1868

SHIU GOLAM SING v. BARAN SING

seems to me upon those authorities, and certainly upon the reason of the thing, that the plaintiff coming into Court to claim a share in property as being joint-family property, must lay some foundation before he can succeed in his suit. He must, at least, show that the defendants whom he sues constitute a joint family, and that the property in question became joint property when acquired, or that at some period since its acquisition, it has been enjoyed jointly by that family. It will be sufficient for this purpose for him to show that the family, of which the defendants came, was at some antecedent period, not unreasonably great, living joint in estate; and that the property in question was either a portion of the patrimonial estate so enjoyed by the family, or that it has been since acquired by joint funds. In this case, the Principal Sudder Ameen has found that the plaintiff has given no proof of the family being joint, beyond the admitted fact of the three persons being brothers, and the plaintiff has also given no sort of proof that these brothers ever were living in the joint enjoyment of any property, still less that this property was acquired by the use and employment of any joint funds. It seems to us that he was entirely right, on the finding, to dismiss the plaintiff's suit, without looking further into the case.

The appeal will be dismissed with costs.

Before Mr. Justice Loch and Mr. Justice Glover.

SHIB KUMAR JOTI *v.* KALI PRASAD SEN.*

1868 *July* 25.

Upanchowki Tenure—Mesne Profits—Rent—Act X of 1859.

A. sued B. for possession, with mesne profits, of a share in certain talooks, alleging that he purchased it in execution of a decree. B. proved that he held the lands under an Upanchowki title. The lower Court, however, awarded to A. mesne profits for six years.

Held, that B. having proved his Upanchowki title, A. could only be entitled to a share of the Upanchowki jumma, which was not of the nature of mesne profits, but of rent; and, therefore, a suit to recover that could not be brought in the Civil Court.

THE suit was for recovery of possession of certain shares in talooks, with mesne profits from the date of purchase, the 29th

* Special Appeal, No. 1787 of 1867, from a decree of the Judge of Rungpore, modifying a decree of the Principal Sudder Ameen of that district.

1868

SHIB KUMAR JOTI v. KALI PRASAD SEN.

December 1852, to the 23rd December 1864. The plaintiffs had previously brought an action, against some of the present defendants, to establish their proprietary right to the talooks purchased by them, and obtained a decree on the 31st of May 1862.

The Principal Sudder Ameen, on the 29th of June 1865, relying on the mutation register of 1207 (1800,) gave a decree in favor of the plaintiffs for possession, by realization of rents from the ryots of the talooks, and allowed wasilat for 6 years only, from 10th Paush 1265 (24th December 1858) to 10th Paush 1271 (24th December 1864), mesne profits for the rest of the period claimed being held barred by limitation.

On appeal, the Judge, without entering into the merits of the case, reversed this decision, on the 19th February 1866, holding that as the proprietary right of the plaintiffs to the shares of the talooks was established by the former decree of 1862, the question involved in this present action for possession and mesne profits resolved itself into one of rent; the plaintiffs ought to have sought their remedy in the Revenue Court under Act X. of 1859.

But on special appeal, the case was remanded, on the 13th of December 1866, by the High Court (*coram* Loch and Macpherson, JJ.,) who held that a suit for wasilat would lie under the circumstances in which the plaintiffs were placed, and that their remedy was not by proceeding in the Revenue Court. The Judge was directed to try the case on the merits.

The defendants set up an old sunnud, alleging that they held the lands in dispute under an *Upanchowki* or istemrari title. It was not denied by the plaintiffs that the other shares of the mehals were held under an istemrai or mukurari title, but they contended that it was confined to the other shares only.

The Judge held that the sunnud was proved to be a genuine document; that it covered the whole of the mehals now sued for, and conferred on the defendants an *Upanchowki* title. But he gave a decree for the plaintiff in respect of wasilat for six years, which he awarded against the defendants, according to their respective shares, with reference to the present *Upanchowki jummas*,

1868

SHIB KUMAR JOTI v. KALI PRASAD SEN.

Baboo *Anukul Chandra Mookerjee* (Baboo *Srinath Das* with him) for appellants.

Mr. *Datta* (Baboos *Kali Mohan Das, Iswar Chandra Chuckerbutty,* and *Bhawani Charan Dutt* with him) for respondents, who preferred a cross appeal, under section 348 of Act VIII. of 1859, with respect to the point of wasilat, contended that the plaintiffs were not entitled to claim wasilat when the right of the defendants to hold as *Upanchowkidars* or istemraridars, was clearly established.

The judgment of the Court was delivered by

LOCH, J. (After stating the facts).—Having come to to the conclusion that the *Upanchowki jumma* covered the whole of the two villages, we do not understand upon what ground the Judge gave a decree for wasilat for six years, for the *Upanchowki* once being established, plaintiff cannot get a decree for wasilat, but can only claim his share in the *Upanchowki jumma* which cannot, under any circumstances, be called wasilat or mesne profits; so long as the validity or otherwise of the *Upanchowki jumma* was not determined. the claim for mesne profits was apparently proper, but no sooner had it been established that the *Upanchowki jumma* covered the whole of the two villages than the case was changed; the plaintiff becomes entitled to recover only her share of that jumma. With regard to that rent, she cannot recover in the Civil Court; and we, therefore, think that the Judge is wrong in giving a decree for mesne profits.

We, therefore, reverse the latter part of the judgment of the lower appellate Court, and dismiss plaintiff's appeal with costs, and give a cross decree to the defendants.