

The 7th June 1869.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Breach of Contract—Limitation—Clause 9, Section 1, Act XIV., 1859.

Case No. 201 of 1868.

Regular Appeal from a decision passed by the Judge of Tirhoot, dated the 1st August 1868.

Mohadeo Lall and others (Plaintiffs),
Appellants,

versus

Nundun Lall and another (Defendants),
Respondents.

The Advocate-General and Mr. C. Gregory and Baboo Sreenath Doss for Appellants.

Mr. G. C. Paul and Baboos Debendro Narain Bose and Obinash Chunder Banerjee for Respondents.

In a suit to enforce the performance of an agreement alleged to have been entered into between plaintiffs and the principal defendant, whereby the latter, on consideration of an undertaking subsequently carried out, was to admit the former, who were his uterine brothers, to a share of the property of his adopting father which included an interest in land :

Held, that this was substantially a suit on a contract governed by the limitation fixed by Clause 9, Section 1, Act XIV. of 1859; that the defendant was in a position to fulfil that contract on the deaths of his adoptive parents respectively; and that plaintiff's suit, not having been brought within three years of the dates of those deaths, was barred by limitation.

Glover, J.—This was a suit to enforce the performance of an agreement alleged to have been entered into between the plaintiffs and defendant Nundun Lall, whereby the latter was to admit the plaintiffs, who are his uterine brothers, to a share of the property of his adopting father Brij Beharee Lall. The consideration for this is said to have been an undertaking (subsequently carried out) to admit Nundun Lall to a share in his natural father's estate.

Nundun Lall was adopted by Brij Beharee Lall in the *Kritima* form in the year 1269 F. S., and it is alleged that his natural father Janokee Ram allowed the adoption to be made solely on the understanding that all his other sons should participate in the adoptive father's property.

Brij Beharee Lall died on the 1st of Bha-dro 1270, and his widow, Anundo Koer, on the 5th of Magh 1271, from which dates defendant, as adopted son, took possession of their property.

The plaintiffs allege further that in the year 1273 F. S., the defendant Nundun Lall executed a written engagement to the same effect as the verbal one entered into in 1269, that this deed was taken to the Collector's office for registration, but that Nundun Lall refused to register, and so the plaintiffs were obliged to bring this suit.

The defendant Nundun Lall (the other defendant Gopal Lall was a *pro forma* defendant only) denied the existence of any agreement either verbal or written, and pleaded that the plaintiffs were out of time under Clause 9, Section 1, Act XIV. of 1859.

The Judge held that this Section of the Act applied, and that as plaintiffs had not brought their suit within three years of the deaths of Brij Beharee Lall and Anundo Koer, they were barred by limitation.

The plaintiffs appeal against this decision.

The principal objection taken by the learned Advocate-General on their behalf is, that their suit was not one to recover on a contract under Clause 9, Section 1 of Act XIV. of 1859, but one for the recovery of an interest to which the 12 years' limitation under Clause 12, Section 1 of the Act would apply.

In support of this objection, it was argued that had the suit been one for breach of a contract, it would have contained a claim for damages; that the plaintiffs had no need to sue for specific performance. All they wanted was to get possession under the agreement entered into with them; that this agreement was substantially in the nature of an exchange between the parties, to which Clause 12 would undoubtedly apply and not Clause 9. We were also, referred to the ruling of the Full Bench in the case of Surwar Hossein *versus* Shahazadah Gofam Mahomed, 9 Weekly Reporter, page 170, as being in point.

This case does not seem to us to have any special bearing on the point at issue. It was held in that case that the mutwallee had entered into no contract, and that as against him the suit was one to enforce a charge upon land, and that, therefore, Clause 12, Section 1 of the Limitation Act was applicable.

Then as to the ground of the plaintiffs' suit, it is not contended that they had by inheritance any claim to share in Brij Beharee Lall's estate. On the contrary, they claim their shares on the ground that the defendant had contracted with them by an ikrarnamah to give them part of the estate, in consideration of their having given up to him a share in his natural father's property; and they date their cause of action from the date on which they say that that ikrarnamah was denied by the defendant Nundun Lall's refusal to register it. They make no mention in any part of their plaint of any other right except that given to them by Nundun Lall under the agreement. Moreover, if the plaintiffs do not sue on their contract, we fail to see what was their ground of action, or what right they had to bring a suit at all; they could only succeed in obtaining an interest in the land by proving the contract—the one thing was a condition precedent to the other.

It was contended further, though the argument was not much pressed, that the plaintiffs alleged themselves to have been in joint possession with their brother of Brij Beharee Lall's property, and that the Judge ought to have determined this question of fact whether the defendant's possession from the dates of Brij Beharee Lall's and of his widow's deaths was joint or separate.

But we find that the plaint most distinctly states that the defendant No. 1 was in possession, and that the plaintiffs never held possession of the disputed property. No doubt one of the plaintiffs' vakeels, in answer to the question put to him nearly a year after the suit was instituted, stated generally that all the brothers were in possession; but this answer was in direct opposition to the terms of the plaint, and altogether inconsistent with the relief which the plaintiffs sought.

Lastly, it is urged that the Judge ought to have taken the ikrar as evidence of the contract, but this ikrar not being registered was not receivable in evidence. This point has been ruled by the Full Bench decision of this Court, dated 7th August 1868, 10 Weekly Reporter 51.

On the whole, therefore, and after considering all the arguments urged, we are of opinion that this was substantially a suit on a contract to which the limitation fixed by Clause 9, Section 1, Act XIV. of 1859

applies; that the defendant Nundun Lall was in a position to fulfil that contract on the deaths of Brij Beharee Lall and Anundo Koer respectively; and that the plaintiffs' suit, not having been brought within three years of the dates of those deaths, is barred by limitation.

The appeal is dismissed, and the Judge's order affirmed with costs.

Kemp, J.—I am of the same opinion. The plaintiffs had no title whatever in the estate claimed, which was the estate of Brij Beharee Lall, and to which the defendant Nundun Lall has succeeded as the adopted son of Brij Beharee Lall. The plaintiffs' title, if any, is under the agreement of the 1st Bhadro 1270. Nundun Lall, on the death of Brij Beharee Lall, took possession of the estate of his adopting father. From that time, Nundun Lall was in a position to perform his part of the alleged contract between him and the plaintiffs. If he did not do so, the cause of action to the plaintiffs accrued to them from the time that Nundun Lall refused to perform his part of the alleged agreement; and as more than three years had expired between the date the defendant Nundun Lall took possession of the estate of Brij Beharee Lall, and the date on which this suit is brought, it is, in my opinion, clearly barred under the provisions of Clause 9, Section 1, Act XIV. of 1859.

The 7th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse,
Judges.

Remand—Section 148, Act VIII., 1859.

Case No. 269 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 12th November 1868, affirming a decision of the Sudder Moonsiff of that District, dated the 28th May 1868.

Puddo Lochun (Defendant), *Appellant,*
versus

Sirdar Khan (Plaintiff), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Anund Chunder Ghossal and Kalee Kishen Sein for Respondent.

When a case is remanded to be re-tried under the terms of Section 148, Act VIII., 1859, a Court is not justified in taking, and determining on, any evidence not on the record at the time of remand.