APPELLATE CIVIL.

Before Mr. Justice Mya Bu and Mr. Justice Baguley.

1929

June 17.

MA BI AND ANOTHER
v.
MA KHATOON AND OTHERS.*

Mahomedan law—Co-ownership of Mahomedan heirs—joint owner's possession—Constructive possession of co-heirs—Dispossession by co-owner in possession of other co-owners—suit falls under Article 142 of the Limitation Act (IX of 1908)—Definite proof required to prove dispossession.

Where a Mahomedan 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, and the other co-owners are accordingly in constructive possession of the property. If therefore the co-owner in actual possession dispossesses any one of the other co-owners, the suit for recovery of possession is not a suit for a share of inheritance, but for recovery of possession of the defined, though undivided, share of the co-owner in the possession of the other co-owners. Such a suit falls under Article 144 and not 123 of the Limitation Act.

Where co-owners are in joint possession, the ouster of one co-owner must be definitely proved. In this case where there was no definite proof that an heir enjoyed a definite benefit from the estate, still as there was no social or financial break between him and his co-heirs, there could be no inference as to dispossession.

Hari Pru v. *Mi Aung Kraw Zan*, 10 L.B.R. 45 ; *Maung Shwe An* v. *Maung Tok Pyu*, 3 Ran. 582 ; *Po Kin* v. *Shwe Bya*, 1 Ran. 405 ; *Rustam Khan* v. *Janki*, 51 All. 101—*referred to.*

Ko Ko Gyi for the appellants.

S. Mukerji for the respondents.

BAGULEY, J.—The appellants in this case are two sisters. They were the first and second defendants in the original suit. The first three respondents were originally plaintiffs ; they are the legal representatives and heirs of one Mahomed Esa, who was the brother of the first two defendants (now appellants). The remaining respondents who were made defendants in

* Civil First Appeal No. 28 of 1928 (at Mandalay) from the judgment of the District Court of Mandalay in Civil Suit No. 77 of 1927.

the lower Court are the legal representatives and heirs of another brother of the two appellants, who died before this case was brought.

The plaintiffs sued the defendants for all property left by their father and husband Mahomed Esa. They said that Mahomed Esa had entrusted the first two defendants with Rs. 10,000 to take care of on his behalf. They also said that the parents of Mahomed Esa, Ma Bi and Ma Rahima and the father of the remaining defendants had left behind property which had never been partitioned among their children, and they claimed for Mahomed Esa's share in the corpus of the inheritance property. The claim for Rs. 10,000 was rejected by the lower Court. The learned Judge however found that two pieces of land known as holdings 3 and 4 were inherited by the two brothers and two sisters, and he directed that these properties be sold and the proceeds distributed in certain shares among the plaintiffs, the two principal defendants and the remaining defendants. Against this decree, so far as it gives an interest in the sale proceeds to the original plaintiffs, the first two defendants now appeal.

The first point which was argued is that the suit should be held to be barred by Article 123, Limitation Act. It is not contested that the parents of Mahomed Esa died more than 12 years before the filing of the suit ; but it is argued that there has never been any distribution of the estate, that it has been enjoyed in common by the heirs, and that therefore it is not a question of applying Article 123 but Article 144 of the Limitation Act.

Appellants rely upon *Po Kin* v. *Shwe Bya* (1) in which it was held : " The appropriate article for suits instituted against co-heirs for a share in the corpus of

(1) (1923) 1 Ran. 405.

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an inheritance is Article 123 of the Limitation Act." This ruling, it is claimed, has been followed in *Ma Tok* v. *Ma Yin* (1) and *Maung Shwe An* v. *Maung Tok Pyu* (2). On the other hand it must be remembered that the parties in these three cases were all Burmese-Buddhists ; the parties in the present case are *Sunni* Mohamedans.

There is an important Full Bench ruling (*Rustam Khan* v. *Janki*), (3), in which the question of the applicability of Article 123 or Article 144 of the Limitation Act in cases such as the one now in question was examined. The parties in this case were also Mohamedans, and it was held in this case that despite the Privy Council ruling of *Maung Tun Tha* v. *Ma Thit* (4), " 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 other co-owners are accordingly in constructive possession of the property. . . 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." The same point of view seems to have occurred to Lentaigne, J., in *Po Kin's* case in which, at page 405 referring to *Nurdin Najbudin* v.

(1) (1925) 3 Ran. 77.
(2) (1927) 5 Ran. 582.
(3) (1928) 51 All. 101.
(4) (1917) 44 Cal. 379.

Umray Bu (1), he states that the judgment of Macleod, C.J., shows that the plaintiff had been in possession of the property as one of the co-heirs, though holding with the other co-heirs as undivided and as tenants-in-common, and that accordingly Article 144 applied ; and he further stated that he agreed with that view because the claim had technically ceased to be a suit for recovery of a share of inheritance inasmuch as such inheritance had been in fact previously possessed by the plaintiff and held jointly, and the inheritance aspect of the case was merely the basis of fixing the title and rights enjoyed by plaintiff in such possession. In *Maung Shwe An's* case, Brown, J., refers to this passage in *Po Kin's* case, and says that there is an exception in a case where the co-heirs including the plaintiff claiming a share have gone into possession and the plaintiff is subsequently ousted and refused his share.

It will therefore be seen that the Rangoon High Court has been moving in the direction in which the Allahabad Full Bench moved before the last quoted ruling was published ; and in the Allahabad ruling we definitely have stated that Mahomedan co-heirs are in joint possession. When co-owners are in joint possession, the ouster of one co-owner has got to be proved very definitely indeed, vide *Hari Pru* v. *Mi Aung Kraw Zan* (2) ; and in the present case, although there is no definite proof that Mahomed Esa was ever enjoying any definite benefit from the estate left by his parents, there is the fact admitted that he lived in the same house with Ma Bi and Ma Rahima for a year or so before he died, during which period they apparently kept him ; he had been visiting the house regularly even before that time when he came back from his business trips to Calcutta. There

(1) (1920) 22 Bom. L.R. 1429. (2) (1919) 10 L.B.R. 45.

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is no proof of any break, socially or financially, between himself and his sisters, and for these reasons I agree with the learned District Judge that the claim cannot be held to be barred by limitation.

The second ground of appeal is that the lower Court wrongly placed the burden of proof on the two defendant-appellants with respect to the ownership of the house, holding No. 4. The plaintiffs aver that holding No. 4 was part of the property inherited by defendants and their brothers from their parents. Defendants aver that holding No. 4 was given outright to the two sisters, Ma Bi and Ma Rahima, by one Ma Bon. The trial Court found that the Zerbadi witnesses on either side were utterly unreliable and both sides were perjuring themselves whenever they thought it would suit their purpose. On a perusal of the record of the evidence, I am quite prepared to accept this valuation which the District Judge placed upon the evidence. It is therefore necessary to decide the point as to whether the house was inherited as joint property or whether it was received as a gift, on such outside evidence as may be available, combined with the burden of proof.

Holding No. 4 is directly adjacent to holding No. 3, which has admittedly descended from the parents of the parties. Holding No. 3 stands in the name of their mother, Ma Hnit, but it is on record that when a mortgage of this property was being negotiated, Mahomed Esa joined in the mortgage. Holding No. 4 stands in the three names : Mahomed Esa, Ma Bi and Ma Rahima. There is no dispute but that there was property inherited by the parties which was in their joint possession ; and when we get a piece of land adjacent to a piece of joint property which is registered in the names of the joint owners of the joint property, it is I think for those who assert that it is not joint

property to prove their assertion. According to Ma Bi and Ma Rahima, there were four people present at the oral gift made by Ma Bon ; two of them are dead, and of the remaining two, one swears that there was such a gift and the other swears that there was not.

In view of all the surrounding circumstances of this case, I am of opinion that the lower Court was quite correct in calling upon the first and second defendants to prove their assertion that Holding No. 4 was their separate property and not part of the estate ; and the land having been held to be part of the joint estate, in the absence of evidence to the contrary, the house on that land must be regarded to be in the same ownership as the land.

The next point to be dealt with is the allegation by the first and second defendants that Mahomed Esa renounced his rights to inherit his parents' estate. The evidence on this point is entirely oral. The learned District Judge has dealt with it in a manner which leaves little to be said by an appellate Court.

The oral testimony as to renunciation must be regarded as that of witnesses who in other respects are perjurers and very possibly in this respect also. The facts which the first and second defendants set out to prove in their oral evidence are quite different from those stated in their written statement. In their written statement they say that after the death of both parents Mahomed Esa renounced his rights to inheritance ; in their evidence they tried to prove that the renunciation was really arranged by the father during his lifetime. I see no reason to hold that the alleged renunciation has been proved. It is quite possible that Mahomed Esa did spend much of his parents' estate, but particularly among Mohamedans, the sons are often regarded as very superior to the

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daughters, and parents allow for behaviour of this kind. Whether his other brother renounced his rights to inheritance or not is quite another matter ; the point was not in issue and we are not concerned with it in the present appeal, but because one brother renounced his rights, it in no way follows that another brother has renounced his rights.

The next point argued was that Mahomed Esa divorced Ma Khatoon before he died. This, even if proved, of course would not disentitle the children to inherit. The conception of Mohamedan law among Mohamedans of this class is tinctured with a strong leaning towards Burmese ideas. The defendants, however, were quite prepared to allow their brother's rights to a divorce purely at his desire, which would of course be impossible under the Burmese Buddhist system, but it is a point which must be known to all Mohamedans that the word commonly used by a Mohamedan when divorcing his wife is *talaq*, and there is no allegation that this word was ever used. If a Mohamedan divorces his wife by another form very cogent proof of this divorce by reliable evidence will be required, and of this there is none in the present case, because there is no reliable oral evidence on the point at all.

The last point which was argued was that the first and second defendants were entitled to reimbursement out of the estate the money which they paid on the mortgage. Evidence with regard to this mortgage is most unsatisfactory. The mortgage deed itself was never produced, and the circumstances under which it came into existence have never been properly explained. It is alleged that the mortgage was effected to pay off a previous mortgage, but there is no real proof of the previous mortgage, and on the plain assertion of Ma Bi and Ma Rahima, discredited as

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the evidence of these persons is, it is impossible to say that they are entitled to get back all the money they borrowed on this mortgage from the estate, when it is quite possible that they spent the whole proceeds themselves.

For these reasons I consider that the judgment of the lower Court must be supported. I would therefore dismiss this appeal with costs.

MYA BU, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Chari.

1929

July 18.

MA SA
v.
MA SEIN NU AND ANOTHER.*

Burden of proof—Transaction on the face of it operative as a transfer of property not intended to be so—Benami *transactions among Burmans—Error of law vitiating a judgment—High Court's power to consider the whole case on second appeal.*

The burden of showing that a transaction which on the face of it is operative as a transfer of property was not intended so to operate is on the person alleging it. Amongst Burmans there is no prevalent usage of purchase of property without any rhyme or reason, as among Hindus and Mohamadans in the name of the wife or child, consequently there is no presumption of *benami* in case of a Burmese husband or father. The latter cannot prove a transaction to be *benami* by showing merely that he advanced the purchase money.

Ma On Pe v. *Ma Nyein Kin*, Civil 1st Appeal No. 36 of 1925. H. C Ran.; *Maung Kyaw Pe* v. *Maung Kyi*, 6 Ran. 203, *Maung Po Kin* v. *Maung Po Shein*, 4 Ran. 203.—*referred to.*

When there is an error of law which vitiates a judgment, the High Court is not confined to a consideration of the particular error which vitiates the judgment but the whole case is open for consideration.

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* Civil Second Appeal No. 99 of 1929, from the judgment of the District Court of Thatôn in Civil Appeal No. 126 of 1928.