1915
March, 9.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

PARSOTAM RAO TANTIA AND ANOTHER (DEFENDANTS) *v.* RADHA BAI AND ANOTHER (PLAINTIFFS).*

Act No. IX of 1908 (*Indian Limitation Act,*) *Schedule I, Articles* 62, 120—*Separate Hindu family—Property managed by one member—Receipt of money by that member—Suit for partition.*

Three brothers who had been living with their father as a joint Hindu family obtained under the will of their father, in whose hands it was separate property, a considerable amount of movable and immovable property. The property so bequeathed was divided by the will into three lots; but the legatees still continued to live as a joint Hindu family; and the property of all was managed for a series of years by one member of the family acting as if he were the *karta* of a joint Hindu family.

Held on suit by the widow of one of the members of the family to recover from the manager her deceased husband's share of money received by the defendant as manager, but owned by all the three members of the family in equal shares, that the suit was not a suit for "money had and received," but was one to which article 120 of the first schedule to the Indian Limitation Act applied.

THIS was a suit for partition of immovable property and recovery of a share in a specific amount of money received by the defendant while acting as manager of property belonging to himself and his brothers. The money was received by the defendant in and before June, 1905, but the suit was brought in 1909. The defence, *inter alia*, was that the suit in respect of that item was barred by limitation. The court below decreed the suit. The defendants appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellants:—

The first point for decision is whether the suit is maintainable in view of the provisions of sections 11 and 47 of the Code of Civil Procedure. In *Parsotam Rao* v. *Radha Bai*, (1) authorities are collected in support of the proposition that a decree for partition is one in favour of each share-holder or set of share-holders having a distinct share. The plaintiff's remedy therefore is to execute the decree made in Janki Bai's suit and the present suit is wholly misconceived. Radha Bai was a party to that suit and she ought to have seen that the decree was properly drawn up. The next question is one of limitation. It is *res judicata* between the

* First Appeal No. 269 of 1913, from a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 23rd of June, 1913.

(1) (1910) I. L. R., 32 All., 469.

parties that they never had a joint title to any property. Their shares were all defined and separate. Consequently if any monies came into the hands of one of them, the three brothers would each be entitled to one-third of the amount and the actual recipient would be holding the same to the use of the other brothers to the extent of their shares. Article 62, Schedule I, of the Limitation Act therefore applies to the case; *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (1), *Banoo Tewari* v. *Doona Tewari* (2) and *Thakur Prasad* v. *Partab* (3). The lower court is entirely wrong in treating this family as joint for the purpose of limitation and as separate for all other purposes. Even if the appellant be treated as the agent of the plaintiff's husband because he was actually managing the property during the life-time of the latter, the article applicable would be 89 and not 120 and the plaintiff's husband having died in February, 1905, the agency must be deemed to have terminated on that date under section 201 of the Contract Act. The defendant repudiated the plaintiff's title after her husband's death and was never her agent. The suit is not one purely for partition, but it is to recover specific items of property including movables and sums of money specifically mentioned in the plaint.

The Hon'ble Pandit *Moti Lal Nehru* (with him the Hon'ble Dr. *Sundar Lal*), for the respondent was called upon in regard to the question of limitation only. Unless article 62, or 89 is clearly shown to apply the only article applicable would be article 120. Neither article 62 nor article 89, has any application to this case. The money claimed was not received for the use of the plaintiff who claimed as the representative of her deceased husband. Article 62 therefore does not apply; *Guru Das* v. *Ram Narain* (4) and *Chand Mal* v. *Angan Lal* (5). Article 89 would have applied if the suit had been instituted by the plaintiff's husband. It has no application to a suit between the representative of the principal and the agent; *Bindraban Behari* v. *Jamuna Kunwar* (6). On the pleadings however, no question arises either under article 62 or article 89. Though there was a separation of interest between the members

(1) (1909) I. L. R., 32 Mad., 191.
(2) (1896) I. L. R., 24 Calc., 809.
(3) (1883) I. L. R., 6 All., 442.
(4) (1884) I. L. R., 10 Calc., 860.
(5) (1891) I. L. R., 13 All., 368.
(6) (1902) I. L. R., 25 All., 55.

1915

PARSOTAM RAO TANTIA v. RADHA BAI.

of the joint Hindu family no actual partition by metes and bound was made and the brothers remained tenants in common of the whole property. This suit in substance is a suit for actual partition of the family property into definite shares. The plaintiff could not claim a specific item, and if she did she would be met with the defence that on a general account there was nothing due to the plaintiff. The case directly in point is *Ganesh Dutt Thakoor* v. *Jewach Thakoorain* (1), where the constitution of the family was exactly similar and the suit was brought for movables and immovables long after three years from the date of separation.

Dr. *Satish Chandra Banarji* was heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit which related to property which at one time belonged to a man named Nana Narayan Rao. We do not for the moment specify the exact nature of the suit inasmuch as our decision upon a law point raised by the appellants depends to some extent upon the view we take of the nature of the suit. Nana Narayan Rao made a will in which he divided up his property between his three sons Ram Chander Rao, Vasudeva Rao and the defendant Parsotam Rao Tantia. Whilst dividing up the property he urged his family to continue to live together in an amicable and friendly way. There has been a good deal of litigation between the members of this family. In the first place a suit was brought by Ram Chander Rao, which was continued after his death in the name of his widow Janki Bai. Partition of the family property, or so much of it as had not already been divided by the will was claimed. Madho Rao and Parsotam Rao were defendants to that suit. It was pleaded by way of defence that the family constituted a joint Hindu family and that Musammat Janki as the widow of Ram Chander had no right to anything save maintenance. It was decided that the family was separate. Again Parsotam Rao brought a suit against Radha Bai, the present plaintiff, widow of Madho Rao, after the death of the latter for a declaration that the family was joint and that the widow Radha Bai had no interest. It was again decided that the family was separate. In the present suit the defendant Parsotam Rao pleads once more that the family is joint. In our opinion on the evidence and also as the result of

(1) (1903) I. L. R., 31 Calc., 262.

the previous litigation, we entirely agree with the decision of the court below that Ram Chander Rao, Vasudeva Rao and Parsotam Rao, the three sons of Nana Narayan Rao, did not constitute a joint Hindu family according to Hindu Law, in that they had specific shares in the property. Nevertheless while the family was in law separate, in many respects it differed very little from a joint Hindu family. So long as the three brothers lived they appear to have been on friendly terms, and it was only shortly before the death of Ram Chander that he brought a suit for partition. The court below has found, and we entirely agree with its finding, that the greater part, if not the whole of the property, was managed by one member of the family, who occupied the position of a manager. The family nevertheless were separate because notwithstanding the mode of enjoyment and management they were entitled to the property in specific shares. When the present suit was instituted there had already been a considerable amount of litigation and the courts had held that the family was not joint, and in bringing her present suit the plaintiff has claimed to be put into possession of a third of specific portions of the property. Amongst the items of property claimed was the sum of Rs. 69,790-8-8. This claim was in respect of certain debentures in the Cawnpore-Achnera State Railway. It appears that the defendant Parsotam Rao had invested the joint funds in debentures in this railway. In course of time Government paid off the debentures at a substantial premium and the money was received by the defendant. The court below decided in the first place that the family was separate. It has given the plaintiff a decree for partition of a portion of the immovable property and also for the sum of Rs. 69,790-8-8 mentioned above. It has made also a decree in respect of other items to which it is unnecessary specially to refer at present. Agreeing as we do with the court below the plaintiff was clearly entitled to partition, and in this respect we have no hesitation in saying that the decree of the court below ought to be affirmed.

The appellants have contended very strongly that the court below ought not to have made a decree in the plaintiff's favour for the sum of Rs. 69,790-8-8 on the ground that her claim in that respect was barred by limitation. The money was paid over to

1915.

PARSOTAM RAO TANTIA v. RADHA BAI.

the defendant on or before June, 1908, and the present suit was not instituted until the 2nd of April, 1912, that is to say, more than three years after the money was received by the defendant. The appellants accordingly contend that the plaintiff's claim in respect of the item was a claim for "money had and received to the use of the plaintiff" within the meaning of article 62 of Schedule I to the Limitation Act. The way in which the plaintiff claimed this sum lends some colour to this contention, and had the present suit been a suit simply to recover this sum of money upon the allegation that the plaintiff being entitled to one-third of the debentures, and that all the redemption money had been paid to Parsotam as the person in whose name the debentures stood we might have been inclined to agree with the contention of the defendant that the claim came within the purview of article 62, and that the suit ought to have been brought within three years. Reading, however, the plaint as a whole, and having regard to the nature of the evidence and the defence, we think that the suit was in reality a suit for partition of the movable and immovable property which had been held by the three brothers and in which the plaintiff's husband had a third share. We have already pointed out that the property was managed by one member of the family. He appears to have received the rents and profits of the immovable property and to have invested and dealt with their money making investments in the ordinary course of business. When he received the money from Government in redemption of the debentures, he still received it in his capacity of manager. When we speak of a manager we do not mean the managing member of a joint Hindu family, but the individual to whom this particular family entrusted the management of their affairs. In this view we think that the suit was a suit governed by article 120, which provides a period of six years limitation for all suits not specifically provided for by the other articles in the schedule.

There was one other item to which Dr. *Banerji* specifically called our attention, namely, the *dera* (or collection house) in this village Lalpur. Dr. *Banerji* contends on behalf of his clients that while the village of Lalpur was specifically bequeathed to the plaintiff's husband, nevertheless as collections generally of several of the villages were made at this house, it must be regarded as

joint property and should have been partitioned. The learned Subordinate Judge considers that the provisions of the will ought to be given effect to, which specifically gave the village of Lalpur to the plaintiff and that this house ought to be regarded as an appurtenant of that village. We see no reason to differ from the view taken by the learned Subordinate Judge. On full consideration of the entire case, we think the decree of the court below ought to be affirmed in its entirety. We accordingly dismiss the appeal with costs.

1915

PARSOTAM RAO TANTIA *v.* RADHA BAI.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Chamier and Mr. Justice Piggott.

SAHADEO GIR (PETITIONER) *v.* DEO DUTT MISIR AND OTHERS (OPPOSITE PARTIES).*

1915
March, 9.

Civil Procedure Code (1908), *section* 152—*Refusal of Court to correct an accidental mistake in the drawing up of a decree—Revision—Jurisdiction.*

In a suit for sale on foot of a mortgage one of the defendants pleaded a prior mortgage. An issue was expressly struck on the point and was found in favour of the prior mortgagee. The operative portion of the judgement directed that a decree for sale should be prepared in accordance with the provisions of Order XXXIV, rule 4, of the Code of Civil Procedure; but the decree which was drawn up was one for sale of the property in suit, without any reference to the prior mortgage. The prior mortgagee presented an application under section 152 of the Code of Civil Procedure to the court which passed the decree to have it amended. *Held* that the prior mortgagee, whether or not he had preferred an appeal from the decree, was entitled, with reference to section 152, to have it amended, and the court in refusing to amend had failed to exercise a jurisdiction vested in it by law.

THE facts of this case were as follows :—

In a suit for sale upon a mortgage one of the defendants pleaded a prior encumbrance. An issue was framed on this plea and the court found that he had priority. Neither the judgement nor the decree, however, made any express provision for securing the prior right. The preliminary decree was passed on the 18th of February, 1911, and on the 1st of March 1913, the said defendant applied for correction thereof. That application was rejected on the 2nd of April 1913, on the ground that the decree was not at variance with the judgement. A decree absolute was passed on

* Civil Revision No. 114 of 1914.