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We think, therefore, that an order for payment may be made on a garnishee under the above circumstances. If, however, the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under section 503. Subject to these remarks we see no objection either to the summons B or the order C.

Attorneys for the Bombay Tramway Company :—Messrs. *Tobin and Roughton.*

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nándbhái Haridás

1886.
December 22.

KA'NE BA'BLE, (ORIGINAL PLAINTIFF), APPELLANT, *v.* ANTA'JI GANGÁDHAR AND OTHERS, (ORIGINAL DEFENDANTS NOS. 11, 12 AND 13), RESPONDENTS.*

Limitation Acts XIV of 1859, *Clause* 13 *of Section* 1, *IX of* 1871, *Art.* 127, *and XV of* 1877, *Art.* 127—*Joint family—Partition—Claim by absent member—Adverse possession—Exclusion—Participation in profits of joint property—Payment—Occasional residence of wife of absent member with joint family.*

The plaintiff and his four brothers (Gáne, Shive, Rámá, and Bále) were members of a joint Hindu family. The only one of them who lived at home was Shive. In 1854 the family property, which had been mortgaged, was redeemed by the brothers, and after redemption it was placed under the management of Shive by the eldest brother, Gáne. Subsequently, two of the brothers died while absent from the village ; and the plaintiff, who was twenty years of age in 1854, joined the army in 1855. He did not return until 1876 ; but, during the interval, his wife used occasionally to visit her husband's native place, and during these visits resided in the family house with Shive and Gáne. In 1872 Gáne died.

The plaintiff alleged that in 1876 he demanded his share, but was refused. In 1883 he filed this suit for partition.

It was contended that the right of the plaintiff had become barred by the Limitation Act XIV of 1859, and was not revived by Act XV of 1877, which was in force at the date the suit was brought.

The Court of first instance awarded the plaintiff's claim. On appeal, the Assistant Judge reversed the decree of the Court below, holding that under clause 13 of section 1 of the Limitation Act XIV of 1859 the plaintiff had lost his right to sue, and that such right could not be revived by the passing of the subsequent Limitation Acts IX of 1871 and XV of 1877. He was of opinion that the fact that the plaintiff's wife "had put up at Shive's house for a few days, if it were a fact, did not help the plaintiff's title."

* Second Appeal, No. 400 of 1884.

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Held by the High Court (following *Kázi Ahmed* v. *Moro Keshav*(1)) that the occasional residence of the plaintiff's wife with Shive, who was in possession of the property, might be a benefit out of the estate equivalent to a payment so as to satisfy the requirement of clause 13 of section 1 of Limitation Act XIV of 1859. If such a benefit had been received by the plaintiff within twelve years previously to the repeal of that Act, the plaintiff had not lost his right to sue at the date of the passing of Act IX of 1871; and that Act would, therefore, have applied to any suit brought by him while it was in force. By article 127 of Schedule II of Limitation Act IX of 1871 the period of limitation dated from the time when the plaintiff claimed and was refused his share, which, according to the plaintiff's allegation, was in 1876. Act IX of 1871 was repealed by Act XV of 1877, which governed the present suit, unless the right to sue had expired under Act XIV of 1859. The Court remanded the case for a fresh decision on the question of limitation, having regard to the above observations.

THIS was a second appeal from the decision of G. Jacob, Acting Assistant Judge of Ratnágiri.

The plaintiff and his four brothers (Gáne, Shive, Rámá, and Bále) were members of a joint Hindu family. The only one of them who lived at home was Shive. In 1854 the family property, which had been mortgaged, was redeemed by the brothers, and after redemption it was placed under the management of Shive by the eldest brother, Gáne. Subsequently, two of the brothers died while absent from the village; and the plaintiff, who was twenty years of age in 1854, joined the army in 1855. He did not return until 1876; but, during the interval, his wife used occasionally to visit her husband's native place, and during these visits resided in the family house with Shive and Gáne. In 1872 Gáne died.

The plaintiff alleged that in 1876 he demanded his share, but was refused.

The plaintiff brought the present suit in 1883 for partition of the property, and claimed one-fifth share therein. The defendants, Nos. 1—10, were sons of the four brothers of the plaintiff. The other defendants, Nos. 11—20, were alienees under Shive. The Court of first instance awarded the plaintiff's claim. The defendants, Nos. 11, 12 and 13, appealed to the Assistant Judge, who held that the plaintiff's claim had become barred under clause 13 of section 1 of the Limitation Act XIV of 1859. The following is an extract from his judgment:—

(1) *See infra*, p. 461, note.

"The lower Court was wrong in holding that the plaintiff's cause of action arose in 1877. When a person has no title, a mere demand on his part will not give him one. The evidence shows that the property was redeemed from a previous mortgage by the joint brothers in 1854, but there is nothing to show that after that date the plaintiff had any connection with the property at all. He was absent in service in the army, and he himself admits (exhibit 40) that he never came back to the village, and never received any of the profits of the property. The statements made by some of the witnesses, that the plaintiff returned on two or three occasions and put up at Shive's house, are falsified by the plaintiff's own admission. The fact that his wife put up at Shive's house for a few days, if it be a fact, does not help the plaintiff's title. Under section 1, cl. 13 of Act XIV of 1859, the period of limitation is counted from the death of the person from whom the property was said to have descended, or from the date of the last payment to the plaintiff or any person through whom he claims by the person in the possession or management of the property or estate on account of the alleged share. It is clear, therefore, that the plaintiff had lost his right to sue under that Act, and that right could not be revived by Act IX of 1871 or Act XV of 1877 * * * * * The fact that the other defendants admitted the plaintiff's claim, is quite immaterial. For the above reasons I amend the decree of the lower Court, ordering that no share of the lands described in the memorandum of appeal by reference to the plaint be partitioned to the plaintiff's share, but that they be left entire in the appellant's possession * * * * . The plaintiff must bear all the costs of the appellants in both Courts."

The plaintiff appealed to the High Court.

K. T. Telang (*Y. V. Athalye* with him) for the appellant:—Exclusion is essential to give adverse possession—*Nilo Rámchandra* v. *Govind*[1]. There is no proof of exclusion here. The plaintiff had been in joint possession with his brother when at home, and his mere absence would not deprive him of his right to the family property. Mere non-receipt of profits of the property does not amount to exclusion—*Rámbhat Agnihotri* v. *The Collector of Poona*[2]. Nor does exclusive possession by a co-sharer, *per se*, amount to adverse possession by another co-sharer—*Sheikh Asud Ali Khán* v. *Sheikh Akbár Ali Khán*[3]. The possession by the co-owner should be such as to rebut the presumption that it was joint. It cannot be that a member of a joint family who has to serve abroad, and who transmits money to the family, should by his mere absence lose his right to the family property. In this case the plaintiff's wife used to visit and stay

(1) I. L. R., 10 Bom., 24. (2) I. L. R., 1 Bom., 590.

(3) 1 Calc. L. R., 364.

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for a few days occasionally at the family house. This should be considered as participation in the profits of the property.

Ghanashám Nilkanth Nádkarni for the respondents :—This suit is barred. Assuming that the plaintiff's wife used to pay occasional visits, that would not save limitation. The plaintiff must have some benefit out of the family property, some payment on account of his share—*Bápuji Bhikáji* v. *Káshináth Jagannáth*(1) ; *Sitárám Vásudev* v. *Khanderáv Bálkrishna*(2). Even if an occasional visit and stay of the plaintiff's wife is to be considered as amounting to "payment" within the contemplation of the Limitation Act, no such visit has taken place within twelve years before this suit was brought. Twelve years' possession by a co-owner without any participation of the profits by the other co-owner would amount to exclusion. It is not necessary that the exclusion should be known to the co-owner—*Báláji Rámchandra Vaidya* v. *Bankat Hanmantrám*(3). The right to sue is barred here; and where the right to sue has gone, no subsequent act or admission can revive it. The plaintiff having been out of possession for more than twelve years, not only was his remedy barred, but his right was extinguished. The right having been extinguished under the Act of 1859, the subsequent Act IX of 1871 could not revive it—*Rám Chunder Ghosaul* v. *Juggutmonmohiney Dabee*(4). The possession, therefore, became adverse; and having been adverse for more than twelve years was of itself sufficient to create a title—*Rám Sahoy Singh* v. *Kooldeep Singh*(5). The plaintiff having lost his right to sue under the old Limitation Acts, the present Act of 1877 cannot help him : see section 1, cl. 4 of Act XV of 1877.

K. T. Telang in reply :—The case of *Rám Sahoy Singh* v. *Kooldeep Singh*(6) does not apply. The case of *Kázi Ahmed* v. *Moro Keshav*(7) is in point, though it was a decision under the Act of 1859. The cases of extinguishment of right or remedy cited for the respondents are not binding authorities in such a case. *Rámbhat Agnihotri* v. *The Collector of Poona*(8) does not

(1) Printed Judgments for 1882, p. 224.
(2) I. L. R., 1 Bom., 286.
(3) Printed Judgments for 1877, p. 118.
(4) I. L. R., 4 Calc., 283.
(5) 15 Calc. W. R. Civ. Rul., 80.
(6) 15 Calc. W. R. Civ. Rul., 80.
(7) See *infra*, p. 461, note.
(8) I. L. R., 1 Bom., 590.

apply. To constitute adverse possession the possession of the co-parcener must be inconsistent with the right of the other co-parceners.

NÁNÁBHÁI HARIDÁS, J. :—The plaintiff Káne brought this suit for partition of joint ancestral property. He claimed one-fifth of it as one of five sons of the original owner, one Báble,—defendants Nos. 1—10 being sons of the remaining four. The other defendants (11—20) claim as alienees under one of those sons, Shive. All the defendants, except Nos. 11, 12, 13, and 17, admitted the plaintiff's claim in their written statements; and No. 17 also, though at a later stage of the case, did the same. The Subordinate Judge held that the plaintiff and the first ten defendants were members of an undivided Hindu family; that the property in dispute was their joint ancestral property, and, as such, liable to be partitioned; that the plaintiff was entitled to his one-fifth share therein; that he was not bound by the alienations relied upon by defendants 11, 12, and 13; and that the claim was not barred. He, accordingly, awarded the plaintiff's claim.

Defendants Nos. 11, 12, and 13 alone appealed against that decision; and the Assistant Judge, having found that the suit was barred, dismissed it, with costs as against the plaintiff.

In this appeal to us against that decision, therefore, the only question we are called upon to determine is, whether the suit is really barred by the law of limitation. The facts, so far as they bear on this question, are as follows:—The five sons of Báble formed a joint Hindu family. The only property of the family, namely, that in dispute, was mortgaged to the father of defendant No. 11. It was redeemed by the brothers in 1854. The only brother who was living at home was Shive, the others being out on service. After redemption, therefore, as the Subordinate Judge finds, it was "placed under the management of.....Shive" by the eldest brother, Gáne, and it was managed by him "for the family." Thereafter two of the brothers died where they were employed; and the plaintiff, who was twenty years of age in 1854, joined the army in May, 1855. He did not return until 1876, but the Subordinate Judge finds

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that during the interval "his wife used to come now and then .....and to live with Shive and Gáne." No partition has taken place up to the present time.

This suit was instituted in 1883, or twenty-eight years after the plaintiff left to join the army. The plaintiff alleges that, in 1876, he demanded his share, and was refused. Such being the case if Act XV of 1877 applies, the suit is clearly in time: see Schedule II, art. 127. But it is contended that that Act does not apply, as any right of the plaintiff to demand a partition had, before the passing of that Act, become barred under Act XIV of 1859, and was not revived thereby. We have, accordingly, to see if that was so. For a suit like the present, section 1 of the latter Act, cl. 13, provides a limitation of twelve years. That period is to be counted either "from the death of the person from whom the property alleged to be joint is said to have descended.....*or* from the date of the last payment to the plaintiff .....by the person in possession or management of such property.....on account of such alleged share." There is nothing in this section to prevent a Hindu family from continuing joint for a longer period than twelve years from the date of such death if the co-parceners wish not to divide. But in that case, whenever, after the twelve years have elapsed, one of them changes his mind and seeks a partition, he has to make out that, within twelve years of his suit, he has received a "payment" within the meaning of the above clause. The expresion "payment" has been interpreted liberally so as to include any enjoyment of, or participation in, the joint property. Even the occasional residence of the plaintiff or of his wife or family with the defendant in possession has been held sufficient to satisfy this requirement. In the case of *Kázi Ahmed* v. *Moro Keshav*(1), Westropp, C. J., lays down that "although the plaintiff may have mainly resided away from the locality of the property, yet he may, either by occasional residence with his brother Shivrám at the expense of the latter, or by leaving his wife or family with Shivrám at the expense of the latter, or by payments, have received a benefit out of the undivided estate." The Subordinate Judge has

(1) *Infra*, p. 461, note

found that while the plaintiff was out on service "his wife used to come now and then into these parts and to live with Shive and Gáne." The Assistant Judge, however, has not found whether such was the case or not. He observes that "the fact that his wife put up at Shive's house for a few days, if it be a fact, does not help the plaintiff's title." But, according to the above decision, if it is a fact, it has a very important bearing on the question of limitation, and must, therefore, be distinctly found before that question can be decided. If such fact took place any time within twelve years previous to the repeal of Act XIV of 1859 by Act IX of 1871, the plaintiff had not lost his right to sue under the former Act; and the latter Act would, therefore, have applied to any suit brought by him while it was in force. Schedule II of that Act, art. 127, provided for such a suit a limitation of twelve years from the time "when the plaintiff claims and is refused his share." The plaintiff alleges that he claimed his share, and was refused in 1876. The respondents do not deny this allegation in their written statement, but contend that that did not make the plaintiff's cause of action to accrue then. That Act was repealed by Act XV of 1877, which is the Limitation Act now in force, and, therefore, governs the present suit, unless the right to sue had gone under Act XIV of 1859. We must, therefore, reverse the decision of the Assistant Judge, and remand the case, in order that he may arrive at a fresh decision on the question of limitation with reference to the above remarks. Costs of this appeal to abide the result.

Decree reversed and case remanded.

NOTE.—The following is the case of *Kázi Ahmed* v. *Moro Keshav*, (Printed Judgments for 1876, p. 120,) referred to and followed in the foregoing case:—

Moro and his four brothers were members of an undivided family. Moro left his house in 1848, and earned his livelihood abroad, as also did three of the other brothers, the family property being left in the management of their brother, Shivrám. In 1854, Shivrám mortgaged the property to the defendant's father, and subsequently held it as a lessee from him at an annual rent. Shivrám was sued for non-payment of rent, and was dispossessed of the property in 1863. Moro brought this suit for his share of the property in 1875. The case came up to the High Court.

The following is the judgment of the Court delivered by

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WESTROPP, C.J. :—The Joint Judge has omitted to find whether or not there was any participation of the plaintiff in the rents and produce of the property (for his share in which he now sues) at any time within twelve years before the commencement of this suit, which was instituted on the 26th July, 1875. Although the plaintiff may have mainly resided away from the locality of the property, yet he may, either by occasional residence with his brother Shivrám at the expense of the latter, or by leaving his wife or family with Shivrám at the expense of the latter, or by payments, have received a benefit out of the undivided estate. This point must be inquired into by the Joint Judge; and, in order that he may make that inquiry, the Court reverses his decree, and remands the cause for retrial by him. The costs of this second appeal must abide the result of the cause. The objection now made by the defendant's pleader, *viva voce*, as to want of parties, comes to late to be permitted. The Joint Judge may admit such evidence on either side on the question of participation in the rents and profits as may seem to him to be expedient for the proper determination of the cause.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *January* 8.

ABDULBHAI, (ORIGINAL DEFENDANT), APPELLANT, *v.* KA'SHI, DECEASED, BY HIS HEIR, DHONDI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage, what is a—Requisites of a mortgage—Contract—Construction.

In 1862, A., in consideration of a debt of Rs. 150, passed to B. a writing called *karz rokhá* (or debt-note). It provided *(inter alia)* that B. should hold and enjoy a certain piece of land belonging to A. for twenty years, that at the end of that period the land should be restored to A. free from all claims for payment of the principal or interest of the debt of Rs. 150; that if B. planted vines, he should be at liberty to retain the land so planted after the lapse of the twenty years as a tenant at Rs. 50 *per annum*.

According to the terms of this agreement, B. continued in possession of the land till 1882, when A., treating the transaction as a mortgage, brought this suit for redemption.

Held, on the construction of the *karz rokhá*, that the contract between the parties was not a mortgage, and that the defendant had a right to retain occupation at least of the vineyard, subject only to a rent of Rs. 50 a year. There was no stipulation for interest, nor was there any agreement for the payment of Rs. 150 in any case.

It is not the name given to a contract, but its contents or the relations constituted by it, that determine its nature.

William v. *Owen*(1) and *Lakhmichand Walchandshet* v. *Chatur Dewchandshet*(2) followed.

* Second Appeal, No. 67 of 1885.

(1) My. & Cr., 303, 308. (2) Printed Judgments for 1884, p. 162.