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of by the judgment of the learned Chief Justice and our late colleague Mr. Justice Young dated the 8th May 1890, and that judgment is confirmed by what my brother Straight has said. Then comes the fourth case, namely, the case in which the Calcutta Court in the case of *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (1) decided the same point, and it was cited by Mr. *Durga Charan* as an authority in his favour.

There is much in that judgment which undoubtedly supports the argument which Mr. *Durga Charan* addressed to us. But it is unnecessary, after the expression of opinion which has been given to the view of this Bench by my brother Straight, that I should say anything more than this that I am not prepared to accept that or all that was said in that case either as to the theory of the *decrees nisi* in such cases or as to the decrees absolute or their effect upon the procedure of the Court, which is governed by the Civil Procedure Code. I therefore give my full concurrence to all that has fallen from my brother Straight.

KNOX, J.—I concur with what has been said by the learned Chief Justice and my brother Straight.

Appeal dismissed

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Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

AMME RAHAM AND OTHERS (PLAINTIFFS) *v.* ZIA AHMAD AND OTHERS (DEFENDANTS).

Act XV of 1877 (*Limitation Act*) *sch. ii, No.* 127—*Limitation—Suit by Muhammadans for possession by right of inheritance of shares in the property of their deceased ancestor.*

The words "joint family property" in No. 127 of sch. ii of the Limitation Act (XV of 1877) mean "the property of a joint family."

Hence the period of limitation prescribed by No. 127 of sch. ii of the Limitation Act will not apply to a case in which members of a Muhammadan family are suing for possession by right of inheritance of shares in immovable property alleged to have been that of the deceased common ancestor of themselves and some of the defendants, and of which they allege they had been dispossessed by the defendants.

Bavasha v. *Masumsha* (2) dissented from.

(1) I. L. R., 16 Calc., 246. (2) I. L. R., 14 Bom., 70.

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THE plaintiffs in this case were two daughters and a grand-daughter of one Karamat Husain who died in February 1862, possessed, as the plaintiffs alleged, of a certain village granted to him in recognition of his services during the mutiny. They alleged that on the 20th June 1880, Nihal Ahmad, the son of Karamat Husain (brother and uncle of the plaintiffs) sold the said village and the vendees in their turn transferred it to others; that they came to know of this on the death of Nihal Ahmad in 1884, and demanded possession of their shares from the assignees. This being refused, they sued the assignees together with certain other members of the family of Karamat Husain for recovery of possession of what they alleged to be their shares in the property together with *mesne* profits. The suit was resisted amongst other grounds on the ground that it was barred by limitation. The Court of first instance dismissed the suit. The plaintiffs then appealed to the High Court and the appeal came before Mahmood and Young, JJ. who, on the question of limitation being again raised, referred the case, by their order of the 2nd July 1890, to the Full Bench for determination of the question whether or not the terms of No. 127, sch. ii of the Limitation Act were applicable to the case.

Mr. *Amiruddin* and Mr. *Abdul Majid*, for the appellants.

Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the respondents.

EDGE, C. J.—The only question which we need decide here is whether art. 127 of the second schedule of the Indian Limitation Act applies. This admittedly is not a family that could strictly or commonly be called joint. It is a Muhammadan family of these Provinces. The difficulty has arisen from the words "joint family property" in art. 127. Now those words may possibly be construed in two different ways. They might be construed as "the joint property of the family" or as "the property of the joint family." I think in this country we would be misconstruing those words "joint family property" to hold that they apply to a case where property was joint but the family was not. Many persons besides a family may have vested in them joint property. A, B and C, in no way related, may have vested in them joint property. If we were to read

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this article as meaning "the joint property of the family," the difficulty in my mind would arise as to what could be the reason why the Legislature intended that art. 127 should apply to a family that was not joint and made no similar provision in respect of the joint property of persons who not were members of the family. In my humble judgment "joint family property," means in art. 127 the property of a joint family and that would be strictly speaking "joint family property." The reason why the word "Hindu" which occurred in art. 127 of Act IX of 1871 was omitted from art. 127 of the present Code may be, that there are, as I believe, in some districts of India Muhammadan families which might be described as joint. The case is to go to the Bench of two Judges with this expression of opinion.

STRAIGHT, J.—By the plaint in this suit, the plaintiffs-appellants, after asserting that they had been in enjoyment of certain property, alleged that some of the defendants had dispossessed them from such enjoyment and they prayed for recovery of absolute possession of their shares according to the Muhammadan law of inheritance, in respect of the estate of a certain deceased person. They nowhere in their plaint alleged that the property is the joint property of a joint family, that they had been excluded from the joint enjoyment and prayed that their right to share in such joint enjoyment should be enforced. It seems, therefore, to me, that the article of the Limitation law naturally and properly applicable to their suit, was the provision to be found in art. 142 of the second schedule of the Limitation Act. As I understand, the rule of interpretation to be applied to the Limitation law is that if a form of suit naturally falls within the four corners of a particular article, we are not to strain construction for the purpose of throwing it into a category of suits to which a more favourable period of limitation is given by some other article of that law. Moreover the Legislature is to be presumed not to have made two limitation articles applicable to the same conditions of facts and identical suits.

Now I take it that art. 127 contemplates, first, a joint family in the accepted and well understood meaning of the term; next, it con-

templates joint family property; next, it contemplates joint enjoyment; and lastly, it contemplates exclusion from such joint enjoyment, which is the motive cause for the institution of the suit. With great respect to the learned Judge who decided it seems to me that the Bombay case of *Bavasha* v. *Masumsha* (1) overlooks the precise wording of this article. What the plaintiff in the suit to which that article applies must pray is to enforce his right to share in, not to a share of the joint family property; that is to say, it is a suit to restore the *status quo ante* of enjoyment that by his exclusion he has been deprived of. This is the particular form of suit to which that article is, in my opinion, limited, and it does not apply to such a condition of facts as are disclosed in the present case. I entirely concur with the learned Chief Justice in the answer proposed.

TYRRELL, J.—I agree.

MAHMOOD, J.—In order to render my judgment short, I wish to refer to the order of reference passed by me in this cause on the 2nd July 1890, in which Mr. Justice Young concurred and which necessitated its coming on for hearing, under the sanction of the learned Chief Justice, before this Bench of five Judges.

To what has fallen from his Lordship the learned Chief Justice and also from my brother Straight as to the exact meaning of art. 127 of the present Limitation Act (XV of 1877), I have nothing to add, beyond wishing to explain that when this case was argued in the Division Bench, much difficulty and doubt arose over some of the cases which are mentioned in my referring order.

I do not wish to deal with those cases in detail. It is enough for me to say that I will consider this point, now that it is before a Full Bench, wholly in reference to the observations which were made on behalf of the plaintiffs-appellants in connection with the alteration of the statutory words of art. 127 in the old Limitation Act (IX of 1871) as that alteration appears by a comparison with the corresponding clause of the present Limitaion Act (XV of 1877). That alteration is represented not by the presence of anything, but by the absence of a word, *viz.*, the word "*Hindu*" and

(1) I. L. R., 14 Bom., 70.

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in lieu, thereof, "*Person*" is introduced. When the case was argued on behalf of the appellants I must confess that I felt, especially in view of the sudden change, (which certainly has to be considered seriously in statutory language) that this art. 127 was intended to be applied to Muhammadans also. The change at least sounded as an amendment of a great verbal sound, but that sound was nothing other than *vox et prœterea nihil* so far as the exigencies of this case are concerned, because upon full consideration of this matter it seems to me that the Legislature never intended to apply to Muhammadans in the Provinces within the jurisdiction of this Court, a rule unknown to the land, unknown to the Muhammadan law, unknown to the people, by saying that upon the death of an ancestor or *propositus* his property does not descend to the heirs in definite separate shares, but acquires the nature of the joint properly of the Hindu jurisprudence. On the contrary, the Muhammadan law presumes that each share is separate and that each sharer is the separate owner of his separate share, and if such sharers wish to live together they may do so, but their separate ownership and relations are not changed.

Enough has been said by the learned Chief Justice and my brother Straight to show that for purposes of employing art. 127 of Act XV of 1877, certain things are necessary, that at least there must be a *joint family,* and I will not go further than that because my brother Straight has already represented what, the other three conditions are. Now in this part of the country the joint family systen as understood by Hindus does not exist among Muhammadans in the sense in which the law has employed it. Even if it did exist, I think I must say that the learned pleader Pandit *Ajudhia Nath's* argument before me when I made the referring order, was prefectly sound, that the law in these provinces will not allow the recognition of any such family *status* because of s. 27 of Act XII of 1887. I must also say what I felt when the learned Pandit then argued, and what I still feel, that the Bombay cases which on that occasion the learned counsel for the appellants referred to and insisted upon, have no application to this case, because it is governed

by a totally different statute as to the application of the Muhammadan law. I also agree with the argument of the learned Pandit, which the learned Pandit then addressed, that Regulation IV of 1872, of the Bombay Code, must not be lost sight of in determining the importance to be attached to the rulings on this point cited from that Presidency.

I wish to say, with reference to some observations which were made in the course of the argument when the case was heard in the Division Bench, (to the effect that it would be depriving the Muhammadans of this part of the country of a great right if the article in question were not applicable to suits such as this), that I have long held the opinion that the statutes of limitation are statutes of repose, and that, far from being construed in the sense of the strict construction of penal statutes against their application, they should be strictly enforced for security of titles. This I have said in more than one case to be found in the reports. I wish to add that whatever difficulty may arise over the interpretation of art. 127, of the present Limitation Act (XV of 1877), that difficulty need not be enhanced in a case in which Muhammadan ladies, even when they are *parda-nahsin*, sue after the lapse of time. For this view I wish to refer to cases where I have before now pointed out the cogency of the doctrine *vigilantibus non dormientibus jura subveniunt*.

One thing more. In the case of *Bavasha* v. *Masumsha* (1) upon which Mr. *Abdul Majid* has again relied to-day, the learned Judge in reading, or rather reproducing, the art. 127 of the Limitation Act (XV of 1877) seems apparently, so far as the report goes, to have understood the phrase "*to share therein*" as if the word "*share*" was a noun and not a verb. I do not understand it in that sense. I understand it to mean exactly what my brother Straight has described, *viz.*, that it is a verb and means "*to have restoration to joint enjoyment.*"

The other cases which have been referred to by me in the referring order must be taken subject to what in this case the learned Chief Justice and my brother Straight have said and which has the

(1) I. L. R., 14 Bom., 70.

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concurrence of my brother Tyrrell. The answer to this reference is that art. 127 of the present Limitation Act, XV of 1877, does not govern such actions as the one represented by the plaint in this case. I therefore agree in the order made.

KNOX, J.—I agree in the answers proposed.

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December 22.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

JAGRUP RAI AND OTHERS (DEFENDANTS) *v.* RADHEY SINGH AND OTHERS (PLAINTIFFS.)

Registered and unregistered documents—Priority—Mortgagee under registered deed competing with auction-purchaser at a sale under a decree on a prior unregistered mortgage-deed—Act III *of* 1877 (*Registration Act*) *s.* 50.

Under s. 50 of the Registration Act the decree or order which is not to be effected by a registered document must be a decree or order made prior to the execution and registration of the registered document. Therefore where the plaintiffs, who were mortgagees under a registered instrument, sued to set aside a sale to the defendants under a decree on an unregistered mortgage, the plaintiffs' registered mortgage being subsequent to the unregistered mortgage on which the defendants relied, but prior to the decree thereon—*held* that the defendants, auction-purchasers, must take subject to the rights of the plaintiffs as mortgagees. *The Himalaya Bank Limited* v. *The Simla Bank Limited* (1), *Madar Saheb* v. *Subbarayalu Nayudu* (2), *Kanhaiya Lal* v. *Bansidhar* (3) and *Shahi Ram* v. *Shib Lal* (4) referred to.

THE facts of this case sufficiently appear from the judgment of Edge, C. J.

Mr. *Abdul Majid* and Mr. *Hamid-ullah*, for the appellants.

Munshi *Jwala Prasad*, for the respondents.

EDGE, C. J.—The plaintiffs were appellants here. They brought their suit to have it declared that a decree obtained on the 12th September 1882, on an unregistered bond of the 31st January 1877, and the auction-sale held under that decree at which the defendants purchased were null and void. The plaintiffs were mortgagees of the property. Their mortgage was dated the 5th December 1877, and was registered. On that mortgage they obtained a decree on the

(1) I. L. R., 8 All., 23.
(2) I. L. R., 6 Mad., 88.
(3) Weekly Notes, 1884, p. 136.
(4) Weekly Notes, 1885, p. 63.