APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

JIVANBHAT (ORIGINAL PLAINTIFF), APPELLANT, *v.* ANIBHAT (ORIGINAL DEFENDANT), RESPONDENT.*

1896. *June* 30.

Hindu law—Partition—Suit for partition—Exclusion—Burden of proof.

In a suit for partition of joint family property, the defendants pleaded that the plaintiff's branch of the family had been separated more than thirty years ago. The plaintiff proved that the family property was joint, and that he had a share in it.

Held, that under the circumstances it lay on the defendants to prove plaintiff's exclusion from the joint estate for more than twelve years and an exclusion known to the plaintiff.

SECOND appeal from the decision of M. H. W. Hayward, Assistant Judge of Belgaum, in Appeal No. 191 of 1893.

Suit for partition.

The plaintiff sought to recover his one-fourth share of certain property, which he alleged was the joint family property of the parties to the suit.

The defendants pleaded that the plaintiff's branch of the family had separated more than thirty years ago, and that the suit was barred by limitation.

The Court of first instance held that the parties were members of a joint Hindu family, that the suit was not time-barred, and that the plaintiff was entitled to recover his share by partition of the property in dispute.

This decision was reversed, on appeal, by the Assistant Judge, who held the claim to be time-barred. He remarked as follows:—

"The plaintiff was bound to prove that he first became aware [illegible] sion within twelve years of the suit under article 127 of Act XV [illegible] this would include proof of possession as well as title [illegible] This he appears to me to have failed to do. His suit is [illegible] under article 127 of Limitation Act."

* Second Appeal, No. 865.

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Against this decision the plaintiff appealed to the High Court.

Daji Abaji Khare for appellant (plaintiff) :—The lower Court has laid the burden of proof on the wrong party. The plaintiff has proved that his branch of the family is not separated from that of the defendants. The parties are still joint. That being so, it lies on the defendants to show that plaintiff has been excluded to his knowledge from the joint property for twelve years before suit.

Unless and until the defendants prove this fact, the plaintiff is entitled to a decree for partition—*Krishnabai* v. *Khangowda*(1) ; *Dinkar* v. *Bhikaji*(2).

N. G. Chandavarkar for respondent :—It is found that defendants have been in possession of the property in dispute for over thirty years. Possession is *primâ facie* exclusive. It is for the plaintiff, who has been out of possession for so many years, to prove that his title was ever acknowledged by the defendants during this period, or that they held the property on his behalf. This he has not done. His claim is, therefore, barred by limitation—*Ramchandra Narayan* v. *Narayan Mahadev*(3).

PARSONS, J. :—The Assistant Judge was wrong in placing the *onus* on the plaintiff of proving possession within twelve years of suit as well as title. Plaintiff sued to enforce a right to a share in joint family property. The defendants pleaded that the plaintiff belonged to a branch of their family which had separated more than thirty years ago. It was, therefore, necessary for the plaintiff to prove title,—that is, to prove that the property was joint, and that he had a share in it. This he did in the opinion of the Subordinate Judge. The Assistant Judge has recorded no finding on this point, and it still remains to be ...ded.

..., however, for the purposes of this appeal, that this ... given, then clearly the *onus* of proving exclusion ... defendants who assert it, and it is not merely

(1) ... 197 at p. 202. (2) I. L. R., 11 Bom., 365.
(3) ... R., 11 Bom., 216 at p. 219.

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an exclusion that must be proved, but an exclusion known to the plaintiff. This is distinctly laid down in *Krishnabai* v. *Khangowda*[1]. See also *Hari* v. *Maruti*[2] and *Dinkar* v. *Bhikaji*[3].

We reverse the decree of the lower appellate Court, and remand the appeal for a fresh trial. Costs to abide the result.

Decree reversed.

(1) I. L. R., 18 Bom., at p. 202. (2) I. L. R., 6 Bom., 741.
(3) I. L. R., 11 Bom., 365.

TESTAMENTARY JURISDICTION.

Before Mr. Justice Strachey.

CHOTALAL CHUNILAL, PLAINTIFF, *v.* BAI KABUBAI, DEFENDANT.*

1897. December 9.

Practice—Procedure—Contentious matter—Duty of Registrar—When a petition for probate or letters of administration becomes contentious—Non-appearance of caveator—Form of order.

So long as a petition for probate or letters of administration is "non-contentious" it is to be dealt with by the Registrar. As soon as it becomes "contentious" it is to be treated as a plaint in a suit, and the suit is governed, so far as practicable, by the procedure prescribed by the Civil Procedure Code.

The petition becomes contentious not upon the entry of a caveat, but upon the filing of the affidavit in support of the caveat.

Where, in consequence of the filing of the affidavit, the matter becomes a suit, the whole suit must be disposed of by the decree of the Court. Where, therefore, at the hearing of the suit the defendant does not appear in support of the caveat, it is not a correct procedure for the Court merely to dismiss the caveat, leaving it to the Registrar to dispose of the petition as a non-contentious matter. The proper form of order is that the caveat be dismissed and that probate or letters of administration issue, provided that the Court is satisfied that the papers are in order.

THE plaintiff presented a petition praying for probate of the will of his father Chunilal Motilal.

The defendant filed a caveat against probate being granted to the plaintiff.

* Suit No. 27 of 1897.