

APPELLATE CIVIL.

Before Mr. Justice Scott-Smith and Mr. Justice Harrison.

MUHAMMAD HANIF (DEFENDANT)—*Appellant,*

versus

RATAN CHAND (PLAINIFF)—*Respondent.*

Civil Appeal No. 829 of 1919.

Indian Limitation Act, IX of 1908, article 120—suit for declaration—starting point of limitation—fresh invasion of rights after previous invasion.

R. C. brought the present suit in 1918 against M. H. for a declaration to the effect that he was the owner of a share in the *shamilat* appertaining to *Khata* No. 75. He alleged that he purchased the *shamilat* of this *Khata* from one T. on 17th February 1879. In 1895 the same *shamilat* was sold by T. to M. H. defendant No. 2. In 1891 the *shamilat* of the village was divided into 3 plots *Jim*, *Sin* and *Toe*, and in 1895 *Toe* was partitioned while *Jim* and *Sin* were retained undivided as grazing ground. In 1895 the plaintiff put forward his claim to a share in the plot *Toe* of the *shamilat*, but the Revenue Officer held that he was not a co-sharer; his share in that plot was 2 *Bighas*, 4 *Kanals* and it went to M. H. defendant. In 1914 fresh proceedings for partition of the plots *Jim* and *Sin* took place and the plaintiff again put forward his claim to a share in them. The Revenue Officer rejected his claim and plaintiff then brought the present suit to establish his title.

Held, that the present suit of the plaintiff is not barred by limitation under article 120 of the Limitation Act; no doubt the defendant's denial of plaintiff's title in 1895 gave him a cause of action to sue for a declaration, but he remained in joint possession of the undivided portion of the *shamilat* and his enjoyment thereof was not interfered with. When fresh proceedings for partition began in 1914, and the defendant again denied plaintiff's title to a share, there was a fresh invasion of the plaintiff's title which gave him a fresh cause of action.

Hakim Singh v. Waryaman (1), followed.

Ahmad v. Karmdad (2), *Kalu v. Ram Lal* (3), and *Ghulam Hussain v. Saifullah Khan* (4), distinguished.

Second appeal from the decree of J. A. Ross Esquire, District Judge, Shahpur at Sargodha, dated

(1) 140 P. R. 1907.

(3) 71 P. L. R. 1916.

(2) 11 P. W. R. 1908.

(4) 79 P. R. 1917.

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the 9th December 1918, reversing that of Sayad Nurullah Shah, Subordinate Judge, 2nd Class, Sargodha, dated the 2nd July 1918, and decreeing plaintiff's suit.

MOTI SAGAR and BADRI DAS, for Appellant.

TEK CHAND, for Respondent.

The judgment of the Court was delivered by—

SCOTT-SMITH, J.— In the suit out of which the present second appeal arises the plaintiff respondent sued for a declaration that he was the owner of a share in the *shamilat* appertaining to *khata* No. 75 in village Hadali. He alleged that he purchased the *shamilat* of this *khata* from one Tahir on 17th February 1879. In 1885 the same *shamilat* was sold by Tahir to defendant No. 2, appellant, who pleaded that the plaintiff's suit was barred by limitation. The trial Court dismissed the suit on two grounds:— (1) that the *shamilat* in question was not sold to the plaintiff by Tahir in 1879 and (2) that the suit was barred by time as plaintiff's title was denied in the course of partition proceedings in 1895. The lower Appellate Court, however, held (1) that the sale to the plaintiff in 1879 included the land in dispute and (2) that the suit was not barred by time because only a part of the *shamilat* was divided in 1895, and thereafter the plaintiff remained in joint possession of the village *shamilat*, of which the land in dispute is a part. It, therefore, decreed the claim and Muhammad Hanif defendant has filed a second appeal to this Court.

It is not now contended that the plaintiff did not buy the *shamilat* appertaining to *khata* No. 75 in 1879, but it is again urged that the present suit is barred by time. A copy of an entry in the *wajib-ul-arz*, prepared in the settlement of 1891, shows that the *shamilat* of village Hadali was divided into three plots *jim*, *sin* and *toe* and that the village proprietors agreed that only *toe* should be divided, plots *jim* and *sin* being retained undivided as grazing ground. In 1895 there was a partition of plot *toe* and the plaintiff put forward his claim to a share in it by virtue of the sale in his favour of 1879. But on the 18th September 1899 the revenue officer held that he was not a co-sharer in the *shamilat* appertaining to *khata* No. 75 and he was, therefore, not allotted any share therein. His share in that plot was 2 *baghas*,

4 *kanoles* in area and it went to Muhammad Hanif and thereafter the plaintiff took no steps to establish his title. In 1914 fresh proceedings for partition of plots *jin* and *sin* took place and the plaintiff again put forward his claim to a share in them, and, because the revenue officer rejected his application for a share he brought the present suit to establish his title. It is admitted that the plaintiff is a co-sharer in the *shamilat* independently of his claim to a share by reason of the sale to him in 1879. It is also admitted that he has all along been in joint possession with other co-sharers of plots *jin* and *sin* and is enjoying grazing rights therein. Counsel for the appellant cites *Ahmad v. Koromad* (1), *Kalu v. Ram Lal* (2), and *Ghulam Hussain v. Saifullah Khan* (3) as authorities for the contention that the present suit is barred by time. Those authorities are, in our opinion, all of them distinguishable from the present case because in those cases there was only one invasion of the plaintiff's rights and he had to bring a suit for a declaration within six years of that invasion. In *Hakim Singh v. Waryaman* (4) it was held that a suit for a declaration of his title to immovable property by a person in possession as proprietor is not barred if brought within six years from the time when the defendant attempts to oust him from the land although a right to sue the defendant who had been recorded as owner of the property in the Settlement Record had already accrued and become barred. No doubt the defendant's denial of his title in 1895 gave the plaintiff a cause of action to sue for a declaration, but he remained in joint possession of the undivided plots of *shamilat* land and his enjoyment thereof was in no way interfered with, and it was, therefore, unnecessary for him to bring a suit to establish his title. He could well afford to wait until an attempt was made to deprive him of his share in those plots. We note also that the entries in the Revenue records have all along been in his favour.

It was pointed out in *Hakim Singh v. Waryaman* (4) (see page 672 of the record) that a man is not bound to

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(1) 11 P. W. R. 1908.

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bring a declaratory suit on any and every possible invasion of his title, and such suits are not encouraged by the Court unless they are clearly necessary. When the fresh proceedings for partition began in 1914, and the defendant denied plaintiff's title to a share in the *shamilat* appertaining to *khata* No. 75 in plots *jim* and *sin* of the *shamilat*, there was a fresh invasion of the plaintiff's title, which, in our opinion, gave him a fresh cause of action. The reason why he brought no suit at the time of the partition proceedings of 1895 was doubtless that the area then involved was very small. But now that the defendant's action threatens to deprive him of his share in the rest of the *shamilat*, he is entitled, upon the fresh cause of action, to bring a suit for a declaration.

In our opinion, the decision of the lower Appellate Court is right and we dismiss the appeal with costs.

Appeal dismissed.

MISCELLANEOUS CRIMINAL.

Before Mr. Justice Martineau.

GHULAM MUHAMMAD AND OTHERS (ACCUSED)—

Petitioners,

versus

THE CROWN—*Respondent.*

Criminal Miscellaneous No. 108 of 1921.

Criminal Procedure Code, Act V of 1898, sections 342 (4) and 526—application for transfer—whether an affidavit by the accused can be accepted in support of his application for transfer.

Held, that the provision in section 342 (4) that no oath shall be administered to the accused has reference only to the statement made by him in answer to questions put by the Court in accordance with sub-section (1) of that section. It does not preclude him from making an affidavit in support of an application for transfer under section 526.

Queen-Empress v. Subbaya (1), *In the matter of Barkat*, (2), and *Emperor v. Bindeshri Singh* (3), not followed.

(1) (1889) I. L. R., 12 Mad. 451

(2) (1897) I. L. R. 19 All. 200.

(3) (1908) I. L. R. 28 All. 331.

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Jan. 3.