We think there is a large mass of evidence, some of it unrebutted in any way, to show that such a custom does exist. We agree with the assessor who came to the conclusion that Matilal Saha had relinquished his wife. No doubt it has been pointed out to us by Mr. Kilby on behalf of the Crown that, according to a decision of the Bombay High Court, such a marriage would not be binding; but a second marriage has been for a long time recognized by this Court among certain classes of people in this country.

We think, therefore, that the decision of the Judge must be set aside, and, acquitting the accused, we direct her discharge.

Conviction set aside.

A. F. M. A. R.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

MAHABIR PERSHAD SINGH AND OTHERS (PLAINTIFFS) *v.* HURRIHUR PERSHAD NARAIN SINGH AND OTHERS (DEFENDANTS).*

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June 2.

Limitation—Instrument, suit to set aside or declare the forgery of—Immoveable property, suit for possession of—Limitation Act (XV of 1877), Schedule 2, Arts. 91, 92, 93, 144.

One *D* died in 1849, leaving an ikrarnamah or will. His widows entered into possession of his property, and the survivor died on the 23rd April 1886. The predecessors in estate of the plaintiffs brought a suit to set aside the ikrarnamah, which suit was dismissed in 1864, on the ground that they had no cause of action during the lifetime of the surviving widow. On the 29th June 1889 the plaintiffs, as the heirs of *D* after the death of the surviving widow, instituted a suit to recover possession of the property of *D* from the defendants, who claimed to have come into possession thereof under the ikrarnamah upon the death of the widow.

Held, that the suit was governed by the limitation of three years for a suit to set aside an instrument, and not by the general limitation prescribed for suits to recover immoveable property, as after the widow's death the

* Appeal from Original Decree No. 264 of 1890, against the decree of A. C. Brett, Esq., District Judge of Tirhoot, dated the 2nd of August 1890.

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parties in possession were those claiming under the ikrarnamah, who could not be displaced except by setting it aside.

Raghubar Dyal Sahu v. *Bhikya Lal Misser* (1) approved. *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (2) and *Janki Kunwar* v. *Ajit Singh* (3) referred to.

THIS suit was brought by the plaintiffs as the descendants of one Durbijoy Singh by his first wife Mussamut Sulagan Koer, claiming to be the heirs of Durbijoy Singh, and as such entitled to recover possession of his properties with mesne profits. The principal defendants claimed to have been in possession of the properties as the agnates of Durbijoy Singh since the death of Mussamut Maheshwar Koer, his second wife, by virtue of an ikrarnamah or will executed by Durbijoy Singh on the 7th October 1847. The second party defendants claimed as purchasers from the principal defendants.

Durbijoy Singh was a member of a joint Hindu family, governed by the Mitakshara law, together with the predecessors of the principal defendants, but separated himself from them during his lifetime. At the date of his death in January 1849 Durbijoy left two widows, the elder of whom, Mussamut Sulagan, died in 1850, leaving three daughters, through whom the plaintiffs claimed to inherit; the other widow, Mussamut Maheshwar, died childless on the 23rd April 1886.

The ikrarnamah executed by Durbijoy Singh was in the following terms:—"Whereas I have not got any son from my first wife, Mussamut Sulagan Koer, therefore, with the advice of all I negotiated to marry Mussamut Maheshwar Koer, daughter of Baboo Lal Narain Singh, on condition that I should give mauza Roop Narainpur to Mussamut Sulagan Koer, my first wife, for her maintenance, to be held by her until her death, and also give her one separate house for her living and all other properties, together with tents and goods to Mussamut Maheshwar Koer. This negotiation was made with Baboo Tirloke Nath Singh, uncle of Mussamut Maheshwar Koer, and upon my agreeing to carry out the above contract, Mussamut Maheshwar was married to me. In accordance with the said agreement I gave mauza Roop Narainpur

(1) I. L. R., 12 Calc., 69.
(2) I. L. R., 13 Calc., 308; L. R., 13 I. A., 84.
(3) I. L. R., 15 Calc., 58; L. R., 14 I. A., 148.

and the western house to my first wife, Mussamut Sulagan Koer, and I kept my second wife, Mussamut Maheshwar Koer, with me in the eastern house. My second wife, Mussamut Maheshwar Koer, told me to execute a document according to the contract entered into by me.' Therefore I execute this document to the effect that if God be pleased to favour me with a son, then he shall get all the properties, tents, camps, &c. If no son is born to me, then after my death Mussamut Sulagan Koer shall hold possession over Roop Narainpur during her lifetime, without having any power to alienate the same, and all my remaining shares and properties shall be taken possession of by my second wife, Mussamut Maheshwar Koer, but no one shall be competent to alienate the said properties; that if necessary she may give lease upon zurpeshgi; that after the death of my first and second wives these shares shall devolve upon my uncles, Baboo Juggernath Singh and Baboo Birj Behari Singh, and my cousins, Baboo Tirbeni Singh and Baboo Roghubuns Narain Singh; that I have already married my daughters and given *dan-dahes* (dowry), so that they have no right to my milkiut. He who does contrary to this deed will be considered a liar in Court. Therefore I write this ikrar, so that it may be of use when required. Dated 13th Assin 1255 Fusli."

Upon the death of Durbijoy his widows came into possession of the property. Litigation was at that time pending between one Rungi Roy and Durbijoy, and in a proceeding to determine the right of representing Durbijoy, Mussamut Maheshwar propounded the ikrarnamah, but no decision was come to upon its validity. The descendants of Mussamut Sulagan then brought a suit to have the ikrarnamah set aside, making Mussamut Maheshwar and the agnates defendants. That suit was dismissed on appeal by the High Court on the 17th December 1864, on the ground that the reversioners were not entitled to recover the property during the lifetime of the widow, that no waste was proved, and that the suit was not framed to obtain a declaration as to the validity of the ikrarnamah after the widow's death.

The present suit was instituted on the 29th June 1889, more than three years after the death of Mussamut Maheshwar. The lower Court held that there was only one issue upon the merits—the validity of the ikrarnamah; that Articles 91, 92, and 93 of the

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Limitation Act applied; and upon the authority of *Raj Bahadoor Singh* v. *Achumbit Lal* (1), *Uma Shankar* v. *Kalka Prasad* (2), and *Jagadamba Chaodhrani* v. *Dakhina Mohan Roy Chaodhri* (3), dismissed the suit upon the ground of limitation, finding also upon the merits that the ikrarnamah was a genuine document, the effect of which was to vest the estates of Durbijoy in the defendants.

The plaintiffs appealed to the High Court.

Mr. *Woodroffe*, Baboo *Srinath Doss*, and Baboo *Saligram Singh* appeared for the appellants.

The Advocate-General (Sir *Charles Paul*), Baboo *Prannath Pandit*, and Baboo *Jogender Chunder Ghose* appeared for the respondents.

The arguments sufficiently appear from the judgment of the Court (PRINSEP and AMEER ALI, JJ.), which was as follows:—

Durbijoy Singh was a member of a joint Hindu family under Mitakshara law with the predecessors of the first party defendants, but it was held by a competent Court that he had separated from them. He died in January 1849, leaving two widows, Sulagan and Maheshwar. Sulagan died in 1850 leaving daughters, and Maheshwar died childless in 1886. The plaintiffs are the natural heirs to Durbijoy, plaintiffs 1 and 2 being sons of daughters of Sulagan, and plaintiffs 3 and 4 sons of a son of a third daughter. As heirs to Durbijoy after the death of his last surviving widow they sue to recover his estate, some of which has been alienated to the second party defendants.

The defendants rely on an ikrarnamah or will, alleged to have been executed by Durbijoy on the 13th Asin 1255 (7th October 1847), under which, in the event of his leaving no son, he gave Sulagan a life estate in a certain property, Roop Narainpur, and gave his other wife, Maheshwar, his remaining estate; all of which, however, at her death was to go to his uncles and cousins, and they also plead limitation as a bar to this suit.

The District Judge has dismissed the suit as barred by limitation, because it is a suit to set aside the ikrarnamah and

(1) L. R., 6 I. A., 110; 6 C. L. R., 12.

(2) I. L. R., 6 All., 75.

(3) I. L. R., 13 Calc., 308; L. R., 13 I. A., 84.

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was not brought within three years from Maheshwar's death, and he has also found that the ikrarnamah is a genuine instrument. The plaintiffs have accordingly appealed.

The District Judge has relied on the judgment of their Lordships of the Privy Council in *Raj Bahadoor Singh* v. *Achumbit Lal* (1) and in *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (2) as explaining that case, and he has also quoted *Uma Shankar* v. *Kalka Prasad* (3).

It is contended for the appellants that the suit is to recover immoveable property by right of inheritance, and that to set aside the ikrarnamah is not the object of the suit, but one of the probable consequences. The matter is not free from considerable difficulty. The predecessors in estate of the plaintiffs sued to get this ikrarnamah set aside as not a genuine instrument, and that suit was dismissed in three Courts, not on the merits, but because it was premature. The High Court, on 17th December 1864, held that "the plaintiffs had no cause of action during the lifetime of the widow." The suit before us has been brought more than three years from the widow's death, and the question is whether it is governed by the limitation of three years for a suit to set aside an instrument, or by the general limitation prescribed for suits to recover immoveable property, that is, twelve years after the right accrued by the widow's death. There is no doubt that the widow Maheshwar set up the ikrarnamah. It was set up in Court in March or April 1849, and although the question of its genuineness was raised and evidence was taken, there was no finding delivered. The reason for this was that Maheshwar had an indisputable title to retain possession as the widow of Durbijoy, and therefore no immediate benefit would be derived by any one seeking to impugn the ikrarnamah; although it was set up, it was never acted upon by the widow in such a manner as to prejudice the rights of any reversionary heir until after her death; any alienation by her would necessarily be valid until that time, and this was declared by the order of the High Court of December 1864 in a suit brought for that purpose. Moreover, it was impossible to predict whether any person then claiming to be a reversionary heir would

(1) L. R., 6. I. A., 110; 6, C. L. R., 12.
(2) I. L. R., 13 Calc., 308; L. R., 13, I. A., 84.
(3) I. L. R., 6 All., 75.

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occupy that position at the widow's death. But after the widow's death, although the right of inheritance has become perfected, so that it can be practically enforced, the parties in possession are those who claim under the ikrarnamah, and these cannot be displaced except by setting it aside. We are inclined to take the view expressed by FIELD, J., in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (1), which is practically that of their Lordships of the Privy Council in the later case of *Jagadamba Chaodhrani* v. *Dakhina Mohan Roy Chaodhri* (2). The case of *Janki Kunwar* v. *Ajit Singh* (3) has been cited in this case by the learned counsel for both sides. It seems to us to be in favour of the defendant and to be in no way in conflict with the case last cited.

The plaintiffs were bound to challenge the ikrarnamah on the widow's death, when it was put into effect as against them in continuance of the title asserted by the widow. No doubt as Maheshwar had another and a complete and independent title as a Hindu widow as has already been intimated, the plaintiffs might not be prejudiced by the setting up of the ikrarnamah during her lifetime. But the ikrarnamah was set up by the defendants at her death, and unless plaintiffs can get rid of the title so derived, they cannot succeed. It therefore seems to us that this is the real object of the suit, and that the limitation applicable is three years from the widow's death. We arrive at this conclusion with some regret. The appeal must therefore be dismissed with costs.

A. A. C. *Appeal dismissed.*

Before Mr. Justice Ghose and Mr. Justice Rampini.

1892 *May* 18.

ABHAI CHURN JANA (PLAINTIFF) *v.* MANGAL JANA AND OTHERS (DEFENDANTS).*

Hindu Law—Reunion—Succession.

Where there has been a reunion between persons expressly enumerated in the text of Brihasbpati, *viz.*, father, brother and paternal uncle, and

* Appeal from Appellate Decree No. 87 of 1891, against the decree of Baboo Dwarka Nath Bhuttacharjee, Subordinate Judge of Midnapore, dated the 11th of September 1890, affirming the decree of Babu Lalit Koomar Bose, Munsiff of Contai, dated the 15th of March 1890.

(1) I. L. R., 12 Calc., 69.
(2) I. L. R., 13 Calc., 308; L. R., 13 I. A., 84.
(3) I. L. R., 15 Calc., 58; L. R., 14 I. A., 148.