Before Mr. Justice Sulaiman, Acting Chief Justice, Mr. Justice Mukerji and Mr. Justice Boys.

RUSTAM KHAN AND ANOTHER (PLAINTIFFS) *v.* JANKI AND OTHERS (DEFENDANTS).* 1928 July, 6

Act No. IX of 1908 (*Indian Limitation Act*), *articles* 123, 144—*Suit by an heir of a deceased Muhammadan for his share of the inheritance, against his co-heirs and the transferees from some of them—Plaintiff alleging joint possession with, and subsequent adverse possession by, co-heirs—Article* 144 *applies.*

Where, after the death of a Muhammadan, one of the heirs is dispossessed by his co-heirs from the property left by the deceased, or has not obtained possession and later on the co-heirs in possession set up a title and execute a transfer inconsistent with his rights, and he then brings a suit against the co-heirs (and their transferees) for recovery of possession of his share, the suit is not one for a distributive share of the property of an intestate, but is a suit for possession of the defined share of one co-owner which is in the adverse possession of the other co-owners. Such a suit is not governed by article 123, but by article 144, of the Limitation Act.

Article 123 of the Limitation Act applies to those suits in which the plaintiff seeks to obtain his legacy or share from a person who, as administrator, represents the estate of a deceased person and is under a legal duty to pay legacies and distribute shares to those entitled to them.

The Privy Council case of *Maung Tun Tha* v. *Ma Thit* (1), explained and distinguished.

Umardaraz Ali Khan v. *Wilayat Ali Khan* (2), *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa* (3), *Aziz-ul-Haq* v. *Mariyam Bibi* (4), *Bashir-un-nissa Bibi* v. *Abdur Rahman* (5), *Kallangowda* v. *Bibishaya* (6) and *Nurdin Najbudin* v. *Bu Umrao* (7), followed. *Mahomed Riasat Ali* v. *Hasin Banu* (8), referred to. *Shirinbai* v. *Ratanbai* (9), *Sri Rajah Partha-*

*Appeal No. 72 of 1926, under section 10 of the Letters Patent.

(1) (1916) I.L.R., 44 Calc., 379.
(2) (1896) I.L.R., 19 All., 169.
(3) (1910) I.L.R., 34 Mad., 511.
(4) (1914) 17 Oudh Cases, 157.
(5) (1921) I.L.R., 44 All., 244.
(6) (1920) I.L.R., 44 Bom., 943.
(7) (1920) I.L.R., 45 Bom., 519.
(8) (1893) I.L.R., 21 Cal., 157.
(9) (1918) I.L.R., 43 Bom., 845.

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sarathy Appa Rao v. *Sri Rajah Venkatadri Appa Rao* (1) and *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao* (2), distinguished.

THE facts of the case are fully set forth in the judgements of the Court.

Munshi *Narain Prasad Asthana* (for whom Mr. *Zahur Ahmad*) and Maulvi *Mushtaq Ahmad*, for the appellants.

Dr. *N. C. Vaish*, for the respondents.

SULAIMAN, A. C. J. :—This appeal has been referred to a Full Bench for considering whether the observations of their Lordships of the Privy Council in the case of *Maung Tun Tha* v. *Ma Thit* (3) have the effect of overruling the previous rulings of this Court.

The appeal arose out of a suit brought by the plaintiffs for recovery of a three-eighth share in the estate of Wazir Khan deceased against his widow, daughter and daughter's son. It appears that Wazir Khan died about 1908, and his legal heirs were his widow Musammat Janki, his daughter Musammat Dhora, and the present plaintiffs, who are the sons of the first cousin of Wazir Khan. Under the Muhammadan law they became entitled to a three-eighth share. The property consists of zamindari, paying a small amount of revenue. On the 1st of February, 1921, Musammat Janki executed a deed of gift in favour of her daughter and daughter's son. The plaintiffs claimed that from that moment the defendants' possession became adverse, and they were entitled to recover their share. Both the courts below held that article 144 of the Limitation Act applied to the case, and that possession did not become adverse till 1921. The suit was accordingly decreed. On appeal a learned Judge of this Court came to the conclusion that in view of the pronouncement of their Lord-

(1) (1922) I.L.R., 46 Mad., 190. (2) (1925) I.L.R., 48 Mad., 312.
(3) (1916) I.L.R., 44 Cal., 879.

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ships of the Privy Council in the case mentioned above, the suit must be taken to be governed by article 123, and having been brought more than 12 years after the death of Wazir Khan, was barred by limitation. The decree was reversed and the suit was dismissed.

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Mr. *Zahur Ahmad*, who had prepared the case thoroughly, placed before us all the relevant rulings in his opening address. There can be no doubt that prior to 1916 the view which prevailed in all the High Courts in India was that a suit brought by a Muhammadan co-heir against another co-heir for possession of his legal share was not governed by article 123 at all. The leading case in this Court is *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1). The learned Judges who decided that case thought that article 123 referred to a suit in which a plaintiff seeks to obtain his share from a person who, either as an executor or an administrator, represents the estate of a deceased person and is under a legal obligation to distribute shares to those entitled to them. They relied on a Madras case as well as on the case of *Mahomed Riasat Ali* v. *Hasin Banu* (2). But in the last-mentioned case, decided by their Lordships of the Privy Council, the plaintiff widow was claiming the whole of the movable and immovable estate under a family custom, and not a fractional share in it. Their Lordships therefore held that article 123 was not applicable to the case.

The view of this Court was accepted by a Full Bench of the Madras High Court in the case of *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa* (3). In that case article 123 was held to be inapplicable to a suit for possession of immovable property by a co-heir, and article 144 was considered to be applicable.

(1) (1896) I.L.R., 19 All., 169. (2) (1893) I.L.R., 21 Cal., 157.
(3) (1910) I.L.R., 34 Mad., 511.

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The same view was followed in the case of *Aziz-ul-Haq* v. *Mariyam Bibi* (1), which was a suit for possession of immovable property, and it was held by LINDSAY, J. C., that article 144 and not article 123 applied. This has been re-affirmed by this Court in the case of *Bashir-un-nissa Bibi* v. *Abdur Rahman* (2).

The Burma case of *Maung Tun Tha* v. *Ma Thit* (3) was not exactly a case brought by a co-heir against another co-heir for possession of his legal share. Under a peculiar Burmese law property is held jointly by husband and wife, and, on the death of either, the eldest son, if he claims his share, is entitled to get one-fourth separated. But if he does not make his claim promptly and get his share partitioned, he has to wait until the other parent's death, when all the other children would be entitled to shares. The suit was brought by the eldest son after 6½ years from the death of his father. There was no question of 12 years' limitation at all. The main defence was that under the Burmese law the plaintiff, not having got his share separated promptly, was disentitled from getting it, and that share had merged in the joint estate. The High Court had remarked that they were not concerned with the period of limitation. The learned Judges conceded that if the plaintiff had demanded his one-fourth share promptly after his father's death and the same had been refused, he would have 12 years from the date of his father's death. But they dismissed the suit, holding that the right to claim a one-fourth share ought to be exercised as soon as possible after the parent's death, and as the appellant had not exercised that right at all, it lapsed altogether. The counsel for the plaintiff before their Lordships of the Privy Council assumed that the case was governed by article 123, and urged that the suit was within limitation. Article 144 was neither mentioned nor discussed.

(1) (1914) 17 Oudh Cases, 157. (2) (1921) I.L.R., 44 All., 244.
(3) (1916) I.L.R., 44 Cal., 379.

There was no need to refer to article 144 as 12 years, even under article 123, had not expired. Their Lordships held that the plaintiff was at liberty to assert his right within the period fixed by article 123. Under the Burmese law it appears that there is an obligation on the surviving parent to allow the eldest son to have his one-fourth share segregated, and the rulings of the Burma High Court clearly lay down that such a suit is governed by article 123. But the principle underlying that decision does not apply to heirs under the Muhammadan law which gives distinct and definite shares to each heir, whose share does not lapse on account of any delay, and which does not impose any obligation to get the share separated or segregated promptly.

None of the previous cases which had applied article 144 were cited before or considered by their Lordships, and they cannot be deemed to have been overruled, as the principles underlying them are quite different.

No doubt there are certain observations in the case of *Shirinbai* v. *Ratanbai* (1), showing that the learned Judges thought that the pronouncement of their Lordships of the Privy Council had displaced the line of Indian cases. But the Bombay case itself was very peculiar. A suit was brought against the representatives of an executor, and the prayer *inter alia* was that the estate should be administered. It was in such a case that the Bombay High Court held that article 123 was applicable. In two subsequent cases the same High Court has applied article 144:—*Kallangowda* v. *Bibishaya* (2) and *Nurdin Najbudin* v. *Bu Umrao* (3).

In the last-mentioned case, at page 522, FAWCETT, J., observed that proper force should be given to the word "distributive" in article 123, that the article could not be construed as if that word had no force, and the

(1) (1918) I.L.R., 43 Bom., 845. (2) (1920) I.L.R., 44 Bom., 943.
(3) (1920) I.L.R., 45 Bom., 519.

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article was meant to cover the case of any claim for a share of the property of an intestate. The learned Judge pointed out that the word "distribution" under the English law has a particular meaning, and was generally applied to the division of the personal estate of an intestate which has vested in an executor or administrator. The omission of the word "movable" from the corresponding article of the Limitation Act of 1877 makes that article applicable both to movable and immovable property in India.

The case of *Sri Rajah Parthasarathy Appa Rao* v. *Sri Rajah Venkatadri Appa Rao* (1), was one for a share in a legacy against executors *de son tort*. SCHWABE, C. J., observed that article 123 applied to suits for legacies against any person rightly or wrongly in possession of the estate under such circumstances that he is bound to deal with it as the estate of the deceased. COUTTS TROTTER, J., was of the same opinion and, at page 210, held that article 123 applied to a case where the person sued is not an executor but a person who is in possession of the estate in circumstances which render him accountable in equity to those having claims upon the estate. KUMARASWAMI SASTRI, J., also held, at page 248, that there was no reason why the suit should not fall under article 123 when it is a suit for a legacy and is against a person who has in law all the duties of an executor cast on him owing to his having intermeddled with the estate or having taken possession of the assets.

In the judgements of the learned Judges there were references to the Burma case decided by their Lordships of the Privy Council, and the three Bombay cases referred to above. This case is particularly important because it went up in appeal before their Lordships of the Privy Council, whose judgement is to be found in the case of *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao* (2).

(1) (1922) I.L.R., 46 Mad., 190. (2) (1925) I.L.R., 48 Mad., 312.

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On the facts the case is clearly distinguishable, because it was a suit to recover legacies bequeathed by a testatrix pure and simple. Article 123, therefore, undoubtedly applied. The only question was as to the starting point of limitation. At pages 325 and 326 their Lordships referred to the use of the words "payable" and "deliverable" in the third column of the article, and in that case held that looking at article 123 as one of general application to such suits, the interpretation to be put on the words would be that "a share in the property of an intestate would not be 'deliverable' until the administrator, to whom letters of administration had been granted, had in his hands the share to be delivered, and, similarly, a legacy or share in a legacy does not become 'payable' until the executor or other person liable to pay it has in his hands money with which it could be paid." Their Lordships accordingly attached great significance to the use of the words "payable or deliverable". Under the article time does not begin to run from the date on which the testator or the ancestor died, but from the date when the legacy or share becomes payable or deliverable.

I think that these observations lend support to the view as regards the meaning of article 123 which had prevailed in this Court. It is also clear from what we have said above that the case of *Maung Tun Tha* v. *Ma Thit* (1) has not the effect of overruling the cases of this Court even by implication.

When a Muhammadan owner dies leaving several heirs, they all become co-owners and tenants-in-common. A joint owner is legally entitled to retain possession of joint property. Even if he is in exclusive possession of such joint property, his possession is ordinarily to be referred to his legal title. The presumption, therefore, is that his possession is lawful and therefore on behalf of all the co-owners. The other co-owners are accordingly

(1) (1916) I.L.R., 44 Cal., 879.

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in constructive possession of the property. As distinct shares have devolved on them, they all are presumed to have taken their legal shares although possession still remains joint. If, therefore, the co-owner in actual possession dispossesses any one of the other co-owners, the suit that is brought for recovery of possession is not a suit for a distributive share of the property of an intestate, but is a suit to recover possession of the defined, though undivided, share of the co-owner in the possession of the other co-owners. Such a suit is not covered by article 123 at all and must fall under the general article 144, limitation running from the date when the defendant's possession became adverse.

I would accordingly allow this appeal, set aside the decree of this Court, and restore the decrees of the courts below with costs in all courts.

MUKERJI, J.—This is a Letters Patent Appeal, which, as usual, came before a Bench of two Judges. It was referred to a larger Bench, as it was found necessary to have the Privy Council case of *Maung Tun Tha* v. *Ma Thit* (1) authoritatively interpreted in this Court.

The facts, briefly, are these. One Wazir Khan died, it is not definitely said when, but we may take it, a little over 12 years prior to the institution of the suit out of which this appeal has arisen. He left him surviving a widow Musammat Janki, a daughter Musammat Dhnra and two agnates, being the sons of a first cousin on the paternal side, who are the plaintiffs in the suit. The plaintiffs, according to the Muhammadan law of the Sunni sect, to which, according to the finding of the courts below, Wazir Khan belonged and the parties belong, would be entitled to three-eighth of the property left by Wazir Khan. The plaintiffs state in the plaint that they were living jointly with Musammat Janki and Musammat Dhura and were thereby in the enjoyment of Wazir Khan's property. Musammat Janki, however,

(1) (1916) I.L.R., 44 Cal., 879.

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on the 1st of February, 1921, purported to make a gift of the entire property of Wazir Khan in favour of her daughter Dhura and Dhura's son Nur Khan, a minor, and thereby gave the plaintiffs to understand that they had no interest whatsoever in Wazir Khan's property. Putting forward this date, namely the 1st of February, 1921, as the date of the rise of the cause of action, the plaintiffs sued for recovery of their share of the property, and for Rs. 40 mesne profits. It may be mentioned, incidentally, that they claimed 7 out of 16 shares, but it was found that they were entitled to a little less, namely 6 out of the 16 shares, or 3 out of 8 shares, as already stated.

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The findings of the courts below are that the plaintiffs never lived jointly or together with the defendants, viz. Musammat Janki and Dhura, and that they never obtained possession over any portion of Wazir Khan's property. The courts below, however, took the view that the possession of Musammat Janki and Musammat Dhura, being the possesison of co-owners, was, *primâ facie*, possession of the plaintiffs, and that the defendants' possession did not start adversely to the plaintiffs till the deed of gift was executed on the 1st of February, 1921. Applying article 144 of schedule 1 of the Limitation Act, they decreed the suit for the share found due and a small amount of mesne profits.

When the matter came up to this Court on appeal by the defendants, a learned Judge of this Court thought that the view of this Court, that in a case like the present article 144 of the Limitation Act applied, had been effectively set aside by their Lordships of the Privy Council in the case quoted in the beginning of this judgement, and holding that the suit was time-barred, ordered the dismissal of the suit.

The question for determination is whether the judgement of the Privy Council has really laid down that

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article 123 of schedule I of the Limitation Act is the proper article to be applied to a case like the present.

Mukerji, J.

To rightly understand the decision in the case of *Maung Tun Tha* v. *Ma Thit* (1), it is necessary to see what were the facts of the case. It appears that under the Burmese-Buddhist law of succession, on the death of a father the eldest son is entitled to a fourth share in the property, which is taken as the joint property of the two parents. If the eldest son does not claim his one-fourth share, and the mother dies, the entire property of the two parents becomes divisible among all the children of the parents. An eldest son, in the case before their Lordships of the Privy Council, claimed his one-fourth share, a little over six years after the death of the father. He was met with the plea that it was his duty to claim the quarter share, if he wanted to claim it at all, without delay, and the fact that he made the delay of $6\frac{1}{2}$ years disentitled him from recovering the property. The ground on which this plea was urged was that the divisible share of the children, on the death of the mother, was likely to fluctuate from time to time and it was the duty of an eldest son, who wanted his quarter share, to take it at once. The contention on the part of the plaintiff was that he had 12 years, under article 123 of the Limitation Act, within which to enforce the delivery of his one-fourth share. The courts in Burma found against the plaintiff, on the authority of a previous ruling of the Chief Court of Lower Burma. In appeal before their Lordships of the Privy Council the learned counsel for the appellants urged that the plaintiff had 12 years under article 123 of the Limitation Act of 1908 to enforce his claim and the learned Judges of the Chief Court in Burma were not right in holding that the period of limitation could be cut down on the considerations on which

(1) (1916) I.L.R., 44 Cal., 879.

they professed to act. In the Privy Council their Lordships found that in the Burmese-Buddhist law there was nothing to indicate that the son was bound to claim his quarter share at once on the death of the father, and pointed out that he could claim it within the period of limitation fixed by article 123 of the Limitation Act.

It will be noticed that there was no question of limitation in the case before their Lordships. The plaintiff himself contended that he had 12 years under article 123, and it was nobody's case that article 144 applied and not article 123. On the other hand, the case of the defendant was that there was no question of limitation at all and the plaintiff was bound to exercise, what was called his "option" in claiming his quarter share, as soon as possible, under the circumstances of the case, after the death of the father. In the circumstances, in my opinion, there is no weight in the argument that their Lordships of the Privy Council laid down what article of limitation would apply where, on the death of the owner of a property, one of the heirs sues another of the heirs for recovery of property.

On an examination of article 123 of the Limitation Act it will be found that it was never meant to apply to a case like the one before us. The first column which prescribes the nature of the suit is as follows: "For a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate." The period of limitation is 12 years; and in the third column, the time from which the period begins to run is described as follows: "When the legacy or share becomes payable or deliverable."

The portion of the entry in the first column with which we are concerned is,—"for a distributive share of the property of an intestate." The corresponding entry in the third column is, "when the share becomes payable or deliverable." The word "distributive" in

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the first column must be given its natural meaning and cannot be ignored. The word "distributive", according to Webster's International Dictionary, means "dealing to each his proper share." This meaning would imply that there is somebody whose duty it is to "distribute" to the several heirs their respective shares. Looking again to the third column, we have the words "payable" and "deliverable." These words again indicate that there is somebody who has to pay the legacy and to deliver the distributive shares of the property. A consideration of the expressions and words used in article 123 leads to the irresistible conclusion that the article applies where there is an administrator administering the estate of a person who has died without making a will, it being the duty of such administrator to pay or deliver the legacy or share.

Mukerji, J.

The learned single Judge of this Court quoted two cases, one decided by the Bombay High Court and the other decided by the Madras High Court, as showing that those Courts had accepted the view taken by the learned Judge himself of the Privy Council case. The case of *Shirinbai* v. *Ratanbai* (1) did not really raise a question of limitation. The suit in that case would be within time whether article 123 or article 144 applied. If some of the observations of the Judges might be taken as supporting the view of the learned single Judge of this Court, we can point out that in two subsequent cases that view was abandoned by at least one of those Judges who were responsible for the decision in I. L. R., 43 Bombay. These cases are *Kallangowda* v. *Bibishaya* (2) and *Nurdin Najbudin* v. *Bu Umrao* (3).

The case of *Sri Rajah Parthasarathy* v. *Sri Rajah Venkatadri* (4) was a suit for a legacy and it was held by the High Court and also by the Privy Council

(1) (1918) I.L.R., 43 Bom., 845.
(2) (1920) I.L.R., 44 Bom., 943.
(3) (1920) I.L.R., 45 Bom., 519.
(4) (1922) I.L.R., 46 Mad., 190.

in appeal (for appellate judgement see I. L. R., 48 Mad., 312) that the legacy did not become payable till the executor had sufficient funds in his hands to pay. In this particular case it was held that a perfect stranger, intermeddling with the estate of an intestate, might be treated as an executor *de son tort* and held liable.

It seems to me abundantly clear that their Lordships of the Privy Council never said anything in the case from Burma, *Maung Tun Tha* v. *Ma Thit* (1), which may be taken to have unsettled the law which was taken to be settled in this country. See, for example, the case of *Khadersa Hajee Bappu* v. *Puthen Veettil* (2).

In the result I would allow the appeal, set aside the decree of this Court and restore the decrees of the two lower courts and allow the appellants their costs of both the hearings in this Court.

BOYS, J.—I agree with the conclusions arrived at by the ACTING CHIEF JUSTICE and Mr. Justice MUKERJI.

BY THE COURT.—This appeal is allowed, the decree of this Court is set aside and the decrees of the courts below restored with costs in all courts.

(1) (1916) I.L.R., 44 Cal., 379. (2) (1910) I.L.R., 34 Mad., 511.