

APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice,
and Mr. Justice Fawcett.*

NURDIN NAJBUDIN AND OTHERS (HEIRS OF ORIGINAL¹ DEFENDANT No. 1 AND DEFENDANT No. 2), APPELLANTS *v.* BU UMRAO, DAUGHTER OF SAMAT KHAN AMUKHAN AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 3), RESPONDENTS².

1920.

July 29.

Indian Limitation Act (IX of 1908), Schedule I, Articles 123 and 144—A Mahomedan dying intestate—Estate undivided—Heirs holding as tenants-in-common—Suit by a heir to recover his share—Adverse possession.

Where members of a Mahomedan family continue to live as tenants-in-common without dividing the estate of a deceased ancestor, limitation will not run from the time of his death and a suit for a distributive share of the deceased's estate will not be governed by Article 123 but by Article 144 of the Limitation Act, 1908.

Kallangowda v. Bibishaya⁽¹⁾, followed.

SECOND Appeal against the decision of Dadiba C. Mehta, Assistant Judge, Ahmedabad, reversing the decree passed by Naginlal V. Desai, Subordinate Judge at Borsad.

Suit to recover possession.

The original owner of the property in suit was one Gulbai Shefulla. She died in 1892 leaving her surviving one sister and four daughters, viz., Ijat (defendant No. 1), Bibi (mother of plaintiff), Neksaheb and Lalan. All the daughters lived with Gulbai at the time of her death and continued to live as tenants-in-common without dividing the estate. Of these Bibi died in 1893, Neksaheb in 1908 and Lalan in 1897.

In 1916, the plaintiff sued to recover one twelfth share of the estate of Gulbai.

¹ Second Appeal No. 645 of 1919.

⁽¹⁾ (1920) 44 Bom. 943.

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The defendants contended, *inter alia*, that the plaintiff was not entitled to the share claimed under Mahomedan law and that her suit was barred by adverse possession.

The Subordinate Judge held that the plaintiff's suit was governed by Article 144 of the Limitation Act but found that the claim was barred by adverse possession on two grounds, viz. :—(1) non-participation by plaintiff in the profits or income of property for a number of years ; (2) in a suit filed in 1899 by one Jiva Feju, a nephew of Gulbai, for a share in Gulbai's property, Ijat, the defendant, had stated in her written statement that the rights of all sharers in the estate were divided and the plaintiff had knowledge of this written statement.

On appeal, the Assistant Judge agreed with the Subordinate Judge that the suit was governed by Article 144 and not by Article 123 of the Limitation Act ; but he reversed the decree on the ground that defendant's adverse possession was not proved by the mere non-participation of the profits by the plaintiff and further that the plaintiff had no knowledge of the written statement of Ijat in the suit of 1899.

The defendants appealed to the High Court.

G. N. Thakor, for the appellant.

N. K. Mehta, for respondent No. 1.

MACLEOD, C. J. :—The plaintiff sued to recover her share in the property of her grand-mother, Gulbai, who died in 1892. It is admitted that she would have been entitled to half her mother's share, and she has been held entitled to 1/12th of the estate of Gulbai.

It is contended that the suit is barred by limitation and that Article 123 applied. But we decided in

Kallangowda v. Bibishaya⁽¹⁾ that where the members of a Mahomedan family continued to live as tenants-in-common without dividing the estate of a deceased ancestor, limitation will not run from the time of his death. Here on the findings of fact by the appellate Court we cannot say that facts were proved to establish adverse possession against the plaintiff. Therefore, we see no reason to differ from the finding of the learned Judge.

The appeal must be dismissed with costs.

FAWCETT, J. :—I agree. The learned pleader for the appellants has relied upon the Privy Council case of *Maung Tun Tha v. Ma Thit*⁽²⁾ where their Lordships refer to Article 123 of the Indian Limitation Act as prescribing the period within which a claim must be made for a share of property on the death of an intestate. It is to be noted with regard to that case that it was one from Burma and, as the report at page 381 shows, there was already a decision of the Chief Court that the period of limitation for the recovery of a share by an eldest son is 12 years from the date of his parent's death under Article 123. The appellant's counsel also referred to that Article as being the one applicable in such a case. Their Lordships' attention does not appear to have been drawn to the Indian rulings regarding the scope of this particular Article, and it was not a point in issue in the case. The reference to this Article is merely incidental, and there may be special reasons for its applicability to the case of Buddhist law there under consideration. I do not, therefore, consider that it is a pronouncement of the Privy Council which should necessarily be held to conclude the question, especially as a contrary opinion appears to me to have been expressed by their Lordships

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⁽¹⁾ (1920) 44 Bom. 943.

⁽²⁾ (1916) 44 Cal. 379.

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of the Privy Council in the case of *Mahomed Riasat Ali v. Hasin Banu*. No doubt it is arguable that Article 123 could not apply on the particular facts of that case. But the view there taken seems to be based on proper force being given to the word "distributive" in this Article 123. We are practically asked by the appellants' pleader to construe Article 123 as if that word had no force and the Article was meant to cover the case of any claim for a share of the property of an intestate. This word "distributive" has always been in this Article, since its enactment in Act IX of 1871, where the Article further inserted the word "moveable" before the word "property". I think the latter fact explains how the word "distributive" came to be in this particular Article. The word "distribution" has under English law a very particular meaning. In the case of real or immoveable property the term "descent" was applied to the division of the property among those legally entitled to it, whereas the term "distribution" was applied to the division of the personal estate of an intestate. And it is also part of the English law that, whereas the title to real estate vests at once in the heirs of the deceased owner, the legal title to his personal property vests in the executor or administrator and is transferred to the persons beneficially interested by the distribution. It has, therefore, a peculiar meaning of distribution of an estate which has vested in an executor or administrator, and in several cases the Article has been so construed as limited to such a case. There are strong reasons for that view, and I do not think the Privy Council judgment relied upon gives any sufficient basis for our differing from it.

Decree confirmed.

J. G. R.