1871

NILKAMAL LAHURI v. SRI GUNOMANI DEBI AND SRI BARODASUNDARI DEBI.

on the part of the Court, the claim of the respondent to mesne profits to some period short of the whole number of years between 1826 and 1854, during which the respondent was kept out of possession of the larger share to which he was entitled. They desire to leave that question open. It will be open to the appellant, in taking the account for which the case has been remitted to the Court of first instance by the High Court, to show any special case (if he is able to show it), by way of appeal to the equity of the Court to shorten the account which otherwise would have to be taken of the mesne profits. Their Lordships leave that view of the case, if it can be presented by the appellant, entirely untouched by what has now been said.

On the whole, therefore, their Lordships are of opinion that in substance the decision of the High Court is correct; they think that the present appeal ought not to succeed, and they will humbly advise Her Majesty that it should be dismissed with costs.

Appeal dismissed.

Agent for appellant : *Mr. Wilson.*

Agent for respondent : *Mr. Barrow.*

[ORIGINAL CIVIL.]

Before Mr. Justice Phear.

1871 *June 12.*

BISWANATH CHUNDER *v.* KHANTAMANI DASI AND ANOTHER.

Limitation—Hindu Widow—Suit to set aside Alienation—Reversionary Heirs.

9 B. L. R. 82.

K., a Hindu widow, assigned one moiety of her share in her husband's estate to H. S., in consideration that H. S. should conduct and pay all costs of a suit which was then to be instituted against her husband's brothers, of whom B. C., the present plaintiff, was one, to recover the share to which she was entitled, and also to pay her maintenance in the meantime. The assignment was dated 24th December 1864. The suit was brought, and a certain sum, in Government paper and notes, was decreed to K. on August 5th, 1868. This sum was paid into Court by B. C. on 10th March 1869, and upon K.'s application was on 10th March 1871 paid out to her. B. C. then sued as rever-

1871
BISWANATH CHUNDER
v.
KHANTAMANI DASI.

sionary heir to have the deed of assignment set aside, and that H. S., should be restrained from receiving the moiety. The plaint was filed on 14th March 1871. In it he alleged his apprehension of waste by K. *Held* that the suit, so far as it was based on the allegation of apprehended waste, was not barred by the Law of Limitation

THIS suit was brought for the purpose of having retained in Court a certain sum of money to which the defendant Khantamani had been declared entitled by a decree dated August 5th, 1868. The suit in which that decree was made had been brought by Khantamani as widow and heiress of one Gokul Chandra Chunder, one of the brothers of Biswanath, against the present plaintiff and his brothers, for a declaration of her right in, and to obtain possession of, her husband's share in certain property, of which he had been up to the time of his death in joint possession with his brothers. Under the decree of August 5th, 1868, Biswanath and the other defendants paid into Court the sum of Rs. 1,01,303-14-2, on 10th March 1869. On 10th March 1871, Khantamani applied that the money might be paid out of Court to her. That application was opposed by Biswanath Chunder as the immediate reversionary heir of Gokul Chandra, by an affidavit in which he stated, upon information and belief, that Khantamani had assigned half the share which had been recovered by her, to Hiralal Seal in consideration of his conducting the suit for her, and that she was leading an immoral life; and expressed his apprehension that if the money were allowed to be taken out of Court, it would be lost to the reversioners. Biswanath at that time also made a counter application that the money might be ordered to be retained in Court. The order in both applications was made in favor of Khantamani, and on appeal by Biswanath that order was confirmed on 13th March 1871 (1). The present suit was thereupon brought by Biswanath, and an *ad-interim* injunction was applied for to restrain Khantamani from taking the money out of Court, but was refused. The plaint was filed on 14th March 1871. In it Biswanath alleged that the assignment to Hiralal Seal was made without any sufficient consideration, and was therefore in-

(1) See 6 B. L. R., 749.

1871

BISWANATH CHUNDER *v.* KHANTAMANI DASI.

valid. He also made allegations of immorality against Khantamani, and stated that she was living extravagantly and in a position quite unsuited to her character of a Hindu widow, and expressed his apprehension that, on obtaining the sum of Rs. 1,01,302-14-2, Khantamani would pay over one moiety thereof to Hiralal Seal, and would squander the remainder in profligacy and extrvagance and commit waste by which the money would be entirely lost to the reversionary heirs. The plaint prayed that the money might be retained in Court, and a receiver, if necessary, be appointed; that Khantamani Dasi might be restrained by injunction from receiving the money out of Court, and that, if necessary, the order of 9th March 1871 should be set aside; that if Khantamani should have obtained possession of the money, she might be ordered to pay it back into Court, and the defendant Hiralal Seal be restrained from receiving the moiety, or be ordered to bring it back into Court if he had received it; and that it might be declared that the assignment to Hiralal Seal was invalid, and created no valid charge against the sum of Rs. 1,01,302-14-2.

The defendant Khantamani Dasi, in her written statement, stated that she had taken the money out of Court after the dismissal of the application for an *ad interim* injunction, and denied the allegations of immorality and waste.

The defendant Hiralal Seal, in his written statement, set up the defence, amongst other things, that the suit was barred by the Law of Limitation; and he alleged that the assignment by Khantamani, which was executed on the 24th December 1864, was made *bonâ fide* and for the relief of the pressing necessities of Khantamani, and to enable her to carry on the suit she had instituted for the recovery of her husband's share of the estate of his father, and that the plaintiff became aware of the said assignment at or before the hearing of the suit against him and his brothers, and until the institution of the present suit had taken no steps to have the same set aside.

The case came on for settlement of issues, and a preliminary issue was raised by Mr. Marindin whether the suit was barred by the Law of Limitation.

Mr. *Cowell* and Mr. *Bonnerjee* for the plaintiffs.

1871

BISWANATH CHUNDER v. KHANTAMANI DASI.

The *Advocate General* and Mr. *Lowe* for the defendant Khantamani.

Mr. *Marindin* and Mr. *Evans* for the defendant Hiralal Seal.

Mr. *Marindin*.—The suit is barred by the Law of Limitation. There is no allegation of actual waste having been committed; it is merely stated that the plaintiff has apprehensions of waste which may be quite unfounded. The suit is one to set aside the deed of assignment of 1864 to Hiralal Seal, and more than six years having elapsed it is barred by lapse of time. [PHEAR, J.—Does not a deed of this kind form a continuing cause of action?] The cause of action arose at the date of the deed—*Moonshee Syed Ameer Ali* v. *Mohendronath Bose* (1).

Mr. *Cowell contra*.—The suit is not barred. One cause of action arose on the execution of the deed of assignment; but another cause of action arose when Khantamani obtained possession of the property. This is not a suit merely to set aside the deed of 1864. Khantamani has possession of the property, and we allege that actual waste is about to be committed. She has had previously no opportunity of committing waste, as she has been out of possession (2). *Kamikhaprasad* v. *Srimati Jagadamba Dasi* (3).

PHEAR, J.—I think, on the whole, I must decide this preliminary issue in favour of the plaintiff. Biswanath sues, as expectant heir in reversion, to restrain Khantamani, a Hindu widow in possession, from committing waste. His ground of action is simply this, namely, that Khantamani in 1864, for a certain consideration, not having at that time obtained possession of the property, executed a deed by which she assigned one-half of it to Hiralal Seal. She has very lately got possession of the property. The plaintiff contends that the assignment is of such a nature as to be void against the reversionary heirs expectant on the death of Khantamani; and he says he is apprehensive that

(1) 2 W. R., 272.
(2) 6 Moore's I. A., 445.
(3) 5 B. L. R., 516.

Khantamani now having got the property into her hands will carry out the terms of the assignment and transfer one-half of it to Hiralal Seal, and so commit what may not improperly be termed irreparable waste, inasmuch as the property is in the shape of money. Mr. Marindin for Hiralal Seal has pressed on me with some force that apprehension really amounts to nothing; that consequently the suit must be taken to be substantially one brought simply to set aside the original assignment, and that if it be so taken the suit is barred by limitation. I think the suit to set aside the deed of alienation simply would be so barred; but it appears to me that Mr. Cowell is right in arguing that this suit involves somewhat more than that. It is a material point in the case that Khantamani has only just got possession of the property, and that the opportunity for committing the anticipated waste has only just occurred. It seems to me that the plaintiff may, under these circumstances, well enough say that the fact of Khantamani having lately obtained the property is a fact which gives rise to his cause of action, in asmuch as it first gives the opportunity to commit the waste which he has reason to anticipate in consequence of her having bound herself by the deed of 1864. So that while I think the original alienation alone could not now be called in question by the plaintiff, it appears to me that it is not too late for him to come into Court to restrain Khantamani from parting with the money under the terms of that alienation. I say nothing now as to the nature of the relief which he asks for in the prayer of his plaint; it will be time enough to consider that in detail at the hearing of the suit. But I may say that even if the Court refrains from calling back the money, as it probably will, at any rate to the full extent of the fund, it may still think it right to restrain Khantamani from paying the whole of the money to Hiralal Seal, and Hiralal Seal from receiving the whole, or if he has already received the whole, may compel him to refund any excess which he may have received beyond the money advanced by him with reasonable interest and costs. It appears to me that there is some likeness between a case of this kind and the case of an executor in England who is about to aliene, or may have aliened, a portion of the assets of his testator for an improper purpose. Although an exe-

1871
BISWANATH CHUNDER v. KHANTAMANI DASI.

cutor by English law has a full legal title to the assets and power to pass that title, a Court of Equity will, if the occasion call for it, restrain him from the full exercise of that power.

Attorneys for the plaintiff: Messrs. *Dhur* and *Mitter*.

Attorneys for the defendants: Baboo *P. C. Bonnerjee* and Messrs. *Gray* and *Sen*.

[PRIVY COUNCIL.]

P. C.*
1871
Jan. 20.

PATTABHIRAMIER (DEFENDANT) *v.* VENKATAROW NAICKEN AND NARASIJHA NAICKEN (PLAINTIFFS).

ON APPEAL FROM THE LATE SUDDER DEWANNY ADAWLUT AT MADRAS.

Mortgage. Madras Law of—Right to redeem—Regulation XVII of 1806—*False Deed in support of True Claim.*

See also 3 B.L.R. 206. B.L.R. 312.

In a suit instituted in 1853 to redeem a mortgage containing a clause making it an absolute sale in default of redemption by a certain date,—*Held*, that in the Madras Presidency, effect must be given to that clause, the Regulation XVII of 1806 not being applicable.

A party is not precluded from succeeding upon a title established by a genuine deed, because he sets up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title.

THIS suit was brought on the 17th November 1853, by the respondents against the appellant and others to recover from them certain property in Talook Namiclam which had been originally mortgaged by the respondents' ancestors on the 13th June 1808 to the appellant's ancestors, and which the respondents alleged had been held by way of usufructuary mortgage, and was therefore still redeemable under the peculiar wording of the mortgage.

The defence was that there had been a sale of the property to the appellant.

*Present:—THE RIGHT HON'BLE LORD CHELMSFORD, SIR JAMES W. COLVILE, LORD JUSTICE MELLISH, AND SIR LAWRENCE PEEL.