APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

1896. *March* 10.

BA'LKRISHNA SAKHA'RA'M (ORIGINAL DEFENDANT), APPELLANT, *v.* MORO KRISHNA DA'BHOLKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Landlord and tenant—Co-sharers—Jághir—Notice to tenant to pay full assessment—Manager acting with the consent of co-sharers—Parties—Suit against tenant by manager alone in his own name—Joinder of all co-sharers necessary—Practice—Procedure.

A co-sharer who is manager cannot, even with the consent of his co-sharers, maintain a suit by himself and in his own name to eject a tenant who has failed to comply with a notice calling on him to pay enhanced rent.

APPEAL from the decision of S. Hammick, District Judge of Ahmednagar, in Suit No. 5 of 1893.

The plaintiff, who was the jághirdár of the village of Akolner, and to whom a commission had been issued by Government under section 88, clauses (*a*) and (*b*)(1), of the Land Revenue Code (Bombay Act V of 1879), instituted the present suit in the District Court to recover from the defendant Rs. 99, being the balance due to him on account of *kamál ákár* (highest rate of assessment) for the three years preceding the suit.

The defendant disputed the plaintiff's right to demand the highest rate of assessment, and contended (*inter alia*) that the plaintiff had no right to sue alone, as he had other co-sharers in the jághir village.

The Judge allowed the claim, holding (*inter alia*) that the plaintiff was entitled to recover the highest rate of assessment, and

* Appeal, No. 40 of 1894.

(1) Section 88, clauses (*a*) and (*b*), of the Land Revenue Code (Bombay Act V of 1879)—

88. It shall be lawful for the Governor in Council at any time to issue a commission to any holder of alienated lands, conferring upon him all or any of the following powers in respect of the lands specified in such commission (namely):

(*a*) to demand security for the payment of the land revenue or rent due to him, and if the same be not furnished, to take such precautions as the Collector is authorized to take under sections 141 to 143.

(*b*) to attach the property of persons making default in the payment of such land revenue or rent as aforesaid.

that though the plaintiff had other co-owners in the jághir, he was entitled to sue alone. The following is an extract from the judgment:—

"The plaintiff admits that there are other sharers in the jághir; but he is the holder of a commission issued by Government under section 88 of Bombay Act V 1879, and I consider that that commission renders the plaintiff competent to bring this suit to establish the jaghirdár's claim to re-settle the revenue of an inferior holder. The same question was similarly decided by Sir W. Wedderburn in Suit No. 4 of 1878."

The defendant appealed.

Branson (with *Ghanashám N. Nádkarni*) for the appellant (defendant):—The plaintiff is not the sole proprietor of the jághir. There are other co-sharers, and the plaintiff cannot sue alone without their consent or without joining them in the suit—*Báláji Bhikáji* v. *Gopál bin Rághu*[1]. There is no evidence in the case to show that the plaintiff was manager, or that he brought the suit with the consent of the other co-sharers. The mere fact that the powers mentioned in section 88, clauses (*a*) and (*b*), were conferred on the plaintiff would not authorize him to sue alone. The suit must, therefore, fail.

Inverarity (with *Purshotam P. Khare*) for the respondent (plaintiff):—The plaintiff holds a commission issued to him under section 88 o the Land Revenue Code, and the powers mentioned in clauses (*a*) and (*b*) of that section have been conferred on him. He is, therefore, entitled under section 94 of the Code to bring a suit to re-assess the land or re-settle the revenue to be received from any inferior holder. The decision in *Báláji Bhikáji* v. *Gopál bin Rághu*[2] is not applicable to the present case.

7th August, 1895. PARSONS, J.:—The District Judge finds that there are sharers in the jághir, and that the plaintiff is not the sole owner, but he thinks that plaintiff can bring this suit to

(1) I. L. R., Bom., 23.

(2) Section 94 of the Land Revenue Code (Bombay Act V of 1879):—

94. Nothing in the last section shall be deemed to prevent a holder of alienated land from instituting a suit in a Court of competent jurisdiction for the purpose of establishing his claim to re-assess the lands or settle the revenue of any inferior holder paying less than the full sum to payment of which he deems him to be justly liable, or from levying the sum ascertained to be due in accordance with the decree in any such suit in the manner hereinbefore mentioned.

1896.

BÁLKRISHNA v. MORO.

recover the highest rate of assessment (*kamál ákár*), because he is the holder of a commission issued by Government under section 88 of Bombay Act V of 1879. It appears that the plaintiff has had conferred on him the powers specified in clauses (*a*) and (*b*) of that section, but we do not see how the conferring of these powers could possibly give him a right to sue alone if otherwise he would have no such right. We think the case must be determined on the principles of law applicable to co-sharers generally, and that the plaintiff would have no right to sue alone, unless, perhaps, to use the words of the decision in *Báláji Bhikáji Pinge* v. *Gopál bin Rághu*[1], he was acting by consent of all the co-sharers as the manager of the village. The lower Court has omitted to determine this question of fact.

We, therefore, under section 566 of the Civil Procedure Code (Act XIV of 1882), refer this issue to the lower Court for it to try and find upon :—"Was the plaintiff acting by consent of all the co-sharers as the manager of the village for the years in suit?"

The Judge should take the evidence offered by the parties, if he considers it necessary to enable him to try the issue properly, and certify his finding to this Court within a month of date of receipt.

The case was accordingly sent back for a finding on the above issue, and upon it the Judge found that the plaintiff was acting by consent of all the co-sharers as the manager of the village for the years in suit.

The appellant (defendant) took the following objections to the finding :—

(1) The Judge was wrong in holding that the plaintiff was the manager for the other co-sharers.

(2) The finding was contrary to the weight of the evidence.

The case then came again before the High Court.

Ghanashám N. Nádkarni, for the appellant (defendant) :—We submit that the finding of the Judge does not conclude us at all. We contend that one co-sharer cannot sue even with the consent of the other co-sharers. They must all be made

(1) I. L. R., 3 Bom., 23.

parties. We rely on *Bálkrishna* v. *The Municipality of Mahád*[1]; *Kálidás* v. *Nathu*[2]; *Gan Sávant* v. *Náráyan*[3]; *Rámsebuk* v. *Rámlall*[4]; *Báláji* v. *Gopál*[5]; Mayne's Hindu Law, section 274.

Mahádeo V. Bhat for *Purshotam P. Khare*, for the respondent (plaintiff) :—As the tenants have separately paid rent to each co-sharer, or agreed to do so, they cannot now raise any objection to the suit. As to the rights of co-sharers, if their interests are endangered they can object, but in the present case they have all consented. The Judge has clearly found, on the issue sent down, that the plaintiff was acting as manager with the consent of all the co-sharers. It is not now open to the defendant to raise any objection. The cases relied on simply lay down that one co-sharer cannot sue for his undivided share, but in this case the plaintiff has, as manager, impliedly sued for the shares of all the co-sharers—*Arunachala* v. *Vythialinga*[6]; *Hari* v. *Mahádu*[7]; Mayne's Hindu Law, section 274.

PARSONS, J. :—By the return of the finding of the District Judge on the issue remanded by us on the 7th August, 1895, we are in possession of the facts of the case.

The plaintiff and his co-sharers own the village of Akolner as their jághir. The defendant cultivates land in that village. Prior to the years in the suit he has always paid the jaghirdárs something less than the full (*kamál*) assessment. The plaintiff, however, gave him notice that for the years in suit he would have to pay the full assessment, and has brought the present suit to enforce his demand. The point of law argued before us relates to the power of the plaintiff alone to bring this suit. It is found that he was acting by consent of all the co-sharers as manager of the village for the years in suit.

In the case of *Báláji* v. *Gopál*[5] the following remark is made by Westropp, C. J. :—"If any one of several tenants-in-common, joint tenants, or co-parceners, who is not acting by consent of the others as manager of an estate, is to be at liberty to enhance rent or eject tenants at his own peculiar pleasure, there

(1) I. L. R., 10 Bom., 32.
(2) I. L. R., 7 Bom., 217.
(3) *Ibid.* 467.
(4) I. L. R., 6 Cal., 815.
(5) I. L. R., 3 Bom., 23.
(6) I. L. R., 6 Mad., 27.
(7) I. L. R., 20 Bom., 435.

1896.

BÁLKRISHNA v. MORO.

manifestly would be no safety for tenants, and it would be impossible for them to know how to regulate their conduct, or whom to regard as their landlord." In *Arunachala* v. *Vythialinga*[1] a somewhat similar remark is made as to a suit by the managing member of a family.

On these remarks it has been argued that the learned Judges thought that a co-sharer who was acting by consent of the others as manager might enhance rent and sue to eject a tenant. The remarks, however, are very guardedly worded, and it is clear that the Judges did not mean to lay down any such rule. In *Kattusheri Kanna* v. *Vallotil Narayanan*[2] it is held that "unless where, by a special provision of law, co-owners are permitted to sue through some or one of their members, all co-owners must join in a suit to recover their property. Co-owners may agree that their property shall be managed and legal proceedings conducted by some or one of their number, but they cannot invest such person or persons with a competency to sue in his own name on their behalf, or, if sued, to represent them." This decision was followed by this Court in *Bálkrishna* v. *The Municipality of Mahád*[3]. In *Hari* v. *Gokaldás*[4] it is said that "it is plain that the right of a plaintiff to assume the character of manager, and to sue in that character, raises a question of fact and law which varies as the other members of the family are minors or adults, whose assent is usually required in important matters, and we think, therefore, that the defendant is always entitled, when the objection is taken at an early stage, to have the other members of the family, when they are known, placed on the record to insure him against the possibility of the plaintiff's acting without authority." To the same effect are the decisions of the Calcutta and Allahabad High Courts. (See *Rámdoyál* v. *Junmenjoy*[5], *Dwarká Náth Mitter* v. *Tara Prosunna Roy*[6], *Kandhiya Lal* v. *Chandar*[7], and *Imam-uddin* v. *Liladhar*[8].)

We must, therefore, treat it as settled law that a co-sharer who is manager even with the consent of his co-sharers cannot

(1) I. L. R., 6 Mad., 27.
(2) I. L. R., 3 Mad., 234.
(3) I. L. R., 10 Bom., 32.
(4) I. L. R., 12 Bom., 158.
(5) I. L. R., 14 Cal., 791 at p. 794.
(6) I. L. R., 17 Cal., 160 at p. 162.
(7) I. L. R., 7 All., 313.
(8) I. L. R., 14 All., 524 at p. 527.

maintain a suit by himself and in his own name to eject a tenant who has failed to comply with a notice calling on him to pay enhanced rent. We must, therefore, reverse the decree of the lower Court and order plaintiff's suit to be dismissed with costs on him throughout.

1896.

BÁLKRISHNA v. MORO.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

FANNYAMMA AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 3), APPELLANTS, *v.* MANJAYA HEBBAR AND OTHERS (ORIGINAL PLAINTIFFS NOS. 2, 3 AND 4), RESPONDENTS.*

1895. *October* 14.

Limitation Act (XV of 1877), Sch. II, Arts. 118 and 140—Limitation Act (IX of 1871), Sch. II, Art. 129—Suit by devisees to recover possession of property devised by will—Prayer to declare alleged adoption invalid.

A suit by a devisee to recover possession of immoveable property and for a declaration that an alleged adoption (on the strength of which the defendant was in possession) was invalid or never took place not being one merely to obtain a declaration, is governed by article 140 of the Limitation Act (XV of 1877). To such a suit article 118 does not apply, as the prayer for declaration is subservient or auxiliary only to the prayer for possession.

APPEAL from a remand order passed by E. H. Moscardi, District Judge of Kánara.

The plaintiffs alleged that under the will of one Nagabhatta, who died on the 28th July, 1880, they were entitled to his immoveable property, all of which was in the possession of the defendants; that on the will being presented for registration in 1880, the first defendant (the widow of Nagabhatta) had declared it to be a forgery, and alleged that in 1879 Nagabhatta had adopted the third defendant.

The 28th July, 1892, was a Court holiday.

On the 29th July, 1892, the plaintiffs brought this suit to recover possession of the property, and praying for a declaration that the alleged adoption was invalid or never in fact took place.

Defendants Nos. 1 and 3 pleaded that defendant No. 3 was the adopted son of Nagabhatta, having been duly adopted by him in

* Appeal No. 27 of 1895 from order.