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in the eye of the law the recorded decree-holder is entitled to execute the decree, and we think she is. The result is that we must set aside the order of the Court below, and send the case back that execution may proceed. Each party will bear their own costs.

Appeal allowed.

A. F. M. A. R.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

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KARTICK CHUNDER GHUTTUCK AND OTHERS (DEFENDANTS 1 TO 3) *v.* SARODA SUNDURI DEBI (PLAINTIFF).*

Limitation Act (XV of 1877), Arts. 127, 142, and 144—Suit by a person claiming share in joint family property.

The word 'person' mentioned in Article 127 of Schedule Second to the Limitation Act means some person claiming a right to share in joint family property, upon the ground that he is a member of the family to which the property belongs.

Radanath Doss v. *Gisborne* (1), *Ram Lakhi* v. *Ambica Charan Sen* (2), and *Horendra Chunder Gupta Roy* v. *Aunoardi Mundul* (3) relied on.

THIS was a suit to recover possession of the share of the plaintiff's father in a Hindu joint family property. The plaintiff alleged that her father was joint in food and estate with his four brothers; that in the year 1872 her father died, leaving her surviving as his sole heiress; that she being then a minor, her paternal uncles, the defendants 1 to 3, took charge of her estate; that subsequently, when she attained majority, she held possession of her father's share jointly with her uncles. She further alleged that when she went to live in her husband's house, she used to enjoy the profits of her share. But in Falgoon 1288 the defendants 1 to 3 separated and divided her father's share among themselves. In Bysack 1289 she demanded her share, which the defendants refused to give her, and subsequently dispossessed her of the same.

* Appeal from Order No. 256 of 1890, against the order of H. F. Mathews, Esq., Judge of Burdwan, dated the 11th of August 1890, reversing the decree of Baboo Kali Dhan Chatterji, Munsiff of Ranigunge, dated the 9th of December 1889.

(1) 14 M. I. A., 1.
(2) I. L. R., 11 Calc., 680.
(3) I. L. R., 14 Calc., 544.

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The plaint was filed on the 10th of January 1889.

The defendants urged various pleas, the chief of which were that the plaintiff's father was disqualified by leprosy from inheriting the property; that he (the father) had left a son surviving him; and that the suit was barred by limitation.

The first Court found that the plaintiff was the only child of her father; that he did not suffer from leprosy, and hence was not disqualified to inherit. It further held that the plaintiff was never in possession of her father's estate, and that the suit was barred by limitation.

The lower Appellate Court held that the suit was not barred, inasmuch as Article 127 of the Second Schedule to the Limitation Act applied to the case. It also further held that the fact of the plaintiff's exclusion not being known to her till within twelve years before the institution of the suit, her remedy was not barred by limitation.

The defendants now preferred this second appeal to the High Court.

Baboo *Koruna Sindhu Mukerji* for the appellants.

Dr. *Rashbehari Ghose* and Baboo *Digamber Chatterjee* for the respondent.

Baboo *Koruna Sindhu Mukerji*.—Article 127, Schedule II to the Limitation Act has no application to this case. It contemplates the case of a person excluded from a joint family. The plaintiff being a member of her husband's family cannot be considered to be a member of the same family with the defendants—*Amritolal Bose* v. *Rajnikant Mitter* (1), *Radanath Doss* v. *Gisborne* (2). This article also provides for a suit to 'enforce a right' and not to 'establish a right,' and therefore applies to suits for partition when the property has remained joint family property. The words 'excluded' and 'inclusion' apply to previous inclusion—*Saroda Soondaree Dossee* v. *Doya Moyee Dossee* (3). Article 127 has also been construed strictly, and has not been extended to a purchaser of a share in joint family property—*Ram Lakhi* v. *Ambica Charan Sen* (4), *Horendra Chunder Gupta Roy* v. *Aunoardi Mundul* (5).

(1) L. R., 2 I. A., 113.
(2) 14 M. I. A., 1.
(3) I. L. R., 5 Calc., 938.
(4) I. L. R., 11 Calc., 680.
(5) I. L. R., 14 Calc., 544.

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At the time the plaintiff instituted the suit, the defendants' family was not a joint family. She was dispossessed in 1289, more than seven years before the suit. She must therefore prove possession within twelve years—*Tulshi Pershad* v. *Raja Misser* (1), *Obhoy Churn Ghose* v. *Gobind Chunder Dey* (2). This case falls either under Article 142 or 144.

Dr. *Rashbehari Ghose*.—Article 127 has been properly applied. The plaintiff was at one time a member of the joint family, and at all events the property in suit was admittedly joint family property. The provisions of the English law as to possession amongst tenants in common may be looked into—*Darby and Bosanquet*, 284. See also the case of *Hari* v. *Maruti* (3). If there be any doubt as to Article 127, Article 144 should apply. The cases cited by the other side are distinguishable.

Baboo *Koruna Sindhu Mukerji* was not called upon.

The judgment of the Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

This is an appeal against an order of remand passed under section 562 of the Code of Civil Procedure by the District Judge of Burdwan. He differed from the Munsiff, who had held that the suit was barred by limitation, and having come to the conclusion that the suit was not barred, the Judge reversed the Munsiff's decision and remanded the case to be disposed of on the merits. In passing this order the District Judge had overlooked the fact that the Munsiff had already decided the suit on the merits, he having tried every issue laid down. The District Judge, therefore, if he thought the suit was not barred by limitation, should have himself determined the case on the merits; and if he thought it necessary to take further evidence, he should not have sent the case back as he did, but should have kept it on his own file and directed the Munsiff to take further evidence and submit the same to him. He could not legally get rid of the case by remanding it under section 562.

But the question whether the Judge was right in holding that the suit was barred by limitation was fully argued before us yesterday.

(1) I. L. R., 14 Calc., 610. (2) I. L. R., 9 Calc., 237.
(3) I. L. R., 6 Bom., 741.

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The suit was brought by a Hindu lady to recover possession of what had been her father's share in what she stated was joint family property. Her father had died a good many years ago, that is, in the year 1272 or 1865, and the suit was brought on the 10th January 1889. The plaintiff was a married woman. It was found that her father had no son surviving him, and that in point of fact the plaintiff would be entitled at his death to inherit his estate, whatever it was. But the Munsiff considered that the suit was barred by limitation, because the plaintiff had not been in possession of her father's estate at any time since his death, which had occurred some twenty-four years before the suit was brought. And upon the merits the Munsiff found that the plaintiff failed to prove that the land in question claimed by the defendants had ever belonged to the plaintiff's father. That was a finding which went directly to the merits of the suit.

Upon appeal the District Judge considered that the Munsiff was wrong in holding the case was barred by limitation, because he thought that the article of the Schedule to the Limitation Act applicable to this case was Article 127, and that therefore the plaintiff was not bound to prove her own possession at any time before the suit was brought. Article 127 is applicable to a suit by a person excluded from joint family property to enforce a right to a share therein, and the period of limitation begins to run when the exclusion becomes known to the plaintiff. The Judge considered the suit as falling within the scope of Article 127, and was of opinion that the plaintiff could not be said to have become aware of her own exclusion from her share of the property until she had asked for it and been refused, or, at all events, until the separation took place between the members of her father's family who held joint possession after her father's death, which separation, she said, took place in Falgoon 1288, and within twelve years before this suit was brought.

We think that the Judge was in error in holding that Article 127 applies to the case. It seems to us that the person mentioned in Article 127 who is the plaintiff in the case must mean some person claiming a right to share in joint family property, upon the ground that she is a member of the family to which the property belongs. There is authority for our opinion in the observations of their Lordships of the Privy Council in the case of *Radanath Doss* v.

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Gisborne.(1) That decision was passed with reference to the old Limitation Act, XIV of 1859; but clause 13 of Section 1 of that Act, which deals with cases of this kind, is similar in wording to Article 127 of the present Schedule. Their Lordships state that they were of opinion that that section, namely, section 13, "is a section which deals with suits between one or some member or members of the joint family, and some other member of the joint family, complaining of what we should term in this country an ouster of some members by others or of a failure by the member in occupation to account for profits, or to pay maintenance where it is due." Clause 13 of Act XIV of 1859 embraced rather more than Article 127 of the present Schedule; it also included suits for maintenance.

The Judge of the Court below thought that this Article was not confined to suits brought by members of a family because of the use of the word 'person.' We do not think that the use of this term is sufficient to alter the meaning of the law. We think from the context, as well as from the decided cases, that we are bound to hold that a person who comes as plaintiff must also be a member of, and not a stranger to, the family to which the joint property belongs—See *Ram Lakhi* v. *Ambica Charan Sen* (2), *Horendra Chunder Gupta Roy* v. *Aunoardi Mundul* (3). In the present case the plaintiff is no longer a member of the family to which this property belongs. She is a lady now of mature age who was married at the age of five, and who, after the death of her father, when she was about 18, left her father's family; and it is proved that from that time, some twenty-four years, she had lived in her husband's house and never in her paternal residence with the members of the joint family. We think, therefore, that this case must fall under either Article 142 or 144 of the Schedule. According to the plaintiff it will come under Article 142, for the plaintiff says in her plaint that she was in possession by enjoying the profits, and that she had been ousted by their refusing to pay what the defendants had agreed to pay. Her story on this point was disbelieved by the Munsiff, and he came to the conclusion that she had had no sort of possession of the estate or of any property of the estate from the time of her father's death.

The District Judge comes to no certain finding upon this point. He does not distinctly confirm the Munsiff's finding that the

(1) 14 M. I. A., 1. (2) I. L. R., 11 Calc., 680.
(3) I. L. R., 14 Calc., 544.

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plaintiff's story is false as to her having received so much money and so much rice annually from the defendants. But he says, admitting this to be false, still it is not shown that she ever resigned her share or acquiesced in her exclusion from it. The Judge further seems to think that, though she had no actual enjoyment from the time of her father's death, she had still a right to obtain a share upon the ground that the exclusion was not known to her till within twelve years before suit and that she had never resigned her share.

We suppose that the Judge meant to say that the possession of the defendants had not been adverse to the plaintiff. We think that he ought to have come to some distinct finding upon this matter instead of leaving it to be a matter of conjecture what he thought; and if he thought the long possession of defendants was not adverse to this plaintiff, he should have given reasons for the opinion. Further, the Judge ought to have found before reversing the Munsiff's decree that the property in question was really property to which the plaintiff was entitled by reason of the share claimed having belonged to her father. The Munsiff found against her upon that point, which was the main point in the case so far as the merits are concerned.

It seems to us, therefore, that the decree of the Lower Appellate Court cannot stand, but it must be set aside, and the case must go back to the District Judge for a finding whether the property in question did belong to the plaintiffs, and, if so, whether the plaintiff is still entitled to obtain a share with reference to the law of limitation as contained in Articles 142 and 144.

Costs of the appeal will abide the result.

A. F. M. A. R. *Case remanded.*

Before Mr. Justice Tottenham and Mr. Justice Ghose.

THAKUR MAGUNDEO (DEFENDANT) *v.* THAKUR MAHADEO SINGH AND ANOTHER (PLAINTIFFS).*

1891. *July* 10.

Res judicata—Suit in ejectment—Civil Procedure Code (Act XIV of 1882), section 13.

A, as *ticcadar*, brought a suit to eject *B* from certain lands, which he claimed as *majhes* land, or land which is ordinarily cultivated by the

*Appeal from Appellate decree No. 1058 of 1890 against the decree of F. Cowley, Esquire, Judicial Commissioner of Chota Nagpore, dated the 2nd of June 1890, affirming the decree of Moulvie Ali Ahmed, Munsiff of Hazaribagh, dated the 29th of December 1888.