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March 21.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

PATESHRI PARTAP NARAIN SINGH (PLAINTIFF) *v.* RUDRA NARAIN SINGH AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 *(Indian Limitation Act), section* 22—*Civil Procedure Code, section* 32—*Hindu law—Suit by head of family to recover possession of immovable property—Non-joinder of plaintiff's brother—Objection as to non-joinder not raised until a late stage of the suit—Competence of Court to add party after the expiry of the period of limitation.*

The plaintiff came into Court claiming possession of certain immovable property on the grounds (1) that it was a portion of an impartible raj of which he was the head, and (2) that he was in any case entitled to the property claimed by virtue of an assignment thereof (*sipurd-namah*) executed by a former *de facto* holder in favour of his (the plaintiff's) predecessor in title. The plaintiff had a brother who had not been made a party to the suit. *Held* that it was unnecessary to decide the plaintiff's first plea, because even if he property did, as asserted, belong to an impartible raj, the plaintiff's claim thereto as head of the raj was barred by limitation; (2) that the plaintiff was entitled to succeed so far as his claim was based on the deed of assignment, but inasmuch as the property thereby disposed of had become divested of the character of impartibility, if it ever possessed such character, the plaintiff's brother was entitled equally with the plaintiff to a share in it; (3) that the suit did not necessarily fail by reason of the plaintiff's brother not having been made a party to it, but that it was competent to the Court under the circumstances to add the plaintiff's brother as a party even in the stage of appeal, although the suit so far as he was concerned would have been by that time barred by limitation, no objection on the ground of non-joinder having been pressed by the respondents until the Court in appeal suggested that he ought to have been made a party. *Guruvayya Gouda* v. *Dattatraya Anant* (1), followed. *Radha Proshad Wasti* v. *Esuf* (2), and *Hulodhur Sen* v. *Gooroo Doss Roy* (3), referred to.

THIS appeal arose out of a suit brought by the Raja of Basti to recover possession of a number of villages, or shares in villages, situate in the district of Basti. The plaintiff's case was that the property in suit belonged to the Basti raj, of which he was the owner, and that the raj was an impartible raj; that a custom prevailed in the raj whereby the property belonging to it descended to the eldest son according to the rules of strict primogeniture, and on the death of a raja and the succession of his son to the raj a portion of the property was given to the brothers of the ruling raja, who were called

* First Appeal No. 265 of 1900, from a decree of E. J. Kitts, Esq., District Judge of Gorakhpur, dated 14th of May, 1900.

(1) (1903) I. L. R., 28 Bom., 11. (2) (1881) I. L. R., 7 Calc., 414.
(3) (1873) 20 W. R., 126.

"Babus," as *haq babuai*, or maintenance, which, on failure of the male issue of the Babus, reverted to the raj, after the death of the Babus and their widows, if any. Under this custom the plaintiff asserted that the property in suit reverted to the raj on the death, in the year 1887, of the surviving widow of Babu Chet Singh, who was nephew of a former raja, Raja Pirthipal Singh. The plaintiff also claimed to be entitled to the property in suit by virtue of a deed of assignment (*sipurd-namah*) executed on the 21st of March, 1848, by Babu Chet Singh in favour of the then ruling raja, Raja Indar Dawan Singh; and he relied also upon a will executed by Dulhin Rup Kunwari, the surviving widow of Chet Singh, on the 6th of January, 1858, in favour of his father the late Raja Mahesh Sitla Bakhsh Singh.

One Raja Jai Singh, who was alive in 1729, had four sons, Dat Singh, Lachan Singh, Ram Singh and Kishan Singh. Kishan Singh died without male issue, leaving a widow, Jian Kunwari, who on her husband's death took possession of the property which had come to Kishan Singh as a younger brother of the reigning raja. Jian Kunwari, the plaintiff alleged, executed two deeds of gift of the property which so came to her, one in favour of Bakhtawar Singh, a younger son of Lachan Singh, and the other in favour of Chet Singh, a son of Bakhtawar Singh. It appears that Raja Jabraj Singh, the grandson of Lachan Singh, who was then the reigning raja, took possession of some of the villages which were so transferred by Jian Kunwari to Chet Singh, and that a suit instituted by Chet Singh for their recovery was dismissed. Subsequently Chet Singh executed a deed of sale in favour of his wife, Rup Kunwari, and in consequence of this, the plaintiff alleged, Raja Indar Dawan Singh, the plaintiff's grandfather, who was then the reigning raja, threatened to take proceedings to have that deed set aside. But these proceedings were rendered unnecessary by the fact that Chet Singh agreed to a compromise, and executed the *sipurd-namah*, dated the 21st of March, 1848, upon which the plaintiff relied, whereby he gave all his property to Raja Indar Dawan Singh, reserving only life estates for himself and his wives, Gulab Kunwari and Rup Kunwari. Raja Indar Dawan

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Singh died in 1850, and in 1858 Rup Kunwari executed a will reciting the disposition made by her late husband, Chet Singh, in the *sipurd-namah* above referred to, and directing that upon her death Raja Mahesh Sitla Bakhsh Singh, the son of Raja Indar Dawan Singh, and father of the plaintiff, should be the heir to all her landed and other property.

Rup Kunwari died in 1887, and the defendant, Rudra Narain Singh, son of Jagannath Singh, and nephew of Chet Singh, took possession of all the property which had been in the possession of Rup Kunwari, claiming it as her heir. The day after the death of Rup Kunwari, the plaintiff's father, Raja Sitla Bakhsh Singh gave notice to Rudra Narain Singh of the deed which Chet Singh had executed in favour of Raja Indar Dawan Singh, and requested that he should not interfere with the estate. Rudra Narain Singh, however, got his name recorded as in possession in the revenue records, and Raja Sitla Bakhsh Singh died in 1890 without bringing a suit for the recovery of the property. Rudra Narain Singh proceeded to raise large sums of money by mortgages of various portions of the property. The present suit was brought in 1899, the plaintiff having been, it was said through lack of funds, unable to institute it earlier.

The defendants denied the custom set up by the plaintiff, and alleged that the property which Kishan Singh, and after him Chet Singh acquired, was their own property and devolved upon their heirs in accordance with the ordinary rules of Hindu law. The defendants denied the genuineness of the *sipurd-namah* alleged to have been executed by Chet Singh and of the will set up as that of Rup Kunwari; and further said that Chet Singh sold some of the properties which came to him from Jian Kunwari to his wife, Rup Kunwari, and that in any event in regard to these properties the plaintiff was not entitled to succeed.

The Court of first instance dismissed the suit, holding that the alleged custom of impartibility of the raj had not been proved, and that the *sipurd-namah* relied upon by the plaintiff was not a genuine document. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *A. H. C. Hamilton*, Babu *Jogindro Nath Chaudhri*, Munshi *Gobind Prasad*, Babu *Jiwan Chandra Mukerji*, and Munshi *Kalindi Prasad*, for the respondents.

The Court (STANLEY, C.J., and BURKITT, J.), after setting forth the facts out of which the suit arose, discussed the history of the Basti raj in connection with the plaintiff's case that it was an impartible raj descending according to the rules of primogeniture; but came to the conclusion that it was unnecessary to determine whether the custom set up by the plaintiff did or did not prevail, inasmuch as "if it existed, Chet Singh acquired the property contrary to and in spite of it, and nothing occurred subsequently to re-impress it with the character of impartibility." The Court found that the *sipurd-namah* of the 21st of March, 1848, executed by Chet Singh was a genuine document and afforded a good foundation to the plaintiff's suit. But if the plaintiff's title rested upon the *sipurd-namah* the property thereby dealt with had devolved upon the plaintiff's father not impressed with the character of impartibility, but subject to the ordinary rules of the Hindu law. This being so, the plaintiff's brother, Babu Bhawaneshri Partap Narain Singh, was equally entitled with the plaintiff. But Babu Bhawaneshri Partap Narain Singh had not been made a party to the suit. Objections had, indeed, been raised by some of the defendants to the non-joinder of the plaintiff's brother, but neither in the Court below nor in the High Court was his non-joinder pressed as a ground of defence. It was in fact only when the High Court came to record judgment in the appeal that the question of the effect of the non-joinder of the plaintiff's brother was raised by the Court itself. The Court permitted the plaintiff to apply for the addition of the name of his brother to the array of parties. Notice of this application having been served on Babu Bhawaneshri Partap Narain Singh, he appeared and admitted the plaintiff's claim. Other respondents, however, objected to the addition of Babu Bhawaneshri Partap Narain Singh as a party to the suit and appeal, mainly on the ground that under section 22 of the Indian Limitation Act, 1877, the suit was barred as against him when the question of his joinder in the

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array of parties was raised, and that it would not be proper for the Court to add him as a party of its own motion if the effect of doing so would be to preclude the defendants-respondents from relying on the bar of the statute. On this question, which was the principal question of law decided in the appeal, the judgment of the Court was as follows:—

"We now come to the question of the non-joinder as a party to the suit of the plaintiff's brother Babu Bhawaneshri Partap Narain Singh. As we have mentioned, the question of non-joinder was raised in several of the written statements, but it was never pressed. During the argument of the appeals the question was never broached by anyone, and it was not until the point occurred to one of us, when preparing our judgment, that any objection on the score of the non-joinder was raised. It has been argued on behalf of the respondents that a suit now instituted by Babu Bhawaneshri Partap Narain Singh would be statute-barred, and that the Court ought not to add him as a party if doing so would have the effect of depriving the respondents of the benefit of limitation. It has been further contended on behalf of the respondents that the plaintiff appellant being a joint tenant cannot alone maintain a suit for the whole or any part of the joint family property, and that consequently the suits were bound to fail. On behalf of the appellant it was contended that the plaintiff as the head of the family was as such entitled to eject trespassers and that the statute of limitation did not furnish any bar to the suit by reason of the addition to the array of parties of Babu Bhawaneshri Partap Narain Singh; that in fact any co-sharer has a right to eject a trespasser, and *a fortiori* the head of the family. The plaintiff did not in express terms sue on behalf of his brother as well as himself. To do so would in fact have been inconsistent with the principal claim which he set up, namely, that the property formed part of an impartible raj, and in accordance with the custom prevailing in the raj reverted to the raj on the death of a collateral member of the family without male issue. He claimed, however, in the alternative to be entitled to the property by virtue of the *sipurd-namah*, and obviously in putting forward this claim he must have done so for the benefit of his

brother as also of himself, for the property in that case devolved upon them as the only sons of Raja Mahesh Sitla Bakhsh Singh without being impressed with the character of impartibility. Babu Bhawaneshri Partap Narain Singh, when the point in question was raised, was not merely willing to be a party to the proceedings, but in the petitions which he has filed asks the Court to decree the plaintiff's claim. To determine the suit against the appellant on this tardily raised point is not a course which one would be disposed to adopt. If the question had been raised at the trial, the plaintiff would have, no doubt, obtained the consent of his brother to his name being added in the array of parties to the proceedings. Mr. Mayne in his work says:—'It would seem that one co-sharer may sue to eject a mere trespasser when his object is to remove an intruder from the joint property without at the same time claiming any portion of it for himself' (6th Edition, p. 371). He refers to the case of *Radha Proshad Wasti* v. *Esuf* (1). In that case Garth, C.J., in the course of his judgment observes:—'When a tenant has been put into possession of ijmali property with the consent of all the sharers, or, what is the same thing, has been placed there by the managing shareholder, who has authority to act for the rest, no one or more of the co-sharers can turn the co-sharer out without the consent of the others. But no man has a right to intrude upon ijmali property against the will of the co-sharers or of any of them. If he does so, he may be ejected without notice, either altogether, if all the co-sharers join in the suit, or partially, if only some of the co-sharers wish to eject him; and the legal means by which such a partial ejectment is effected is by giving the plaintiff's possession of their shares jointly with the intruder, as explained in the case of *Hulodhur Sen* v. *Gooroo Doss Roy* (2), *per* Jackson, J., The point arose in a case not unlike the present, namely, the case of *Guruvayya Gouda* v. *Dattataraya Anant* (3). In that case a suit was originally brought by two plaintiffs to recover possession of a house, the second plaintiff being described as the manager of the family. Subsequently, at a late stage of the

(1) (1881) I. L. R., 7 Calc., 414. (2) (1873) 20 W. R., 126.
(3) (1903) I. L. R., 27 Bom., 11.

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suit, the defendants having raised an objection of non-joinder of parties, the other members of the family who were satisfied to be represented by the plaintiff No. 2 as the manager of the joint family, were joined as co-plaintiffs after the expiry of the period of limitation prescribed for the suit. The first Court allowed the claim: but on appeal the lower appellate Court reversed the decree and dismissed the suit as time-barred under section 22 of the Limitation Act. It was held on appeal by Sir L. H. Jenkins, C.J., and Jacob, J., reversing the decree of the lower appellate Court and restoring that of the first Court, that section 22 of the Limitation Act does not in itself purport to determine directly whether the joinder of the parties after the institution of the suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired. Jacob J., who delivered the judgment of the Court, observed that 'such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed.' Later on he observes:—'It is further clear that the plaintiff No. 2 was from the outset joined as manager of the joint family in view of the alternative prayer for declaration of their ownership and for consequential recovery of possession of the property, failing proof of the oral leases. The question therefore before us is rather whether the claim could have been decreed in the suit of plaintiff No. 2 as manager, or whether the non-joinder of the other co-sharers, minors and adults, was a defect which could be overlooked by reason of the delay on the part of the defendants in taking objection to it. If fresh parties are merely joined for the purpose of the safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination (by application of the provisions of section 22 of the Limitation Act) of the date of the institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit, and would not therefore attract the application of the general provisions of the Limitation Act.' He then proceeds:—'The main question in this appeal is whether, had the additional plaintiffs not been

joined, it would have been competent to the Subordinate Judge to pass a decree for ejectment against the defendants, on the facts alleged and proved, in favour of the original plaintiffs.' He then cites some authorities, and concludes by saying:—'We must hold that the bar of limitation was not established, as the defendants' objection to non-joinder of parties having been taken at a late stage of the suit may be disregarded.'

"This decision appears to us to be consonant with justice, and we are prepared to follow it. We are unable to discover any substantial difference in the facts of that case and those in the case before us. In both the suit was to eject trespassers by co-sharers; in the one, one of the plaintiffs being described as manager of the family; in the other, the sole plaintiff being described as raja, that is, head of the family. In both cases the members of the family who were not represented were placed in the array of parties after the expiry of the period of limitation prescribed for the suit. In the suit out of which this appeal has arisen and in three other of the suits objection was raised by the defendants, but was not pressed. It was this Court which pointed out the defect in the matter of parties. If the raj is impartible, and if the property comprised in the *sipurdnamah* was impressed with the character of impartibility, the plaintiff alone would be entitled to it, which is in dispute in Appeal No. 246. We therefore hold that the objections thus tardily presented to the joinder of the plaintiff's brother as a party to the suits and appeals are untenable and that the Statute of limitation furnishes no bar to the suits."

In the result the major portion of the plaintiff's claim was decreed, and on the request of B. Bhawaneshri Partap Narain Singh a decree was passed in favour of the plaintiff alone.

Appeal decreed in part.