1869

RAJLAKHI DEBI v. TARAMANI CHOWDHRAIN

therefore, the money was taken away from her, it was only nominally taken away from her; and in reality it was taken away from Hara Chandra. Neither was there any necessity for her to recoup Hara Chandra, against whom there was no decree. It was thus clearly nothing more than a voluntary payment on her part, and so was not a payment which entitled her to sue for contribution against her co-sharers.

In this view of the case we think that the plaintiffs' suit must be dismissed, and the judgments and decrees of both the lower Courts be reversed with costs in all Courts in favor of the special appellant Rajlakhi Chowdhrain.

We would add that the judgment of the Privy Council, *Fatima Khatun* v. *Mohammed Jan Chowdry* (1), is not in our opinion in point; and as regards special appeal No. 2350, we think that it must be dismised with costs.

Before Sir Barnes Peacock, Kt., Chief Justice and Mr. Justice L. S. Jackson.

1868
July 27. †

UMA SUNDARI DASI AND OTHERS (DEFENDANTS) *v.* DWARKANATH ROY (PLAINTIFF.)*

Limitation—Act XIV. of 1859, *cl.* 13, *s.* 1, *and s.* 2—*Benamidar—Trustee.*

A Hindu died in 1840, leaving him surviving seven sons, who, after their father's death, entered into joint possession of certain immoveable property which had been left by him, and continued to live in commensality until 1859, when a separation in mess took place. Subsequently, more than twelve years after the father's death, a suit was brought by the youngest son for his share of the joint ancestral property belonging to the father, and to property subsequently acquired out of the proceeds of such joint estate, to which the brothers were entitled in equal shares. The plaintiff failed to show that any payment was made to him or any person through whom he claimed by the person in possession or management of the property within 12 years before the commencement of the suit.

see also 12 B. L. R. 220
10 B. L. R. 279.

Held, that the suit was barred by limitation under clause 13, section 1 of Act XIV. of 1859. (2).

* Regular Appeals, Nos. 281 and 287 of 1866, from a decree of the Judge of Beerbhoom, dated the 28th May 1866.

† The judgement in the case was given on the 7th May 1868. The records were subsequently recorded on 27th July 1868.

(1) 1 B. L. R., (P. C.) 21.

(2) *Act XIV.* of 1859, *sec.* 1, *cl.* 13. To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property: and to suits for the recovery of maintenance, when the right to receive such maintenance is a charge in the inheritance of any estate, the period of twelve years from the death of the persons from whom the property alleged to be joint is said to

Held also, that a benami transaction does not create the relation of trustee and *cestuique trust*. A benamidar is not a trustee within the meaning of Act XIV. of 1859. section 2.

Messrs. *R. V. Doyne* and *W. M. Bourke*, and Baboos *Krishnakishor Ghose*, *Jagadanand Mookerjee*, *Ramesh Chandra Mitter* *Chandramadhab Ghose* and *Ashutosh Chatterjee* for appellants.

Mr. *J. W. Montriou* and Baboos *Srinath Doss*, *Annada Prasad Banerjee* and *Anukul Chandra Mookerjee* for respondents.

The facts of the case fully appear in the following judgment delivered by

PEACOCK, C. J.—Parmananda Roy had eight sons, of whom Shibnarayan Roy, the second, died without issue in his father's life-time. Ganganarayan, of whom the last three defendants, Ramkumar, Nandakumar, and Saradakumar, were the sons, was the eldest, Kailashnath of whom the 5th defendant, Uma Sundari Dasi, is the widow, was the 6th, and the plaintiff, Dwarkanath Roy, was the youngest. The defendants, Kashinath, Haranath, Trailakhanath, and Loknath, were the 3rd, 4th, 5th, and 7th sons.

The suit is substantially against the three sons of Ganganarayan and the widow of Kailashnath ; the other defendants are probably colluding with the plaintiff. At any rate their interests are substantially the same as his, and they set up no substantial defence, and state that they have no objection to the plaintiff's claim. Parmananda died about the year 1247 or 1840, Ganganarayan, about the year 1260 or 1853, and Kailasnath died, without issue, above 1269 or 1862, leaving the defendant, Uma Sundari Dasi his widow. Up to the year 1823, Paramananda and his brothers and nephews were joint in food and estate. In that year, however, they separated, and their several shares of the joint property were

have descended, or on whose estate the maintenance is alleged to be a charge ; or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share, or on account of such maintenance, as the case may be.

Section 2.—No suit against a trustee in his life-time, and no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time. * * * *

1868

UMA SUNDARI DASI v. DWARKANATH ROY.

subsequently defined by a deed of partition dated 21st Baisakh 1238. By that deed it is stated that Paramananda was allowed a larger share than the other brothers, on partition, in consequence of his having acquired a larger portion of the properties, and it was stipulated, that whatever real and personal properties had been acquired by the several co-sharers, should remain with them respectively.

Paramananda's sons were no parties to that partition, they not being entitled, during the life of their father, to any share on partition of the ancestral or other property held jointly by Paramananda and his brothers and nephews. It is not probable that Paramananda's sons would have brought into joint estate with Paramananda and his brothers and nephews any property which they might have respectively acquired, when it appears that Paramananda's brothers and nephews severally kept their self-acquired property, and retained it by express stipulation on partition.

It is alleged by the plaintiff, and may be taken as a fact, that, upon the death of Paramananda, the father, in 1840, his seven surviving sons, entered into joint possession of certain immoveable property which had been left by him, and continued to live in commensality until Aghran 1266 (about the year 1859), when a separation in mess took place. It is not denied that, up to the time of the separation, they remained joint as regards the estate which they took by descent from their father. The separation took place some time after the death of Ganganarayan, who, as before stated, died in 1260 or about 1853. The plaintiff in his plaint alleges that part of the moveable and immoveable property left by Paramananda stood in his own name, and part in those of some of his sons and other individuals; and that during joint tenancy, the family lived under the joint management of Ganganarayan and Kailashnath, and after the death of the former, under that of Kailashnath alone; that several other properties were acquired in the names of some of the defendants out of the joint fund; and that all were jointly in the enjoymet of all the property.

The claim, as pointed out by the defendant's Counsel in his arguments, is not a claim to participate in property separately

acquired by Ganganarayan and Kailashnath, respectively, in Paramananda's life-time, either with or without the use of his funds, or after the death of Paramananda, with the use of joint funds, belonging to the joint family. It is confined to property left by Paramananda standing in his own name or in the names of some of his sons or others, and to property acquired out of the joint funds, of which all the brothers were jointly in the enjoyment. The plaintiff says that, when a separation in mess took place, he proposed that a separation and division of the aforesaid properties, ancestral as well as acquired from the joint funds, should be made, and possession thereof given and and taken in proper order ; that before this could be done, Kailashnath died, and that his widow and heiress obtained a certificate under Act XXVII. of 1860 ; that the plaintiff, being entitled to one-seventh share, instituted this suit for possession and division of moveable and immoveable property, and for the value of moveables, if misappropriated. I allude to this for the purpose of shewing that the claim is confined to the plaintiff's share of joint ancestral property belonging to the father, and to property subsequently acquired out of the proceeds of such joint estate, to which the brothers were entitled in equal shares.

According to the law as current in Bengal, a father is entitled to a share of his son's self-acquired property. If the property is acquired by the son at the charge of the father's estate, the father is entitled to a moiety, the son who makes the acquisition to two shares, and the rest to one share each. See Colebrooke's Dayabhaga, Chapter II., verse 65, and following verses ; and Vyavastha Darpana, 385, 1st edition. If the father's property has not been used, the father has two shares, the acquirer as many, and the rest are excluded from participation. The plaintiff in his evidence says :—" I think Kahsinath, while at Elam Bazar, took money from my father and carried on speculations. I was then a minor.—After Kailashnath's death, Nandakumar Roy has been managing his estate. Nandakumar has married his daughter to Banwari, Kailash's daughter's son. He has held the management from before the marriage."

It is probable that Ganganarayan and Kailashnath were put forward in life by their father, and it is possible that they were

1868

UMA SUNDARI DASI v. DWARKANATH ROY.

assisted by their father's property in making self-acquisitions in his life-time, and so probably were the other sons.

It is not very likely that Kashinath would speculate for the benefit of his brother, who was then only six years old. But, as the plaintiff's claim is not based upon a right to participate in the self-acquired property of his brothers, it is not necessary to enter further into that question or into others arising out of it; such, for instance, as to whether it may not be inferred from the conduct of the parties that each of the sons was content to retain the entirety of his own self-acquisitions, and to forbear to claim, either personally or by inheritance, from his father any share of his brother's self-acquired property in consideration of their showing similar indulgence to him.

In the case of *Eshun Chunder Singh* v. *Shama Churn Bhutto* (1), the Lords of the Judicial Committee expressed a desire to have the rule observed that the "state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff shall not be departed from." It is not competent for the plaintiff, therefore, in this suit to claim any portion of his brother's self-acquisitions.

The defendant, Uma Sundari, by her written statement, alleges amongst other things, that of the properties claimed by the plaintiff those that are joint and undivided are held without dispute by the plaintiff and the other co-parceners and herself; that plaintiff was never ousted by her or by any one; and that the plaintiff is in possession of his one-seventh share of those properties; that of the properties claimed and set out in the schedule to the plaint certain properties specified by her are her stridhan granted to her by her husband, and that she held possession of them as sole owner from the time when they were so granted to her; and that neither the plaintiff nor any other of the co-parceners has ever had any title to a share in them; that others of the said properties were acquired by her husband, the deceased Kailashnath Roy, from the gains of his employments, trades, &c.; and that from the time of the acquisition of them, he was himself separately the possessor. Further to show that the brothers had separate

(1) 11 Moore, I. A., 7.

properties, she alleges that the plaintiff himself is the separate owner of lot Kytorah. She denies that her husband was ever the manager of the joint property, either jointly with Ganganarayan or alone; and states that the management by a younger brother in the life-time of an elder is not probable.

The whole of the properties, as to which the defendant, Uma Sundari, sets up a separate claim, and of which she disputes the plaintiff's right to a share, are set forth and described in a schedule annexed to her written statement. The sons of Ganganarayan put in an answer in some respects similar to that of Uma Sundari, and they, amongst other things, allege that the property specified in the schedule annexed to their written statement, was acquired gradually by their father, Ganganarayan, out of the profits of his employments, trades &c.; and they deny that the plaintiff has ever been ousted from, his share of the joint property. These defendants, as well as Uma Sundari, set up twelve years' limitation as a bar to the plaintiff's claim, under the provisions of Act XIV. of 1859, section 1, clause 13. The plaintiff in his plaint did not allege that he had ever been ousted by Uma Sundari or any of the other defendants fron his share of any property which, prior to the separation, had been held jointly by the family or in the profits of which he had ever participated. The only property in which the plaintiff's right to participate is disputed by the defendants, is that set out in the schedules annexed to their respective written statements. Two issues were framed by the Judge : *First.*—Whether the property in dispute was joint or self-acquired. *Second.*—Whether the suit was barred by limitation. Upon both of these issues, the Judge held that the onus of proof lay upon the defendants, and he ultimately upheld the plaintiff's claims, and pronounced a decree in his favor.

The Judge was probably wrong, as regards the 2nd issue, in throwing the onus upon the defendants, for the plaintiff alleged that his cause of action accrued in Aghran 1266, when the brothers separated in mess ; and it appears to us that the onus lay upon the plaintiff (even if the property claimed by the

1868

UMA SUNDARI DASI v. SWARNANATH ROY.

defendant as separate was really joint,) to show that he had participated within twelve years in the rents and profits of those estates, and that they had been brought into joint account. But it is not necessary to determine this question, inasmuch as the defendants have, we think, given sufficient affirmative proof to shift the burthen if it ever rested on them. We may here remark, that in our opinion, the evidence did not support the plaintiff's allegation; that the family property was managed by Ganganarayan and Kailashnath, together in Ganganarayan's life-time or by Kailashnath alone after Ganganarayan's death. There is no doubt that Paramananda, and his sons each had some business or employment in which he was engaged separately from the rest; whether such business or employment was conducted by him for his own separate benefit, or for the joint benefit of the family. * * * *

The Chief Justice (after reading and commenting on much of the evidence,) continued.—I entertain no doubt that the finding of the Judge below on the first issue was erroneous. With regard to the second issue, admitting for the sake of argument, that the properties claimed by the defendants as to their separate properties were orginally purchased, by Ganganarayan and Kailashnath, respectively, benami, for the benefit of the joint family, there is no evidence to satisfy me that the plaintiff or the other members of the joint family ever participated in the profits of those estates, or derived any benefit therefrom. The Judge says:—"With regard to the question of limitation, the Court has found that the relation fof trustee and *cestuique trust* existed between the parties up to the institution of this suit. The possession of the defendants must be regarded, therefore, as the possession of themselves and their brothers; and their possession, not being adverse to the plaintiff cannot be pleaded as a ground of limitation in bar of the suit. Of the doubt existing as to the origin and execution of the trust, lapse of time will not enable those who were trustees to appropriate to themselves that which is the property of others."

I do not think that the relationship of trustee and *cestuique trust* existed between the parties. By clause 13, section 1, Act

XIV. of 1859, it is enacted that "to suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property * * * * * * the period of twelve years from the death of the person from whom the property alleged to be joint is said to have descended * * * * or from the date of, the last payment to the plaintiff, or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share."

This is clearly a suit within the meaning of that section. The suit was not brought within twelve years from the death of Paramananda Roy, and the plaintiff has not shown that any payment was made to him or to any person through whom he claims, by the person in the possession or the management of the property within twelve years next befor the commencement of the suit.

Section 2 of Act XIV. of 1859 enacts that "no suit against a trustee in his life-time, and no suit against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time." The Judge has, it would seem, treated a benami transation, as creating the relationship of trustee and *cestui que trust* between the benamidar and the real principals. But there can be no greater reason for holding, that no length of time is a bar to a suit to recover property, on the ground that it is joint family property, when the property is purchased benami in the name of one member of the family, than there is for holding that it would be so barred, if the property stood openly and honestly in the names of all the members. It would be dangerous to hold, that a benamidar is a trustee for the real owner within the meaning of section 2, Act XIV. of 1859; for if such were the case, a person might, after any length of time, sue another for recovery of property by getting up a fictitious case against him, however long he may have been in possession, that the property was conveyed to him benami. Such a construction would tend still further to weaken the law, which, according to the judgment pronounced by the Judge of Beerbhoom upon the first issue, is at present not sfficiently powerful to suppress the

1868

UMA SUNDARI DASI v. DWARKANATH ROY.

evils consequent upon the pernicious system of benami so prevalent throughout Bengal.

It appears to me, looking at the plaint and the whole of the evidence in the case, that the plaintiff has failed to make out against the defendants, Uma Sundari and the sons of Ganganarayan, such a case as entitles him to recover any portion of the land mentioned in the schedules annexed to the respective written statements of those defendants, and the latter have made out their rights to those properties respectively.

If Gentlemen will purchase and hold property benami, keep fictitious books, and make false statements in petitions to Courts of Justice, and in their private correspondence, whether it be for the purpose of concealing property from their creditors, or deceiving the members of their own family, they have only themselves to blame; and they must not be surprised if they are not belived when, for their own benefit, they offer themselves as witnsses in a Court of Justice, and openly, without shame, avow that all that has been said or done was false and fictitious, for the purpose of carrying into effect their own infamous designs.

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Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

1869
March 2.

RICHARD SNADDEN (DEFENDANT) *v.* MAH WINE AND AGA SYUD ABDUL HOSSEIN (PLAINTIFFS).*

Cutting Timber—Exclusive Right—Damages.

Where one acquires, by license, an exclusive right to cut and to authorize others to cut timber in a forest, such right does not vest in him the timber in the forest. He might thereby have a right to recover damages against any person, who, by cutting timber, should interfere with his exclusive right, but that would not vest in him the timber so cut by others.

Mr. *Paul* for appellant.

The *Advocate-General* for respondents.

THIS was an appeal from a decision of the Recorder of Moulmein.

* Regular Appeal, No. 48 of 1868, from a decree of the Recorder of Moulmein dated the 16th December 1867.