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almost to a custom, to bring forward unfounded or at least unprovable claims for ornaments against her husband's relatives; but the course she has adopted in compelling the attendance, in Court, of the ladies Lálvahu and Shámvahu has determined me not to do so. I cannot but think that their attendance in Court was not really required by the plaintiff in her own interest; and that the process of the Court has been made use of to annoy the defendant through the ladies of his family or to annoy the ladies themselves. This is an abuse of the process of the Court, and calls for its censure. I am afraid that some solicitors are not sufficiently urgent in impressing upon their clients the impropriety of such conduct.

The suit, as regards the plaintiff's ornaments, will stand dismissed; and there will be a decree directing the defendant to pay to the plaintiff, for her separate maintenance, the sum of Rs. 40 *per mensem* on the first day of each month in advance for the term of her natural life. The first payment to be made on the 1st day of July *proximo* The order for costs will be as stated in my judgment.

Attorneys for the plaintiff:—Messrs. *Tobin and Roughton.*

Attorneys for the defendant:—Messrs. *Little, Smith, Frere, and Nicholson.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1886. *July* 24.

RA'MCHANDRA NA'RA'YAN, (ORIGINAL DEFENDANT), APPELLANT, *v.* NA'RA'YAN MAHA'DEV AND ANOTHER, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation Act XV of 1877, *Art.* 127—*Hindu law—Joint family—Joint estate—Partition—Portion of estate reserved undivided—Possession of reserved portion by one member of family—Adverse possession—Possession, inference arising from—Burden of proof—Res judicata as between defendants.*

The plaintiffs sued for part of a house as a portion of joint-family property left undivided on the occasion of a general partition which had taken place about thirty-five years before the suit. The defendant had since then been in sole possession

Appeal from order, No. 12 of 1886.

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and enjoyment of the house in dispute. The Subordinate Judge dismissed the suit as barred by limitation, on the ground that the plaintiffs had failed to prove participation in possession or enjoyment within twelve years. On appeal, the Assistant Judge held that, as no share had been demanded or refused, the defendant's possession was not adverse to the plaintiffs, and as the house in dispute had been admittedly reserved from partition, article 127 of the Limitation Act XV of 1877 did not apply. He, therefore, reversed the decree of the Subordinate Judge, and remanded the case for retrial on the merits. On appeal to the High Court,

Held, that the suit was barred. The fact that the house in question had admittedly remained undivided, did not prevent the operation of the Limitation Act, and article 127 of Act XV of 1877 applied. That article applies equally to a portion of joint-family property left undivided as to the whole estate, and a twelve years' exclusion, known to the excluded sharer, binds him in the one case as in the other. What would bar the operation of the article in question, would be a reserve of a part of the joint estate from partition, and a possession of that portion conceded to, and taken by, one of the sharers as the common property of himself and the other sharers.

2. Possession is evidence of title, and is primarily exclusive. It is for him, who impugns this exclusive title, to show that the possession arose in some way which has preserved his own right.

In every case the person who has been out of possession for more than twelve years must make out some *primâ-facie* title, and some agreement or acknowledgment of that title, such that possession is deprived of its ordinary effect through being held on a joint right, or a subordinate right.

3. Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group.

THIS was an appeal from the order of remand made by A. B. Steward, Acting Assistant Judge of Poona, in Appeal No. 249 of 1884.

The plaintiffs in this case sought to recover one-fourth share of a house in Poona, alleging that it was the joint ancestral property of the parties to the suit.

The plaintiffs admitted that, with the exception of the house in dispute and certain *inám* land in the Ratnágiri district, all the rest of the family property had been divided about thirty years before the institution of the suit.

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The defendant contended *(inter alia)* that the suit was barred by limitation.

The Subordinate Judge, having found that the plaintiffs had failed to prove possession, or participation of the rents and profits, of the property in dispute within twelve years before the institution of the suit, rejected the claim.

On appeal, the Acting Assistant Judge, following the rulings in *Hansji Chhiba* v. *Valabh Chibba*[1] and *A'tmárám Báji* v. *Mádavráv Bápuji*[2], held that the suit was not barred by limitation under article 127, Schedule II of Act XV of 1877. He said: "In this case, no share in the family property has been claimed and refused; the possession of the house by the defendant has never become adverse to the plaintiff; and though the defendant has let the house, managed it, received rents and profits for more than twelve years before the suit, there has not been at any time such an alteration in the state of circumstances as to render the possession of the house by the defendent adverse to the plaintiffs, and there is no evidence to show that the house was given to the defendant as his separate property by agreement."

On these grounds the decree of the Subordinate Judge was reversed, and the case remanded for retrial on its merits.

Against this order of remand the defendant appealed to the High Court.

Shántárám Náráyan for the appellant.

M. B. Chaubal for the respondents.

WEST, J.:—The Assistant Judge in this case has reversed the decree of the Subordinate Judge on the point of limitation, and sent the case back for retrial. The Subordinate Judge found that the suit was barred, because, admitting that the property in dispute was originally joint-family property, yet the defendant was in possession, and the plaintiffs did not show any participation of the possession or enjoyment within twelve years. The Assistant Judge, on the other hand, found it admitted that the house in dispute had remained undivided at the partition of the family estate, which took place thirty-five years ago. Its remain-

(1) I. L. R., 7 Bom., 297. (2) Printed Judgments for 1880, 311.

ing undivided, however, would not place it in any category, such as to exclude the operation of article 127, Schedule II of the Limitation Act XV of 1877. That article applies equally to a portion left undivided as to the whole estate, and a twelve years' exclusion, known to the excluded sharer, would bind him equally in the one case as in the other. What would bar the operation of the article in question would be a reserve of a part of the joint estate from partition and a possession of that portion conceded to, and taken by, one of the sharers as the common property of himself and the other sharers—*Dádobá* v. *Krishna*(1). In such a case there would be no exclusion, because the individual holding would be by a common consent, implying, not contradicting, the joint right. The mere non-division of a particular house or piece of ground, on the other hand, raises no presumption against him who holds it undivided, but a presumption in his favour. It is evident that a partition can be best effected by giving to each coparcener distinct portions of the property which each then holds without further sub-division. Hence, when once a partition has been effected, the Hindu law refuses a further partition, presuming that the portions of the once united estate found in the possession of the ex-coparceners are the shares allotted to them in the partition. In every case the person who has been out of possession for more than twelve years must prove some facts which will bar the operation of the Limitation Act and of the principles set forth in *Tátya* v. *Anáji*(2), *Vithoba* v. *Nárayan*(3), and *Rái Raghunáth Báli* v. *Rái Maháráj Báli*(4). There does not appear, in the present instance, to have been any admission, on the defendant's part, of the house being undivided in the sense of reserved and held by him in the common right; and as the Assistant Judge has fallen into a misconception on this point, we must reverse his order, and direct him to deal with the case on its merits.

It has been urged that in a former suit there was an adjudication against the plaintiffs and the defendant jointly in favour of one Ganesh Narsinh, whereby he was decreed a share of

(1) I. L. R., 7 Bom., 34.
(2) See note (*a*), *infra*, page 220.
(3) See note (*b*), *infra*, page 221.
(4) L. R., 12 I. A., 112.

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the property in dispute as a joint-family estate. According to *Rámchandra Bhimáji Nabar* v. *Abáji Parashrám Nabar*(1), it was contended this adjudication constituted *res judicata* amongst the then defendants that the property was joint estate. It was certainly held several years ago in *The Collector of Sholápur* v. *Náná*(2) that a Court ought, in some cases, to determine the rights of the defendants *inter se*. On this principle probably were founded the observations in *Venktesh* v. *Ganpaya*(3). Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication—*Cottingham* v. *Earl of Shrewsbury*(4), and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim to a share made against them as a group. The plaintiffs in this case have not, therefore, been able in this appeal to sustain the judgment of the District Court on the ground that the property had already been adjudged to be joint family estate.

The costs of this appeal are to abide the event.

Decree reversed and case remanded.

(1) Printed Judgments for 1886, p. 15.
(2) Printed Judgments for 1874, p. 14.
(3) Printed Judgments for 1876, p. 110.
(4) 3 Hare's Rep., 627.

NOTE (*a*) :—The following is the judgment of West and Nánábhái Haridás, JJ., in *Tátyá* v. *Ánáji* referred to in the above case (see Printed Judgments for 1883, p. 259) :—

WEST, J. :—The state of things existing in 1851 was exclusive possession, by the defendants' father Dáji, of the family property, with the exception of the house in which the plaintiff was ordered to receive apartments, and did receive them to the extent of 15 khans. The original presumption in favour of the joint possession of joint-family property was thus supplanted by another and totally different presumption, and it lay on the plaintiff to make out that a new state of things had subsequently arisen by which he had been re-admitted to possession as a joint owner, or had otherwise obtained a practical recognition of his right in that character. He has brought forward a considerable body of oral testimony to

support his claim; and if this evidence could be accepted without scrutiny, he must succeed. But it is loose and vague and defective in particulars in which, had there been a joint enjoyment, evidence would almost certainly have been forthcoming. Not a *kabuláyat* has been produced given to the plaintiff, though his grand-nephews, the defendants, were infants at their father's death, nor is there any other documentary evidence to support the claim. Anáji went away for some years, and appears to have received nothing out of the common property during his absence. An extensive business was carried on by his nephew Apáji in which he says he had a share, yet not a particle of evidence is produced of his having ever enjoyed a share in that business. It seems quite unlikely that he should have remained quiescent while his rights were completely ignored and a title built up against him. The probabilities being such as we have stated, and the evidence for the plaintiff being met by a stronger body of evidence proceeding from better informed witnesses, we think we cannot with safety maintain the judgment of the Court below, except as to 15 khans of the family house. It is so far confirmed. As to the rest, it is reversed. The respondent will have to pay, in each Court, the fees from which he was provisionally exempted as a pauper.

NOTE (*b*):—The following is the judgment of West and Nánábhái Haridás, JJ., in *Vithobá* v. *Náráyan* (see Printed Judgments for 1883, p. 262), also referred to in the above case:—

WEST, J.:—The plaintiffs sued for part of a field as a portion of joint property left undivided in a general partition. This partition took place so long ago that no clear evidence about it is available. What is clear is that the defendants have had exclusive possession of the whole field in dispute for a time, which gives them, *primâ facie*, a title by prescription. Now, possession is evidence of title, and is primarily exclusive. It is for him who impugns the exclusive title to show that the possession originated in some way which has preserved his own right; otherwise we must attribute a legal origin and the usual incidents to actual, continued, and peaceable enjoyment. It is no proof of property's being still undivided that it was once undivided; otherwise there would be a ground for a general redistribution of all Hindu estates. A counter presumption of greater force arises from long exclusive possession. The man who is out must make out some *primâ-facie* title and some agreement or acknowledgment of that title, such that possession by his adversary is deprived of its ordinary effect through being held on a joint right or on one subordinate to the right set up. No such title and agreement have been made out here; none certainly can arise from another field having, some years ago, been given by a defendant to a plaintiff.

Referring to *Devapa* v. *Ganpaya*(1), we reverse the order of the District Court, and direct that the appeal be recalled and disposed of according to law with reference to the above observations. The District Court will award costs.

The following is the judgment of West and Nánábhái Haridás, JJ., in another case (*Lachirám* v. *Umá*; see Printed Judgments for 1883, p. 285) (Second Appeal No. 489 of 1882) bearing upon the same question:—

(1) Printed Judgments for 1877, p. 194.

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WEST, J.:—When of two persons one is in enjoyment of property and the other has no enjoyment or possession, that is, *primâ facie*, an exclusion of the latter. There may be a contract or other jural relation between the parties which accounts for the sole possession, and makes it preserve, instead of destroying, the joint right, but of such a state of things positive evidence is always required, since otherwise possession continued even for centuries would afford no security to property. An enjoyment by agreement, even after partition, by one for several would, of course, satisfy the test, but then there must be evidence of the agreement to prevent the inference of exclusive possession. In the present case, there has been exclusive possession in fact since 1867 by Tilokchand and his son. They have had the mortgage deeds and have received the rents. Vishrám, who made the partition, must have known of this exclusion of him from this part of the once joint property, and, therefore, from the moment of separate sole enjoyment by Tilokchand, time must be computed for limitation. Hence the suit as one for a share in the mortgage rights over the property in question held by the defendants must fail, and not the less so because of a foolish or perverse admission of the widow Magnibái on which, seeing the whole case, it would be impossible to ground a decision in favour of the plaintiff. The plaintiff it appears has separately become a puisne mortgagee of the property in dispute. In that character he may redeem the prior mortgage; but his present suit, as one to obtain a share in the mortgage interest held by his cousins, is barred.

We, therefore, reverse the decrees of the Courts below, and reject the claim, with costs throughout on the plaintiff.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhai Haridás.

1886. *August* 17.

SHIVRA'M DINKAR GHA'RPURAY, (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SECRETARY OF STATE FOR INDIA, (ORIGINAL DEFENDANT), RESPONDENT.*

Jurisdiction—Suit against Government for inám lands and mokása amals—Regulation XXIX of 1827, *Sec.* 6—*Pensions Act* (*XXIII of* 1827), *Sec.* 4—*Bombay Revenue Jurisdiction Act* (*X of* 1876), *Sec.* 4—*Limitation—Attachment under Act XI of* 1852, *effect of—Adverse possession—Mokása amals, meaning of.*

In 1826, A. obtained a decree on a mortgage, awarding him possession and enjoyment of certain *inám* property, consisting of lands and of cash allowances annually paid from the Government treasury, called *mokása amals*. A. and his successors continued in possession down to 1852, when the *inám* was attached on behalf of Government pending an inquiry, under Bombay Act XI of 1852, into the title of the holders of the *inám*. The attachment remained in force till 1865,

*Appeal No. 31 of 1884.