. 60 or art. 127 of the Limitation Act (XV of 1877) was applicable, and that upon either supposition the suit was within time. In regard to art.

60, it was argued that the deposit was admitted by the defendant in para. 3 of his written statement, and that there was no evidence of any demand prior to the 25th October, 1883, the date mentioned in para. 11 of the plaint. In regard to art. 127, it was argued that the amount claimed was "joint family property," that the plaintiff not having been a party to the settlement of accounts of the 21st May, 1875, nothing had been done which, so far as he was concerned, deprived the property of its joint family character or altered the nature of his title to it, and that his "exclusion" from his share, within the meaning of art. 127, accrued on the 18th August, 1877, when the defendant first denied all liability in respect of the share.

Mr. C. H. Hill, Mr. A. Strachey, and Pandit Sundar Lal, for the appellants.

The Hon. T. Conlan, Maulvi Abdul Mojid, Munshi Hanuman Prasad, and Pandit Moti Lal Nehru, for the respondents.

EDGE, C. J. (after stating the facts, and holding that the conclusions of the Court of first instance upon the merits were substantially correct, continued) :—The question of limitation has been argued in two ways before us. It has been argued that art. 60 of the 2nd schedule of the Limitation Act applies to this case on the basis that it has been proved that there was a deposit within the meaning of that article, and that we must infer an agreement to pay on demand, and that there was proof that the first demand was made on the 25th October, 1883. I see no evidence of deposit within the meaning of that article or at all, so far as the plaintiff is concerned. As I have said, it is very probable that these parties intended to defraud, and did probably in that transaction of May, 1875, defraud the plaintiff. But that is not his case now. The plaintiff relies of course on para. 3 of the defendant's written statement, but that paragraph would not assist the plaintiff, even if it were not absolutely at variance with the finding of this Court in the previous action. That paragraph makes no admission that any money was deposited by the plaintiff or by the plaintiff's brothers on the plaintiff's behalf with the defendant.

The other question which has been argued with regard to limitation is based on art. 127 of the 2nd sch. of the Limitation

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Act. It is contended that art. 127 applies to this case, and that the plaintiff in the present action is a person excluded from joint family property who is suing now to enforce a right to share therein. There are two or three answers to that contention. In the first place, according to the plaintiff's own case, the account was settled, the share of the three brothers was appropriated, and the money representing that share was deposited with the defendant, and the plaintiff's two brothers subsequently drew out their portion of the common share of the three. That is the plaintiff's case. How the balance now claimed could be said, under those circumstances, to be joint family property, I fail to see. If the plaintiff's case was a true one, according to his plaint that balance would represent the moneys which had come to him out of the joint family property; but having once so come to him and having been separately appropriated and enjoyed by him, I fail to see anything of joint family property in it. It was the result of his having enjoyed the family property, and the fact of his having received it and then deposited it in the hands of the manager of the joint property would cause it to cease to retain the status of a joint family property, just as much as if it had been deposited in the hands of a third person not connected with the estate. I may say that I do not think that art. 127 applies at all to a cause like this. There has never been, so far as we know, a denial of the plaintiff's right to share in the family property. What has been denied is the plaintiff's right to recover the specific money. I cannot see how it can be said that he was excluded. If he has been excluded from the proceeds of his share, he was excluded either by fraud on the part of the defendant and his brothers, which is not the case which he attempts to make out here, or he was excluded in this sense, that he did not exercise his right of asking for the money from his agent. In any way looking at this case as launched before this Court on behalf of the plaintiff, we fail to see from the plaintiff's own case how art. 127 can possibly apply.

Under these circumstances, I come to the conclusion that the judgment and the decree of the Court below was a proper one and that this appeal ought to be dismissed with costs.

TYRRELL, J.—I concur.

*Appeal dismissed.*