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30 C. 990 (=7 C. W. N. 864.)

[990] APPELLATE CIVIL.

APPELLATE CIVIL.

BIJOY GOPAL MUKERJI v. NIL RATAN MUKERJI.*

[2nd, 3rd, 4th and 16th June, 1903.]

30 C. 990=7 C. W. N. 864. *Lease—Limitation—Hindu widow, lease granted by—Suit by reversioner for khas possession—Limitation Act (XV of 1877) ss. 91, 118, 125, 141.*

A lease granted by a Hindu widow is on her death only voidable and not of itself void.

Modhu Sudan Singh v. *Rooke* (1) followed : *Sadai Naik* v. *Serai Naik* (2) referred to.

On the death of a Hindu widow a suit by a reversioner to recover possession of immoveable property by setting aside a lease executed by her, is governed by Art. 91 and not by Art. 141 of Sch. II of the Limitation Act (XV of 1877.)

Jagadamba Chaodhrani v. *Dakhina Mohun Roy Chaodhri* (3), *Malkarjun* v. *Narhari* (4), *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (5), *Shrinivas Murar* v. *Hanmant Chavdo Deshapande* (6), *Janki Kunwar* v. *Ajit Singh* (7), *Mahabir Pershad Singh* v. *Hurrihur Pershad Narain Singh* (8), and *Chunder Nath Bose* v. *Ram Nidhi Pal* (9) referred to.

Sheo Sankar Gir v. *Ram Shewak Chowdhri* (10), distinguished.

[(1) Hindu Law—Lease by widow. **Ref.** 34 Cal. 329 P. C.=34 I. A. 87=11 C. W. N. 424=5 C. L. J. 334=4 A. L. J. 329=9 Bom. L. R. 602 =2 M. L. T. 133 = 17 M. L. J. 154 ; 1 C. L. J. 408=60 I. C. 826=33 C. L. J. 193=25 C. W. N. 420 ; **Dist.** 5 P. W. R. 1908=33 Cal. 257 ; 8 C. W. N. 802.

(2) Limitation Act, Arts. 91, 141.—Suit for possession. **Dist.** 8 C. W. N. 802. **Ref.** 32 Cal. 165 ; 9 C. W. N. 222 ; 33 Cal. 257 ; 34 Cal. 329 ; P. C. 811.]

APPEALS (No. 71 of 1899) by the plaintiffs, Bejoy Gopal Mukerji and others, and (Nos. 74, 87, 94, 99 and 175) by some of the defendants.

These appeals arose out of an action for recovery of possession of certain immoveable property left by a deceased Hindu. The suit was brought by four out of the seven reversionary heirs. **[991]** The other reversionary heirs having refused to join, they were made parties, defendants. The allegation of the plaintiffs was that one Chandra Bhushan Mukerji was the proprietor of the properties, in dispute ; that he died in 1832 leaving him surviving his widow, Shoyamoni Debi, as his sole heiress ; that in 1270 B. S. (1863) Shoyamoni created an *ijara* of her interest for a term of 60 years (1270 to 1329 B. S.,) in favour of one Saroda Prosad Mukerji, and Annoda Prosad Mukerji the father of the plaintiffs ; that between 1271 to 1273 B. S. Sarada and Annoda, on the basis of their *ijara*, granted several *dar-ijaras* of those properties in favour of different persons, who again created serveral *se-*

* Appeals from Original Decrees Nos. 71, 74, 87, 94, 99 and 175 of 1899, against the decree of Prosanna Kumar Ghose, Subordinate Judge of Nadia, dated November 28, 1898.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Geidt.

(1) (1897) I. L. R. 25 Cal. 1 ; L. R. 24 I. A. 164.
(2) (1901) I. L. R. 28 Cal. 532.
(3) (1886) I. L. R. 13 Cal. 308 ; L. R. 13 I. A. 84.
(4) (1900) I. L. R. 25 Bom. 337 ; L. R. 27 I. A. 216.
(5) (1892) I. L. R. 20 Cal. 487 ; L. R. 20 I. A. 30.
(6) (1899) I. L. R. 24 Bom. 260.
(7) (1887) I. L. R. 15 Cal. 58 ; L. R. 14 I. A. 148.
(8) (1892) I. L. R. 19 Cal. 629.
(9) (1902) 6 C. W. N. 863.
(10) (1896) I. L. R. 24 Cal. 77.

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ijaras in favour of others; that Shoyamoni died in Kartic 1300 B. S. (September 1893), and on her death they were entitled as reversionary heirs to recover khas possession of the properties left by the last full owner.

The suit was brought on the 30th September 1897, for recovery of possession of the said properties by cancellation of the *ijara* created by Shoyamoni and of the *dar-ijaras* and *se-ijaras* created by the *ijaradars*. The defence, *inter alia*, was that the Court had no jurisdiction to entertain the suit; that the suit was bad for non-joinder and misjoinder of parties; that the suit was barred by the general and special law of limitation; that the plaintiffs were not entitled to maintain the suit in respect of their shares only; that the *ijara*, *dar-ijaras* and *se-ijaras* were valid and binding as against the plaintiffs, as they were created for legal necessity and with the consent of the then reversioners; and that by acceptance of rent and allowing the *ijaradars* to go on paying the Government revenue, the plaintiff's must be taken to have elected in favour of the lease.

The Court of First Instance having overruled the objections set aside the *ijara*, the *dar-ijaras* and *se-ijaras*, and decreed the plaintiffs' claim for khas possession of the properties with the exception of those in dispute lying in the districts of Faridpore and Mymensingh.

Dr. *Ashutosh Mookerjee* (Babu *Hara Prosad Chatterjee* and Babu *Chunder Kant Ghose* with him) for the defendants-appellant (in appeal No. 74). The only question (material to the point) is whether the suit of the plaintiffs is barred by limitation. I submit **[992]** that Article 91 of Schedule II of the Limitation Act applies to this case. The reversioners are bound to set aside the lease before they can recover possession from my clients, who are the *ijaradars*, *dar-ijaradars*, etc. The plaintiffs themselves took that view of the matter as appears from their prayer (*Ka*) in the plaint. The lease by the widow became, on her death, only voidable and not void. The following cases were cited:—*Modhu Sudan Singh* v. *Rooke* (1), *Sadai Naik* v. *Serai Naik* (2), *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (3), *Malkarjun* v. *Narhari* (4), *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (5), *Shrinivas Murar* v. *Hanmant Chavdo Deshapande* (6), *Janki Kunwar* v. *Ajit Singh* (7), *Mahabir Prashad Singh* v. *Hurrihur Pershad Narain Singh* (8), *Chunder Nath Bose* v. *Ram Nidhi Pal* (9), *Jagannath Prasad Gupta* v. *Runjit Singh* (10), *Ram Chandra Mukerjee* v. *Ranjit Singh* (11), *Lali* v. *Murlidhar* (12).

Dr. *Rash Behary Ghose* (Babu *Ram Charan Mitter* and Babu *Lal Mohan Das* with him) for the respondents. I contend that Article 91, Schedule II of the Limitation Act has no application to the present case, which is governed by twelve years' limitation prescribed by Article 141 of the 2nd Schedule of the Act. The main object of the suit is to recover possession of immoveable properties, and the plaintiffs' prayer

(1) (1897) I. L. R. 25 Cal. 1; L. R. 24 I. A. 164.
(2) (1901) I. L. R. 28 Cal. 532.
(3) (1886) I. L. R. 13 Cal. 308; L. R. 13 I. A. 84.
(4) (1900) I. L. R. 25 Bom. 387; L. R. 27 I. A. 216.
(5) (1892) I. L. R. 20 Cal. 487.
(6) (1899) I. L. R. 24 Bom. 260.
(7) (1887) I. L. R. 15 Cal. 58; L. R. 14 I. A. 148.
(8) (1892) I. L. R. 19 Cal. 629.
(9) (1902) 6 C. W. N. 863.
(10) (1897) I. L. R. 25 Cal. 354.
(11) (1899) I. L. R. 27 Cal. 242.
(12) (1901) I. L. R. 24 All. 195.

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to set aside the *ijara*, *dar-ijaras* and *se-ijaras* is subservient to that prayer. The plaintiffs are not bound to have the *ijara*, *dar-ijaras*, *se-ijaras*, etc., set aside; see Articles 121 and 125, Schedule II of the Act. I rely on the following cases:—*Sheo Shanker Gir* v. *Ram Shewak Chowdhri* (1), *Sham Lall Mitra* v. *Amarendro Nath Bose* (2), *Sreeramulu* v. *Kristamma* (3), *Beni Pershad Keori* v. *Dudh Nath Roy* (4), *Srinath Kur* v. *Prosunno Kumar Ghose* (5), *Pursut Koer* v. *Palut* [993] *Roy* (6), *Sheo Narain Singh* v. *Khurgo Koerry* (7), and *Runchordas Vandravandas* v. *Parvatibai* (8).

Dr. *Ashutosh Mookerjee* in reply.

Cur. adv. vult.

MACLEAN, C. J. This is a suit by four out of the seven reversionary heirs of a deceased Hindu, subject to the interest of his widow, and its object is to have a certain *ijara* lease for sixty years, dated September 1863, and all the *dar-ijaras* and *se-ijaras* and other rights subordinate thereto declared inoperative as against the plaintiffs for khas possession of the property in dispute and for mesne profits.

The suit was substantially decreed by the Subordinate Judge of Nadia; and against that decision six appeals have been presented, one of them, No. 71 of 1899 by the plaintiffs, on the ground that the Court below had not given them all to which they are entitled, whereas appeals Nos. 74, 87, 94 and 99 are by those claiming under the *ijara*, whilst appeal No. 175 relates to a very small matter; and the plaintiffs and the appellant in that appeal have settled it.

The following is a short history of the case:—

One Chunder Bhusan Mukherjee, from whom the title of the plaintiff is traced, died in 1832, without any son, but leaving his wife, Shoyamoni, him surviving. At that time she was a child, apparently about ten or eleven years old; she survived her husband for more than 60 years, and died in October 1893. She would appear to have been dispossessed of the property to which she was entitled as heiress of her husband by a relation of his, one Baman Das Mukherjee, and in 1844 she instituted a suit to recover the property inherited from her husband: the litigation lasted from 1844 to 1858, when her right, which had been decreed by the first Court and by the Sudder Dewany Adalut, was ultimately affirmed by the Judicial Committee of the Privy Council in 1858. She would appear to have experienced great difficulty in reaping the advantage of her decree owing to the opposition of Baman Das: she obtained possession [994] of part of the property only, and in September 1863 she executed the *ijara* lease now complained of. The *ijaradars* under the ijara were Annoda Prosad Mukerjee and Saroda Prosad Mukerjee the former of whom was, at that time, one of the reversioners, whilst Saroda Prasad Mukerjee was the son of another reversioner Gouri Prosad Mukerjee. Annoda Prosad Mukerjee who died in 1882, was the father of the present plaintiffs and of Upendra Lall Mukerjee, who is also one of the reversionary heirs, and who declining to be a plaintiff was made a defendant in the suit. The other reversionary heirs are Tara Nath Mukerjee and Nil Ratan Mukerji, and they are defendants. The rental reserved under the *ijara* was Rs. 12,330 odd; the term was for sixty

(1) (1896) I. L. R. 24 Cal. 77.
(2) (1895) I. L. R. 23 Cal. 460
(3) (1902) I. L. R. 26 Mad. 143.
(4) (1899) I. L. R. 27 Cal. 156; L. R. 26 I. A. 216.
(5) (1883) I. L. R. 9 Cal. 934.
(6) (1881) I. L. R. 8 Cal. 442.
(7) (1882) 13 C. L. R. 337.
(8) (1899) I. L. R. 23 Bom. 725.

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years from the date of the lease, and the ijaradars were to pay out of the above rent Rs. 7,030 odd, the collectorate sudder revenue.

It is objected for the plaintiffs that Shoyamoni had no power to grant a lease of the property beyond the period of her own life.

The defendants are those claiming under the *ijaras*, *dar-ijaras* and *se-ijaras*.

The plaintiffs claim that the *ijara* lease for the period beyond the life of the widow is an incumbrance on the estate, that they are entitled to have it set aside, and, as I have already pointed out they ask for that relief with a view to obtain khas possession of the property.

I have already mentioned that the widow died in October 1893, and the suit was instituted on the 30th April 1897, more than three years after her death.

The defendants contend (i) that the suit is barred by limitation ; (ii) that the lease is binding upon the plaintiffs, as it was executed for legal necessity and with the consent of the then reversioners ; and (iii) that by acceptance of rent and allowing the ijaradars to go on paying the Government revenue, the plaintiffs must be taken to have elected in favour of the lease.

The defendants are in possession, and if they are right on the first point, the others become immaterial.

The case of the defendants is that the plaintiffs cannot recover possession of the property without first setting aside the *ijara* lease of 1863 ; that that lease is an obstacle in their path which **[995]** they must get rid of ; that the form of their suit recognizes that this is so ; and they contend that, under those circumstances, the case falls within Article 91 of the Second Schedule to the Limitation Act, which runs as follows :—" To cancel or set aside an instrument not otherwise provided for," the period of limitation being " three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him."

The plaintiffs, on the other hand, say that the suit is one merely for the recovery of possession of immoveable property to which they become entitled on the death of the widow, and they rely upon Article 141 of the Schedule, which runs as follows :—" Like suit," that is, a suit for possession of immoveable property " by a Hindu or Mahomedan entitled to the possession of immoveable property on the death of a Hindu or Mahomedan female," the period of limitation is " twelve years " from the time " when the female dies."

These being the contentions of either side, we have first to consider whether the lease in question was *void* or *voidable*. This is set at rest by the Judicial Committee of the Privy Council in the case of *Modhu Sudan Singh* v. *Rooke* (1), where it was held that a lease similar in principle to that now under discussion was, on the death of the widow, only voidable and not of itself void. Their Lordships there say at page 8 :—

" In considering their effect it must be observed that the *putni* was not void ; it was only voidable ; the Rajah might elect to assent to it, and that it was valid. Its validity depended upon the circumstances in which it was made. The learned Judges of the High Court appear to have fallen into the error of treating the *putni* as if it absolutely came to an end at the death of the widow."

(1) (1897) I. L. R. 25 Cal. 1 ; L. R. 24 I. A. 164.

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This case (1) has been followed by this Court in the case of *Sadai Naik* v. *Serai Naik* (2).

In the present case it may be remembered that the defence of legal necessity and of election to treat the lease as valid, if substantiated, would show that the lease could not be treated as *ipso* [996] *facto* void. The plaintiffs evidently treat the lease as one that must be avoided by being set aside; and the question before us appears to resolve itself into this—whether they could obtain khas possession without having the lease set aside. If they could not, Article 91, and not Article 141, would seem to govern the case.

There appears to us to be no real difference in principle between the present case and those cases in which the Judicial Committee has held that when a plaintiff seeks to recover *khas* possession of property, and he cannot successfully do so unless and until he displays an apparent adoption, which stands in his way, his suit must be regarded as one to obtain a declaration that the adoption is invalid, and he must bring it within the period specified in Article 118 of the Second Schedule to the Limitation Act. I refer to the case of *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (3) and to the observations of their Lordships in the case of *Malkarjun* v. *Narhari* (4). In the latter case their Lordships say at page 350:—"Then the suit, being rightly described as one to set aside an adoption, attracted the consequence that the time for suing ran from the date of the adoption, and that the suits of 1873 and 1874 were barred. It is obvious that the expression 'set aside a sale' is not attended by any such difficulty, because a sale, valid until set aside, can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside." The same view was held by the Privy Council in the case of *Mohesh Narain Munshi* v. *Taruk Nath Moitra* (5) and followed by the Full Bench of the Bombay High Court in the case of *Shrinivas Murar* v. *Hanmant Chavdo Deshapande* (6).

Again the same principle would appear to be involved in the case of *Janki Kunwar* v. *Azit Singh* (7), *Mahabir Pershad Singh* v. *Hurrihur Pershad Narain Singh* (8), *Chunder Nath Bose* v. *Ramnidhi Pal* (9) and *Shrinivas Murar* v. *Hunmant Chavdo Deshapande* (6). The only case in this Court which would appear to take a contrary view is that of *Sheo Shankar Gir* v. *Ram* [997] *Shewak Chowdhri* (10), but there the document was treated as void and not voidable.

It seems to me to be a little foreign to the present enquiry to discuss the cases of *Jagannath Prasad Gupta* v. *Runjit Singh* (11), *Ram Chandra Mukerjee* v. *Runjit Singh* (12), and of *Lali* v. *Murlidhar* (13), for these were cases the converse of that in the Privy Council—*Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhuri* (14), and that of *Srinivas Murar* v. *Hamant Chavdo Deshapande* (6).

In the case before us the plaintiffs expressly ask to have the *ijara* lease set aside, and cannot recover possession unless it is set aside.

(1) (1897) I. L. R. 25 Cal. 1; L. R. 24 I. A. 164.
(2) (1901) I. L. R. 28 Cal. 582.
(3) (1886) I. L. R. 13 Cal. 208; L. R. 13 I. A. 84.
(4) (1900) I. L. R. 25 Bom. 337; L. R. 27 I. A. 216.
(5) (1892) I. L. R. 20 Cal. 487; L. R. 20 I. A. 30.
(6) (1899) I. L. R. 24 Bom. 260.
(7) (1887) I. L. R. 15 Cal. 58; L. R. 14 I. A. 148.
(8) (1892) I. L. R. 19 Cal. 629.
(9) (1902) 6 C. W. N. 868.
(10) (1896) I. L. R. 24 Cal. 77.
(11) (1897) I. L. R. 25 Cal. 354.
(12) (1899) I. L. R. 27 Cal. 242.
(13) (1901) I. L. R. 24 All. 195.
(14) (1886) I. L. R. 13 Cal. 308.

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From these authorities it would appear that if the plaintiffs can recover possession without setting aside the lease, then Article 141 would apply, and not Article 91; but if they cannot so succeed without getting rid of the lease, then the case would fall within Article 91.

It is contended, however, for the plaintiffs that Article 91 cannot apply, because the time from which the period begins to run is when the facts entitling the plaintiffs to have the instrument cancelled or set aside become known to them.

It has not been disputed that these facts were known to them on the death of the widow, and probably long before, for the father (Anuoda) of five of the reversioners was himself one of the ijaradars, and his *ijara* interest passed under his will. But it is said that these facts might have become known to them during the life of the widow, in which case they would have had to bring their suit during her lifetime. If well founded, I scarcely see how this argument would assist the plaintiffs: it would only mean that they were not necessarily entitled to three years from the death of the widow; but the argument does not appear to me to be sound, because the lease was perfectly good during the widow's life, and the reversioners did not become entitled to have the instrument set aside until after her death, and her death is one of the elements which entitled them to have it set aside.

[998] In the case suggested the plaintiffs might have proceeded under Article 125 which does not appear to clash, as has been suggested, with the view we take as to the applicability of Article 91. If a reversioner desire to set aside a deed executed by a Hindu widow, which is voidable as against him, the Legislature may well have thought that it was desirable that such suits should be brought within a much shorter period than that prescribed for the recovery of immoveable property in ordinary cases.

On these grounds I think the suit was barred by limitation, and it must be dismissed with costs.

The result will be that appeals Nos. 74, 87, 94 and 99 will be allowed with costs, and appeal No. 71 will be dismissed with costs. Appeal No. 175 was compromised.

As between the plaintiffs and the defendants Nos. 18 to 24, both inclusive, we on the 1st day of the hearing, *i.e.*, at the hearing of appeal No. 71, sanctioned a compromise which the parties have come to. That was before the case had been argued. That compromise will stand and will not be affected by the judgment which has just been delivered as between the plaintiffs and the other defendants.

GEIDT, J. I concur.

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30 C. 999 (=7 C. W. N. 784.)

[999] ORIGINAL CIVIL.

KUSUM KUMARI ROY *v.* SATYA RANJAN DAS.*

[12th and 17th June, 1903.]

Hindu Law—Adoption, validity of—Son of a Brahmo, adoption of—Onus of proof—Incapacity—Brahmo Samaj—Evidence taken on Commission, reference to—Practice.

* Original Civil Suit No. 759 of 1897.