

Hence if the zemindar, at the time of his death, and his nephews were members of an undivided Hindu family, one of the nephews was entitled to succeed to it." The eldest surviving co-parcener was accordingly held entitled to succeed to the Raj by the law of survivorship. The same rule of Hindu law was applied in the [227] succession to Killa Sukinda, an estate similarly situated as Killa Patia, in the case of *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanund Man Singh* (1). Sir Richard Couch, in delivering the judgment of the Judicial Committee, said:—"According to the decision in the *Shivagunga* case, the fact of the Raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rule which governs the succession to a partible estate is to be looked to."

It is conceded that the respondent has succeeded to the Patia Raj by virtue of the law of survivorship. We do not therefore see why the incidents of survivorship as to partible estates should not apply to an impartible estate. The Raj now in the possession of the respondent is no longer assets of the deceased, neither is he the legal representative of the deceased.

In *Juga Lal Chaudhuri v. Aduk Behari Prasad Singh* (2), it was held that the interest which a deceased member of a Mitakshara family had in the family property is not assets in the hands of the surviving members, and proceedings under section 234, Civil Procedure Code, cannot be taken against them. If, as has been held by the Judicial Committee, the rule of succession as to partible and impartible estates be the same, we see no reason why in a case of an impartible estate the successor should be held to hold the estate as assets of the deceased.

In *Ram Das Marwari v. Tekait Braja Behari Singh* (3) a different view was taken, but it does not appear that the attention of the Court was drawn to the principle of survivorship enunciated in the *Shivagunga* (4) and the *Killa Sukinda* (1) cases. Having regard to these decisions of the Judicial Committee, we do not think it necessary to refer the matter to a Full Bench.

We are, therefore, of opinion that the decision of the Subordinate Judge is right, and we accordingly dismiss this appeal with costs.

Appeal dismissed.

31 C. 228.

[228] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Pargiter.

KRISHNA PRASAD ROY v. BIPIN BEHARI ROY.*
[2nd September, 1903.]

Limitation—Limitation Act (XV of 1877), Sch. II, Art. 11—Claim to attached property—Suit to establish right to attached property—Civil Procedure Code (Act XIV of 1882), ss. 278, 281, 283.

* Appeal from Order No. 300 of 1902, against the order of Tara Charan Sen, Subordinate Judge of Tipperah, dated May 31, 1902, reversing the order of Debendra Prasad Bagchi, Munsif of Brahmanbaria, dated July 31, 1901.

(1) (1890) I. L. R. 18 Cal. 151;

(3) (1902) 6 C. W. N. 879.

L. R. 17 I. A. 128.

(4) (1868) 9 Moo. I. A. 589;

(2) (1900) 6 C. W. N. 228.

2 W. R. (P. O.) 31.

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The plaintiff preferred a claim to properties in dispute which were attached in execution of a decree. The claim was disallowed, but the decree was satisfied and attachment withdrawn :—

Held, that the plaintiff was not required to institute a suit under s. 283 of the Civil Procedure Code to establish his right to the property in dispute, and that accordingly a suit brought by him to recover possession of the property was not barred by Art. 11, Sch. II, of the Limitation Act.

Ibrahimbhai v. Kabulabhai (1) and *Gopal Purshotam v. Bai Divali* (2) followed.

Surnamoyi Dasi v. Ashutosh Goswami (3), distinguished.

[Foll. 3 C. L. J. 881 ; Dist 29. Mad. 225=16 M. L. J. 136 ; Diss. 1 C. L. J. 296 ; Con. 26 M. L. J. 499=26 I. C. 532 ; Ref. 59 I. C. 774=19 A. L. J. 268 ; 45 Bom. 561.]

APPEAL by the defendants, Krishna Prosad Roy Chowdhry and another.

The plaintiff, Bepin Behary Roy, brought the suit for recovery of *khas* possession of certain plots of lands on declaration of his *taluki* title therein. It was alleged that one Brindaban Shaha, who had purchased the lands at a sale in execution of a mortgage decree against the defendant No. 3, Ram Narain Shaha, sold them to one Adhar Chandra Shaha on the 29th December 1888, who sold them to the plaintiff on the 30th April 1889 ; that the plaintiff was in peaceful possession of the same since his purchase till the 28th June 1899, when his [229] possession was interfered with by a decree obtained under s. 9 of the Specific Relief Act by the defendant No. 4.

Different written statements were filed by the defendants in the case, impugning the plaintiff's title. A plea of special limitation was also raised in this way. One Parmeshwari Chowdhri had obtained a decree for arrears of rent in respect of the lands in dispute and attached them in execution of the decree. The plaintiff preferred a claim under s. 278 of the Civil Procedure Code, which was disallowed on the 14th January, 1891. The plaintiff then paid down the amount of the decree, and the execution case in which the claim was preferred was struck off the file on full satisfaction. The present suit having been instituted on the 14th September 1900, the defendants contended that, as it was not instituted within one year from the date of the order disallowing the claim, it was barred by limitation under Art. 11, Sch. II, of the Limitation Act.

The Munsif gave effect to this plea of limitation, and dismissed the suit, holding also that there was another fatal objection to the suit, namely, that while the plaintiff claimed the lands in his *taluki* right, the sale certificate of his predecessor in title was of *jote* right. As to the other issues framed, he added : " As my finding upon the above two points is sufficient for the decision of the suit, I do not consider it necessary to record my finding upon the other issues raised in the suit." On appeal, the Subordinate Judge held that the suit was not barred by limitation, and, also differing from the Munsif on the other point, remanded the case for trial on the merits, under s. 562 of the Civil Procedure Code.

Dr. Ashootosh Mookerjee (Babu Rajendra Nath Bose with him) for the appellant. I contend that the suit is barred by limitation under Art. 11, Sch. II, of the Limitation Act : *Surnomoyi Dasi v. Ashutosh Goswami* (3). The Court below ought not to have followed *Ibrahimbhai v. Kabulabhai* (1), which is not consistent in principle with the Calcutta

(1) (1888) I. L. R. 13 Bom. 73.

(3) (1900) I. L. R. 27 Cal. 714.

(2) (1899) I. L. R. 18 Bom. 241.

case ; see also *Gopal Purshotam v. Bai Divali* (1). Moreover, the order of remand under s. 562 [230] of the Civil Procedure Code is bad, as the case was not decided by the first Court on a preliminary point ; *Abraham Khan v. Faizunnessa Bibi* (2), *Lalla Chunilal v. Mahiji Singh* (3) and *Rama Koor v. Bhugwan Lall* (4).

Babu *Hari Charan Sarkhel*, for the respondent, contended that the object of a suit under s. 283 of the Civil Procedure Code was to obtain a declaration that the property under attachment was or was not liable to sale in execution of a decree. Hence the decree in the present case having been admittedly satisfied within one year from the date of the order in the claim case, and the attachment having been removed by operation of law, it was not necessary for the plaintiff to institute a regular suit under s. 283 of the Civil Procedure Code ; the case of *Surnamoyi Dasi v. Ashutosh Goswami* (5) is, therefore, distinguishable.

BRETT AND PARGITER, J.J. This appeal arises out of a suit brought by the plaintiff to recover possession of certain lands in which he said he had purchased a *taluki* right from Adhar Chandra Shaha on 19th Baisakh 1296, and from which he had been dispossessed by defendant No. 4 under a decree obtained under section 9 of the Specific Relief Act on the 28th June, 1899.

In 1891, Parmeshwari Chowdhrahi, predecessor in interest of defendants 1 and 2, obtained a decree for arrears of rent in respect of the lands in suit, and attached them in execution of the decree. Thereupon the plaintiff put in a claim under section 278, Code of Civil Procedure, which, however, was disallowed on the 14th January, 1891. The plaintiff then paid up the money, due under the decree, and the attachment was withdrawn. Subsequently, however, the lands were again attached for arrears of rent and sold, and they were purchased by the decree-holder and according to the defence settled with defendant No. 4.

The only plea taken in the Court of first instance, which it is necessary to consider for the purpose of this appeal, is that the suit was barred by limitation under Art. 11, Sch. II, of [231] the Limitation Act, by reason of the fact that the plaintiff had failed to bring his suit within one year from the 14th January 1891, the date on which his claim preferred under section 278, Civil Procedure Code, was disallowed under section 281, Civil Procedure Code.

The first Court held that the suit was barred. The lower Appellate Court, relying on the decision of the Bombay High Court in the case of *Ibrahimbhai v. Kabulabhai* (6), has held that the suit was not barred. Disagreeing with the finding of the Court of first instance on this point and on another preliminary point as to title, the Sub-Judge set aside the judgment and decree of the Munsif and remanded the case, under section 562, Civil Procedure Code, to be tried on the merits.

Defendants 1 and 2 have appealed, and in support of their appeal two points have been taken ; (i) that the Sub-Judge's decision on the question of limitation was erroneous ; and (ii) that he had no power to remand the case under section 562, Civil Procedure Code, as the whole of the evidence had been taken in the Munsif's Court, and the Sub-Judge ought therefore to have arrived at findings on the merits on the evidence.

(1) (1893) I. L. R. 18 Bom. 241.

(2) (1889) I. L. R. 17 Cal. 168.

(3) (1895) I. C. W. N. 840.

(4) (1874) 22 W. R. 224.

(5) (1900) I. L. R. 27 Cal. 714.

(6) (1888) I. L. R. 18 Bom. 72.

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In support of the *first* contention, we have been referred to the decision of this Court in the case of *Surnamoyi Dasi v. Ashutosh Goswami* (1). That case however is distinguishable from the present, for in that the land attached was in fact sold after the claim had been disallowed under section 281, Civil Procedure Code.

In our opinion the principle laid down by the Bombay High Court in the case of *Ibrahimhai v. Kabulabhai* (2), which was followed in the case of *Gopal Purshotam v. Bai Divali* (3) applies to the present case. The object of the claim preferred by the plaintiff under section 278, Civil Procedure Code, was to obtain the removal of the attachment and when that attachment had been removed after payment of the decretal amount, there was no longer an attachment or any proceeding in execution on which the order could operate to the prejudice of the plaintiff, and therefore there was no necessity to bring a suit to set [232] aside the order. We are unable to accept the view suggested on behalf of the appellants that, in spite of the withdrawal of the attachment, the dismissal of the claim under section 281, Civil Procedure Code, could, by virtue of the provisions of section 283, Civil Procedure Code, have the effect of finally determining the question of title between the parties. The first point in support of the appeal therefore fails.

As to the *second* point we think that in this case the remand is not open to objection. The finding of the Munsif does not show what issues were framed other than those in bar, which he has decided, and he has not dealt with the evidence adduced by the parties. We think that in this case the evidence should be duly weighed and considered by the Court of first instance and findings arrived at on the other issues raised in the case. This point also fails, and we dismiss the appeal with costs.

Appeal dismissed.

31 C. 233 (=7 C. W. N. 876.)

[233] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mitra.

UMESH CHANDRA KHASNAVIS v. GOLAP LAL MUSTAFI. *

[25th May and 12th June, 1903.]

Interest—Compound interest—Unconscionable bargain—Unfair dealing—Delay in suit—Urgent necessity—Parādashin lady.

A bargain as to compound interest in a mortgage bond, which is not itself open to objection as hard and unconscionable, cannot be held to have assumed that character by reason of the delay on the part of the creditor in suing on the bond.

Madho Singh v. Kashi Ram (4), dissented from.

When the interest charged in a mortgage bond is very high and the debtor is of full capacity, the general rule is that the Court will not grant relief without proof of unfair dealing or undue pressure or influence on the part of the creditor, or that the creditor has taken unfair advantage of the debtor's weakness and necessities, or that the debtor has been overreached, tricked or deceived, or that he was ignorant of the unfair nature of the transaction. The case of a female debtor in fiduciary relation to the creditor and of an expectant heir are exceptions to the general rule.

* Appeal from Original Decree No. 188 of 1901, against the decree of Benode Behary Mitler, Subordinate Judge of Dinajpur, dated April 12, 1901.

(1) (1900) I. L. R. 27 Cal. 714.
(2) (1888) I. L. R. 18 Bom. 72.

(3) (1893) I. L. R. 18 Bom. 241.
(4) (1887) I. L. R. 9 All. 228.