

have access, nor was it a place to which the public were ever permitted to have access, though it adjoined a public road. We must look to s. 159 of the Indian Penal Code to see what are the ingredients of the offence of an "affray." S. 159 runs as follows:—

"When two or more persons by fighting in a public place, disturb the public peace, they are said to commit an "affray." It will be observed that this section does not make fighting "in public," which is likely to disturb the public peace, an affray. The fighting disturbing the public peace which is an affray, is fighting which takes place in a "public place." No doubt the fighting in this case on the *chabuttra* was fighting in public, because the public could see what was taking place.

Some of the statutes in England make acts penal which are done in public, others make acts penal which are done in a public place, so that in the criminal statute law in England, the distinction is, it will be observed, between doing an act in public and doing an act in a public place. As the *chabuttra* was not a place to which the public had by right or by permission, or by usage or otherwise, access, we must hold that it was not a public place, although any member of the public walking along the street could walk on to it, but in doing so he would be committing a trespass.

Under these circumstances we must set aside the convictions. We acquit the applicants, and order that the fines, if paid, be refunded.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Banerji.

NATTHU SINGH (DEFENDANT) v. GULAB SINGH (PLAINTIFF).*

Limitation—Suit for possession of property incidentally necessitating the setting aside of or declaration of invalidity of an adoption—Act No. XV of 1877, (Indian Limitation Act) sch. ii, art. 118.

Article 118 of sch. ii of the Indian Limitation Act applies only to suits for a declaration that an adoption is invalid or in fact never took place; it does not apply

* First Appeal No. 93 of 1893, from a decree of Bābu Ganga Saran, B.A., Subordinate Judge of Aligarh, dated the 23rd January 1893.

1895

QUEEN-
EMPEROR
v.
SRI LAL.

1895

February 5.

1895

NATTHU
SINGH
v.
GULAB SINGH.

to a suit for possession of property merely because it may be necessary in order to give effect to the relief claimed in such suit to find that a given adoption is invalid. *Basdeo v. Gopal* (1), *Ghandharap Singh v. Lachman Singh* (2), *Pada-jirav v. Ramrav* (3) and *Lala Parbhu Lal v. Mylne* (4) referred to.

The plaintiff in this case sued for possession of a share in certain immovable property which had been in her lifetime in the possession of one Musammat Lachcho, the widow of one Tarsi Ram. The property in suit, with the exception of two plots, once belonged to Zorawar Singh, the common ancestor of the parties save the defendants Zauki Ram and Murli Singh who were mortgagees from Musammat Lachcho. Zorawar Singh had five sons, three of whom, *i.e.*, Tarsi Ram, Ganga Ram and Khushal Singh, died in his lifetime. Zorawar Singh died in 1864, leaving him surviving two sons, Gulab Singh (the present plaintiff) and Shib Singh, and sons of two other sons.

Musammat Lachcho [Kuar, widow of Tarsi Ram, got a one-fifth share of the property left by her father-in-law Zorawar Singh; and it is now undisputed that she was in separate possession of the share up to her death in November 1891.

On the 19th of June 1876, Musammat Lachcho executed a hypothecation bond in favor of Zauki Ram and Murli Singh. The mortgagees brought a suit in 1888 upon the bond. The plaintiff, Gulab Singh, and Natthu Singh were added as defendants to this suit under s. 32 of the Code of Civil Procedure. Gulab Singh contested the validity of the mortgage on the ground that Musammat Lachcho was in possession as a Hindu widow in lieu of her right of maintenance and that the transfer by her was void. The Court held that Musammat Lachcho was in adverse and proprietary possession of the property and gave the plaintiffs a decree for a portion of the amount claimed. On appeal the defendants got a decree for a larger amount, and in other respects the finding of the Lower Court was upheld. Upon the death of Musammat Lachcho Natthu Singh set up his right as the adopted son of Tarsi Ram and his right was recognized by the Revenue authorities.

(1) I. L. R., 8 All., 644.

(3) I. L. R., 13 Bom., 160.

(2) I. L. R., 10 All., 485.

(4) I. L. R., 14 Calc., 401.

The plaintiff claimed to recover possession of a share in the property on the ground that it had been given to Musammat Lachcho in lieu of maintenance and that on her death it reverted, in part at least, to the plaintiff. He denied that Natthu Singh had been ever adopted by Tarsi Ram as his son, and sued to have it declared that the decree obtained by the mortgagee defendants could not be executed against the property because the interest of Musammat Lachcho came to an end at her death.

The defendant Natthu Singh maintained the validity of his adoption, and also pleaded limitation, and further that the plaintiff on his own showing was not entitled to more than a one-fourth share.

The Lower Court (Subordinate Judge of Aligarh) found that the plaintiffs' claim as against the mortgagee defendants was barred by the principle of *res judicata*; but that as against Natthu Singh and the other defendants the plaintiff was entitled to a one-fourth share of the property in suit, and made a decree accordingly. Natthu Singh thereupon appealed to the High Court.

Mr. *Abdul Raof*, for the appellant.

Mr. *C. Ross Alston* and *Munshi Ram Prasad*, for the respondent.

EDGE, C. J. and BANERJI, J.—This appeal has been heard with First Appeal No. 117 of 1893. In First Appeal No. 93 of 1893, the defendant Natthu Singh is the appellant, and in First Appeal No. 117 of 1893, Gulab Singh, plaintiff, is appellant. The suit was for possession of shares in a village which were in the possession of the defendant Natthu Singh at the commencement of the suit. The plaintiff was entitled to the decree which he got in the Court below, if Natthu Singh was not adopted, as alleged by him, by one Tarsi Ram. Tarsi Ram was one of the five sons of Zorawar Singh. Gulab Singh, the plaintiff, was one of those sons. Natthu Singh's case was that Tarsi Ram and Tarsi Ram's then wife, Musammat Lachcho, adopted Natthu Singh about two years before Tarsi Ram died. The plaintiff's case is the utter negation of any

1895

NATTHU
SINGH
v.
GULAB SINGH.

1895

 NATTHU
 SINGH
 v.
 GULAB SINGH.

such adoption. The adoption is said to have taken place about 1863. In 1876 (Zorawar Singh having died in 1864), Musammat Lachcho, the widow of Tarsi Ram, who had predeceased his father Zorawar Singh, presented an application to the Revenue Court asking for mutation of names in respect of a certain share in the village to be made in favor of Natthu Singh. She alleged in the proceedings on that application that her deceased husband had adopted Natthu Singh when the latter had been about one year old. As a matter of fact that application was opposed by, amongst others, the plaintiff in this suit, and Musammat Lachcho's name was entered in the revenue papers and Natthu Singh's was not entered.

On the fact of that application having been made in 1876, and opposed by the present plaintiff, Mr. *Abdul Raof*, for the defendant Natthu Singh, has contended that this suit is barred by limitation. He relies on art. 118 of sch. ii of the Indian Limitation Act, 1877, and in support of his contention further relies on the judgments of their Lordships of the Privy Council in *Jagadamba Chaodhrani v. Dakhina Mohun Roy Chaodhri* (1), *Mohesh Narain Munshi v. Taruck Nath Moitra* (2), and on a judgment of this Court in *Inda v. Jehangira* (3). The last mentioned case was undoubtedly decided on art. 118 of sch. ii of Act No. XV of 1877; the two cases before their Lordships of the Privy Council were decided upon the former Limitation Act, No. IX of 1871. The article especially referring to adoptions was, in Act No. IX of 1871, art. 129 of sch. ii. The two articles of Act No. XV of 1877 which especially refer to suits relating to adoption are arts. 118 and 119 of sch. ii. Article 129 of Act No. IX of 1871 in words related to suits "to establish or set aside an adoption." It is true that their Lordships of the Privy Council, in the cases to which we have referred, treated the words "to set aside an adoption," in that article, as referring to suits for a declaration that an adoption was invalid. We find also that when the Legislature passed Act No. XV of 1877, they did not use the language of art. 129 of Act No. IX of 1871, but used language in

(1) I. L. R., 13 Calc., 308.

(2) I. L. R., 20 Calc., 487.

(3) Weekly Notes 1890, p. 241.

1895

NATTHU
SINGHv.
GULAB SINGH.

arts. 118 and 119 which, according to the ordinary construction, would limit those articles to suits, in the one case to obtain a declaration that an alleged adoption was invalid or never in fact took place, and in the other case to obtain a declaration that an adoption was valid. The Legislature in other parts of the schedule, for example, in art. 91 of schedule ii, of Act No. XV of 1877, followed the wording of art. 92 of Act No. IX of 1871, which had reference to suits "to cancel or set aside an instrument not otherwise provided for." We assume that by departing from the language of art. 129 of Act IX of 1871, and by using language in arts. 118 and 119 of the schedule of the present Act, which can only refer to suits for declarations, it was intended that those articles should apply only to suits in which such declarations were sought. In this view we are supported by the decision of this Court in *Basdeo v. Gopal* (1) and *Ghandharap Singh v. Lachman Singh* (2); by a decision of the Bombay High Court in *Padajirav v. Ramrav* (3), and by a decision of the Calcutta High Court in *Lala Parbhu Lal v. Mylne* (4). This being the case, and the present suit not having been one for a declaration, we hold that art. 118 does not apply and that the suit is not barred by limitation.

We now come to the merits of the suit. Zorawar Singh, the head of this family, died in 1864. His son, Tarsi Ram, whose widow Musammat Lachecho was, predeceased Zorawar. At the time that Musammat Lachecho's name was entered in the revenue papers as representing a one-fifth share in the property left by Zorawar, Zorawar's son, Shib Singh, was alive. Shib Singh was the father of three sons, one of whom was Natthu Singh, who was alleged to have been adopted by Tarsi Ram. It is impossible to believe that, if this adoption had in fact taken place, Shib Singh would not, on the death of Zorawar Singh, have insisted on the right of his own natural son Natthu Singh to have his name entered as the grandson of Zorawar and as the adopted son of Tarsi Ram. He did not insist on anything of the kind. Musammat Lachecho's name was entered. There is another thing which in our opinion is fatal

(1) I. L. R., 8 All., 644.

(3) I. L. R., 13 Bom., 160.

(2) I. L. R., 10 All., 485.

(4) I. L. R., 14 Calc., 401.

1895

NATTHU
SINGH
v.
GULAB SINGH.

to this alleged adoption. If the adoption had in fact taken place, Natthu Singh ceased to have any share in the interest of his natural father, Shib Singh; but, on the death of Shib Singh, Natthu Singh took an equal share in Shib Singh's property with his brothers and continued to cultivate the *sír* of Shib Singh. Another fact which goes against the adoption is that Musammat Lachcho up to the time of her death in 1891 continued to be not only recorded in respect of the one-fifth share, but actually cultivated it.

There is evidence on the record which we believe, which shows that Tarsi Ram died some years before Natthu Singh was born. Natthu Singh's case depends on his proving that the adoption alleged by him took place in Tarsi Ram's lifetime. Musammat Lachcho, as the widow of Tarsi Ram, was allowed by the family to be entered in the revenue papers in respect of the one-fifth share for her maintenance, though she was not entitled to be so entered. It is very possible that in 1876, owing to some ill-feeling amongst the members of the family she was disposed to put forward Natthu Singh as the adopted son of Tarsi Ram. Whatever was the cause of her line of conduct at that time, her subsequent conduct was inconsistent with any adoption having taken place. On these grounds we dismiss first appeal No. 93 of 1893, with costs.

Appeal dismissed.

Before Mr. Justice Knox and Mr. Justice Aikman.

HAMIDA BIBI (PLAINTIFF) v. ALI HUSEN KHAN (DEFENDANT).*

Civil Procedure Code, ss. 366, 588—Abatement of suit—Appeal.

No appeal will lie from an order under the first paragraph of s. 366 of the Code of Civil Procedure declaring that a suit shall abate, such order neither amounting to a decree nor being specifically appealable under s. 588. *Bhikaji Ram Chandra v. Purshotam*, (1) dissented from.

THE facts of this case are as follows :—

The plaintiff sued in the Court of the Subordinate Judge of Sháhjahánpur to recover a sum of Rs. 41,686-10-8 as her dower

*First Appeal No. 123 of 1894, from an order of Rai Banwari Lal, Subordinate Judge of Sháhjahánpur, dated the 26th June 1894.

(1) I. L. R., 10 Bom., 220.

1895
February 11.