Appellate Jurisdiction (a)

Special Appeal No. 633 *of* 1868.

K. SUBBAIYA.....*Special Appellant.*

K. RAJESVARA SASTRULU..... ...*Special Respondent.*

In a suit by a co-parcener to enforce a division of family property it is necessary, in order to constitute the bar provided by Clause 13 Section 1 of the Limitation Act, to prove possession and enjoyment of the property as the possessor's own separate property to the absolute exclusion of the person suing to enforce the right to share for twelve years computed either "from the death of the person from whom the property alleged to be joint is said to have descended" or "from 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." The question of fact whether there has been such exclusive possession or enjoyment must be decided upon the evidence in each case and may be satisfactorily proved although there may be no evidence of an express refusal to allow the plaintiff any part of the benefits of the joint property.

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THIS was a Special Appeal against the decree of L. Forbes, the Civil Judge of Nundial, in Regular Appeal No. 12 of 1866, reversing the decree of the Court of the District Munsif of Kurnool in Original Suit No. 177 of 1865.

The plaintiff, elder brother of defendant, sued for a division of family estate, and sought to recover one-eighth of the lands set out in the plaint, being his moiety, together with rent.

The defendant alleged that of the lands in issue some were self-acquired; that he had been in exclusive independent possession, and as plaintiff had for over thirty years lived in another village enjoying other lands, and had never occupied or had any interest in the lands, the claim was barred.

The Munsif made a decree in favor of the plaintiff.

Upon appeal the Civil Judge reversed the decree upon the ground that the suit was barred. The following is taken from the Judgment of the Civil Judge :—

I am clearly of opinion that this claim is barred by lapse of time. It is simply a question upon the facts whether possession has been adverse for a period exceeding that within which a suit may be brought. It constantly,

(a) Present: Scotland, C. J. and Innes, J.

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of course, happens that relatives, especially brothers, are content to live on undivided, in co-parcenership, and I conceive that as regards them individually, so far at least as concerns Southern India, where birth does not give a starting point, no lapse of time would bar a suit for division, unless the holder were shown to have held exclusively and on the footing of separate ownership, and the claimant had been out more than twelve years.

The father of the parties died in 1834, and from that time, or for upwards of thirty years, (plaintiff confesses to twenty-eight years), plaintiff has lived in another village Timmupuram with his wife's relatives in enjoyment of other property. Well then has plaintiff shown that he has ever been either actually or constructively in possession of the plaint lands? Has he shown that he has ever exercised any act of ownership, contributed anything to, or derived anything from, the property? He states in his appeal petition that, as the ancestral property was not sufficient to provide maintenance for all, he left it in possession of the others. Seventy-seven out of the eighty-two plaint lands are in Kumbalapalli, and it is important to notice that in the old Paimaish Talaband, Jamabundy and Faisalate Accounts the one-fourth share of these, of which a moiety is now sought to be recovered, stands in the name of the defendant the younger.

I do not propose to go into the direct evidence offered regarding the partition. It would be a manifest injustice if, after being out of possession for more than thirty years, and having during that time derived no benefit from, and taken no part in the management of, the property, plaintiff could now come in and say to defendant, "All this you admit to be ancestral—I demand my share: if we are divided it is for you to prove it." Defendant is entitled to reply "No—I have held all these years independently of you, and the old accounts are in my favor: it may be true—I cannot by direct evidence prove the actual partition, but I stand upon my exclusive possession, and I plead the limitation bar; it now lies on you to prove joint interest—not on me to prove the division." If Clause 13 does not apply here, can it ever have any application?

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Being of opinion then that the suit is barred, I must, in reversal of the Lower Court's decision, decree that the claim be dismissed.

Plaintiff presented a special appeal to the High Court against the decree of the Civil Judge on the grounds that

I. The status of non-division being found by both the Lower Courts as a fact, the onus of proving hostile possession was clearly on the defendant who had failed to satisfy the burthen.

II. The facts found by the Munsif and not disputed by the Civil Judge proved that there was no hostile possession by the defendant as against the plaintiff till 1862.

III. There is no evidence on record to shew that prior to 1862 there was any refusal by the defendant to give plaintiff's share.

Miller and *Kuppuramasamy Sastry*, for the special appellant (plaintiff.)

Venkatapathy Row, for the Special Respondent (defendant)

The Court delivered the following

JUDGMENT:—This is a suit between two brothers for a partition of family property in the possession of the defendant, the plaintiff being the elder of the two; and the sole question raised in the appeal is whether the Lower Appellate Court was wrong in dismissing the suit on the ground that it had been barred by Clause 13, Section 1 of the Act of Limitations. There is no doubt that the plaintiff has been out of possession of the property without deriving any benefit from it since the death of his father in 1834, and the objections urged on his behalf against the decree are first, that some proof of an express refusal by the co-parcener in possession to allow the plaintiff any part of the benefits of the joint property on account of his share or of the repudiation of the plaintiff's right to share as a co-parcener is necessary to constitute the bar under the clause, and that no evidence of either requisite appears in the record: secondly, that, as by the law which governs here, ancestral property does not pass by inheritance from

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a father to his sons, the earlier provision in the clause as to the computation of the period of limitation "from the death of the person from whom the property alleged to be joint is said to have descended" renders it inapplicable to this suit.

With respect to the first point, it is clear that such positive proof as that contended for is not essential to the bar. It has been distinctly laid down by this Court in the cases of *Govinda Pillay* v. *Chedambara Pillay*, 3 *Madras High Court Reports*, 99, and *Abbakku* v. *Ammu Shettati*, 4 *Madras High Court Reports*, 137, that what is necessary in order to constitute the bar is proof of possession and enjoyment of the property as the possessor's own separate property, to the absolute exclusion of the person suing to enforce the right to share, for twelve years computed from either of the events mentioned in the clause, so as to rebut the presumption of constructive joint possession arising out of the relation of co-parceners; and in that construction of the clause we concur. The bar then depends upon the question of fact whether there has been such exclusive possession and enjoyment, and that must be decided upon the circumstances in evidence in each case, and may be satisfactorily proved although there should be no evidence of an express refusal or repudiation of the kind contended for.

In the present case the Civil Court has distinctly found separate possession to the absolute exclusion of the plaintiff, and we have simply to see that there is evidence in the record from which the Court might reasonably come to that conclusion; and such evidence there undoubtedly is. It appears that for about 30 years the plaintiff had been living with his wife's relatives in the enjoyment of other property in a village at some little distance from the defendant, and there is clear evidence to the effect that during that period his interest in the property had not been in any way acknowledged or regarded, nor had he assisted or interfered with the defendant in the management of the property or attempted to interfere until about 1860 when the disputes arose which led to this suit; that a considerable portion of the property

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had been all along entered in the paimash and other public accounts in the defendant's name alone although he was the younger brother; that he had been treated by the Officers of the Government as sole owner; had from time to time let out portions of the property in his own name; and in all other respects dealt with and beneficially enjoyed it as exclusively his own, and had in 1855 recovered some of the land from relatives who had improperly taken possession of it by legal proceedings taken in his own name as the sole owner; and that all these matters were well known to the plaintiff.

The appellant's second objection, we are of opinion, is not maintainable. The difficulty attending the application of the first branch of the provision as to the computation of the period of limitation was pointed out by the learned Judges who decided the case of *Govinda Pillay* v. *Chedambara Pillay*, 3 *Madras High Court Reports*, 99, and we agree in the view which is expressed in their judgments, that as by the well-established law in Madras the original acquirer is the only person from whom ancestral property can be said to have descended in its entirety that branch of the provision can have complete application to but few suits for partition. It seems to us that, subject to the question of fact which we have just been considering, the provision admits of application to cases in which neither the claimant suing nor any person through whom he claims had received from the person holding the property any benefit on account of his alleged share since the death of the self-acquirer; but that whenever ancestral property has been enjoyed by one or more generations of the family it is altogether inapplicable as a bar to the maintenance of a suit instituted after twelve years from the death of the original acquirer by a descendant of the member or one of the members of the family who last enjoyed or shared in the enjoyment of the property; and the present is such a case.

But this inapplicability of the first part of the provision does not limit the operation of the second part which provides for the computation of the period of limitation "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." Reading the word "payment" in the sense which we consider the reasonable construction of the clause shews that it was intended to have, namely, as importing anything given or allowed to be enjoyed on account of the share sued for, the second part of the provision is, we think, applicable to this suit and to every case in which such a benefit can be shewn to have been received by the claimant or the co-parcener through whom he claims however long the property may have been ancestral. From the date of the last benefit received, the period of twelve years is computable; but to establish the bar there must be proof of absolutely exclusive enjoyment for that period. In the present case, the receipt by the plaintiff of a portion of the produce of the property on account of his share ceased a short time after his father's death in 1839, and the Civil Court has found that from that time the property has been enjoyed adversely to the plaintiff. For these reasons the decree appealed from will be affirmed with costs.

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Special Appeal No. 113 *of* 1869.

UNICHA KANDYIB KUNHI KUTTI NAIR..... } *Special Appellant (Plaintiff.)*

VALIA PIDIGAIL KUNHAMED KUTTY MARACCAR and 5 others..... } *Special Respondents (1st to 4th and 9th and 10th Defendants.)*

The 15th clause of Section 1 of Act XIV of 1859 does not require that the acknowledgment should be given to the mortgagor.

In a suit to redeem, the plaintiffs produced a mortgage, the genuineness of which the defendants denied, but they produced a mortgage from the plaintiff's ancestors to their ancestors. The Principal Sadr Amin made a decree for the restoration of the lands according to the terms of the mortgage produced by the defendants. The Civil Judge reversed the decision.

Held, in special appeal, that the Principal Sadr Amin was justified in making the decree which he gave.

THIS was, a Special Appeal against the decision of G. D Leman, the Acting Civil Judge of Tellicherry, in Regular Appeal No. 262 of 1867, reversing the decree of the Court

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(a) Present; Bittleston and Carmichael, J, J.