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authorize the Court to frame issues from certain materials besides the pleadings and to amend the issues at any stage of the case. The objection on the ground of absence of notice, though not taken in the written statement, was raised in argument, and the objection was entertained and disposed of, though erroneously, by the Courts below. It cannot therefore be thrown out on the ground that it was not specially pleaded.

But though we hold that the objection on the ground of want of notice cannot be thrown out altogether, we are of opinion that as it was not taken in the written statement and was urged only in argument, the plaintiffs are entitled to have an opportunity of meeting it. In our opinion it will be sufficiently met if it is shewn that the notice served on the Traffic Superintendent reached the Manager within six months from the date of delivery of the goods.

The case must therefore go back to the first Court, in order that it may be disposed of after determination of the point indicated above. Both parties will be at liberty to adduce evidence upon the point. Costs will abide the result.

As the appeal is only on behalf of defendant No. 1, and the ground upon which the appeal succeeds relates only to the liability of defendant No. 1, the decrees of the Courts below as against defendant No. 2 will stand.

F. K. D. *Appeal allowed and case remanded.*

Before Mr. Justice Beverley and Mr. Justice Ameer Ali.

BANOO TEWARY (DEFENDANT) *v.* DOONA TEWARY AND OTHERS (PLAINTIFFS).*

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Dec. 10.

Limitation Act (XV of 1877), Schedule II, Articles 62, 127—Separation in Joint Hindu family—Suit for share in joint property.

At the separation of members of a joint family governed by the Benares School of Hindu law, in 1885, the unrealized debts of the family were left undivided. The debts were subsequently realized by some of the members of the separated family. In a suit brought by the other members in 1893, (*inter alia*), to recover their shares in the debts so realized,

* Appeal from Original Decree No. 262 of 1894 against the decree of Babu Abinash Chandra Mitter, Subordinate Judge of Tirhoot, dated the 21st of June 1894.

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Held, that the claim of the plaintiffs could only be treated as coming under article 62, Schedule II of the Indian Limitation Act (XV of 1877), and the claim in respect of such of the debts as were realized more than three years before the institution of the suit was barred by limitation. Article 127 of the same Schedule would not apply to such a case. *Thakur Prasad* v. *Partab* (1) referred to.

THE facts of this case are fully set forth in the judgment of the High Court. The present report relates only to a portion of the claim, *viz.*, debts forming items Nos. 1, 2, 3, 4 and 6 of Schedule IV of the plaint filed in the case, which were realized by the defendants more than three years before the institution of the present suit. The Subordinate Judge held that article 127, Schedule II of the Limitation Act (XV of 1877) governed the case, and the plaintiffs' claim to their share in these realizations was not barred by limitation.

The defendant No. 1 appealed to the High Court.

Mr. *C. Gregory*, Babu *Durga Mohan Das* and Babu *Jogindra Chandra Ghose* for the appellant.

Babu *Umakali Mukerjee* for the respondents.

Mr. *C. Gregory*.—The plaintiffs admit separation ; the claim to realization beyond three years is therefore barred under article 62. Article 127 does not apply. *Thakur Prasad* v. *Partab* (1), *Arunachala Pillai* v. *Ramasamya Pillai* (2), *Webor Ali* v. *Gaddai Behari* (3), *Kundun Lal* v. *Bansi Dhar* (4), *Lootf Ali Khan* v. *Afzuloonissa Begum* (5).

Babu *Umakali Mukerjee* for the respondents.—There was partition of some of the properties only. Article 127 would apply to the case. [AMEER ALI, J.—Does not article 127 relate to an *existing* joint family?] That article would apply as well to a portion left undivided as to the whole estate ; *Ram Chandra Narayan* v. *Narayan Mahadeb* (6). There is no distinction between moveable and immoveable properties ; the question is whether the properties were joint or not ; *Raoji* v. *Bala* (7).

Mr. *C. Gregory* in reply cited *Amme Raham* v. *Zia Ahmad* (8)

(1) I. L. R., 6 All., 442.
(2) I. L. R., 6 Mad., 402.
(3) 2 C. L. R., 165.
(4) I. L. R., 3 All., 170.
(5) 16 W. R., P. C., 20.
(6) I. L. R., 11 Bom., 216.
(7) I. L. R., 15 Bom., 135 (143.)
(8) I. L. R., 13 All, 282.

Saroda Soondury Dassee v. *Doyamoyee Dassee* (1); Mitra on Limitation, 3rd edition, p. 782. There was a joint family in the case of *Raoji* v. *Bala* (2). In the case of *Ram Chandra Narayan* v. *Narayan Mahadeb* (3) the ruling was that the suit was barred, and there was no decision on the present question.

The judgment of the High Court (BEVERLEY and AMEER ALI, JJ.) was as follows :—

These appeals arise out of a suit brought by the plaintiffs under the following circumstances: The plaintiffs and defendants were at one time members of a joint Hindu family subject to the Mitakshara law. According to the plaintiffs' case a separation took place between them in the year 1293 (1886), and the bulk of the immoveable property, together with ornaments, &c., was divided among the different members ; but it is alleged by the plaintiffs that two elephants, together with debts payable to the joint family upon bonds and decrees standing in the names of the different members, and certain pieces of land, were left joint. The principal defendant in the case (defendant No. 1) was to realize the major portion of these bond and decretal debts. The plaintiffs allege in their plaint that he has realized the amounts covered by the bonds and decrees which stood in his name, but has refused to give them their shares in the same ; that as regards the elephants he has sold one and appropriated the price thereof to his own use, and was claiming the other as his own. They further allege that they on their part had realized a certain debt on behalf of themselves and others entitled to it, and were willing to deposit the amount in Court, and that the defendant Hemraj had similarly realized the debts which stood in his name and divided the same rateably among the persons entitled. Upon these allegations the plaintiff sued to obtain partition of the lands which were said to have been left joint, for a declaration that the debts realized by the defendant No. 1 were on behalf of all the persons who had formed members of the joint family, and for a decree for their share in the same and in the price of the elephant sold by Banoo Tewary. They also asked for a declaration that the elephant in his possession belonged to all the parties, and for a

(1) I. L. R. 5 Calc., 938. (2) I. L. R., 15 Bom., 135 (143).
(3) I. L R., 11 Bom., 216.

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direction that it may be sold and the proceeds divided rateably. The defendants other than Banoo Tewary and Jhinga Tewary supported the plaintiffs' allegations. The defendant Hemraj expressed his willingness to pay to Banoo Tewary his share in the money which he (Hemraj) had realized, and they all asked that their share in the bond and decretal debts might be decreed in their favour.

The defendant No. 1 alleged that the family had separated in 1285 (1878) and not in 1293 (1886), and that nothing was left joint; that in fact all the properties possessed by the joint family had been divided, that the bond and decretal debts which he had realized belonged to him exclusively, and that nobody else had an interest in them. He denied the existence of two elephants at any particular time, and claimed the one in his possession as his own property acquired by his money. And he pleaded that so far as the debts were concerned the plaintiffs' claim was barred by limitation.

The defendant Jhinga set up a totally different case. He alleged that the family had never separated, and claimed a division of all the properties.

Upon these allegations of fact several issues were framed in the lower Court, but it is unnecessary to refer to them particularly. As a matter of fact it appeared in the course of the trial that the lands which were said to have been left joint had been subsequently partitioned either by the Collector or privately, and that the parties were in separate possession of their respective shares. The Subordinate Judge accordingly gave the plaintiffs a declaration of their rights in some of the lands mentioned in Schedule II, and as regards the others he dismissed their suit; but he found that the story of the defendant that a complete partition had taken place in 1285 was untrue. He held upon the evidence that the family had actually separated in 1293 when the bulk of the landed property was partitioned as alleged by the plaintiffs, but the debts owing to the family not being ripe for realization were left outstanding to be divided when realized. He also found that the existing elephant was joint property, and he accordingly made a decree in favour of the plaintiffs in respect of their one-fifth share in the amounts realized by the defendant No. 1, and also gave a declaration in respect of their right to a one-fifth share in the elephant.

From this decree there are three appeals, *viz.*, one by Jhinga, another by defendant No. 1, and the third by way of cross-appeal by the plaintiffs in respect of the price of the elephant appropriated by Banoo Tewary.

They also ask for a direction that the existing elephant may be sold and the proceeds distributed among the parties entitled.

As regards Jhinga's appeal we may say at once that we entirely agree with the Subordinate Judge that there is absolutely no evidence excepting his own discredited statements in support of his story, and his own conduct, as proved by the documents executed by him, contradicts his testimony. His appeal will accordingly be dismissed with costs.

On behalf of the defendant No. 1 two contentions have been raised in this Court—(1) that the lower Court is wrong in holding that separation took place in 1293 and not in 1285 ; and (2) that the lower Court is wrong in over-ruling the plea of limitation raised by the defendant.

On the question of partition we are of opinion that the Subordinate Judge is right in his conclusion that the family separated in 1293 and not in 1285. The evidence of the defendant himself leaves no room for doubt that his story of a separation in 1285 is false. He admits that after 1285 various properties were purchased in his father's name, which were divided among the different co-sharers. He admits that the shares so given were of considerable value, amounting to twelve or thirteen thousand rupees, and the sole explanation he furnishes is that he gave the shares to the other parties out of favour. We agree with the Subordinate Judge in holding that the explanation given by the defendant is absolutely false, and that the only ground upon which his action can be explained is that those persons to whom the shares were given were entitled to them, and that no separation had taken place in 1285 as alleged by him. We think that the other circumstances referred to by the Subordinate Judge also tend to the same conclusion.

Mr. Gregory relied upon two documents to prove separation in 1285.

As regards the *mukhtarnamah* given by the members of the

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direction that it may be sold and the proceeds divided rateably. The defendants other than Banoo Tewary and Jhinga Tewary supported the plaintiffs' allegations in the separate written statement pressed his willingness, and it was clearly necessary for one of them money which *mukhtarnamah* from the others in order to be able to their act the business of the family. We agree with the Subordinate Judge that the *mukhtarnamah* does not establish separation. The sale of the decree by Budhoo Tewary in favour of Udho Tewary is proved, as the Subordinate Judge points out, to be an unreal transaction made for a certain purpose stated by the pleader, Umesh Baboo. We agree therefore with the finding of the Subordinate Judge that the partition was in Assar 1293.

The main point, however, turns upon the question of limitation.

Mr. Gregory for the defendant urged that the items Nos. 1, 2, 3, 4 and 6 in pages 28 and 29 of the Paper Book were barred by the Statute of Limitation, as those sums were realized beyond three years from date of suit. The Subordinate Judge has held that the plaintiffs' suit comes under article 127 of the Limitation Act. Mr. Gregory's contention is that it is governed by article 62. Article 127 of the Limitation Act runs as follows: "In a suit by a person excluded from joint family property to enforce a right to share therein the period of limitation is twelve years from the time when the exclusion becomes known to him." The only case directly in point is *Thakur Prasad* v. *Partab* (1), and although there was no argument in that case, it seems to us that the reasoning of the District Judge which was adopted by the High Court is deserving of consideration. Article 127 presupposes the existence of a joint family, and proceeding upon the hypothesis that there is a joint family it provides that when any member of such joint family is excluded from the enjoyment of the joint property or any portion thereof, the period of limitation shall run from the date when the exclusion comes to his knowledge. But when there has been a disruption of the status of jointness, it is difficult to conceive that it could have been the intention of the Legislature that the same provision should apply. The case of the plaintiffs is, that everything was divided, the family became separate, and only those debts were left undivided

(1) I. L. R., 6 All., 442.

From this decree there are three appeals, *viz.*, one by Jhinga, another by defendant No. 1, and the third by way of cross-appeal by [illegible] person or persons in whose names the elephant appropriated by trustees for the other separated members, and [illegible] debts and withheld payment to the others the claim of [illegible] may be were thus deprived of their shares in the money can only be [illegible] as coming under article 62 of the Limitation Act. That article provides as follows: "In a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiffs' use, the period of limitation shall be 'three years' from the time when the money is received." The defendant was acting on behalf of the other co-sharers merely as their agent in the realization of their shares in these moneys, and we think therefore that the case is subject to three years' limitation, and that the claim of the plaintiffs, so far as the items Nos. 1, 2, 3, 4 and 6 are concerned, is barred inasmuch as they were realized more than three years before the institution of the suit.

With regard to the cross-appeal of the plaintiffs we are of opinion that it is clearly established that there was another elephant belonging to the joint family which was sold by the defendant some time in 1299 (1892) for the price stated by the plaintiffs in their evidence. The reason given by the Subordinate Judge for disbelieving that portion of the plaintiff's evidence does not appear to us to be sufficient.

On the whole case, therefore, we hold that the plaintiffs are entitled to a declaration regarding their one-fifth share in the sum of Rs. 3,286 plus 2,500, the value of the elephant sold by defendant No. 1. They are also entitled to an order that the elephant now existing might be sold under the direction of the Court and the proceeds distributed among the persons entitled thereto.

In order to avoid a multiplicity of suits, and having regard to the allegations made in the plaint and written statements, it seems to us that the decree in this case ought to contain a similar declaration in favour of the defendants other than Jingha, who appears to have received from the defendant No. 1 his share in these sums of money. Of course as regards these defendants Banoo

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family to the father of the defendant it is clear that it was given for the purpose of enabling him to transact the business of the family. There were many trans[illegible] is that instead of Rs. 1,532 the decree in different members [illegible]ntiffs will be for $\frac{1}{6}$th of 5,786. to have a [illegible] except this modification and the direction as to the trans[illegible] of the elephant and the declaration as to the rights of the defendants other than Jhinga, we affirm the decree of the Court below.

Considering the circumstances we think that in appeals Nos. 262 and 325 the parties ought to pay their own costs in this Court.

Appeal allowed in part.

S. C. C. *Decree modified.*

CRIMINAL REFERENCE.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1897 *January* 20.

RAMZAN KUNJRA (COMPLAINANT) *v.* RAMKHELAWAN CHOWBE AND OTHERS (ACCUSED).*

Criminal Procedure Code (Act X of 1882), section 423, clause (b,) sub-section 3—Penal Code (Act XLV of 1860), sections 147, 379—Enhancement of sentence.

In a case where the accused were convicted by a Deputy Magistrate of the offence of rioting under section 147, and theft under section 379, of the Penal Code, and sentenced to four months for the first and two months for the latter offence, but on appeal the District Magistrate, considering the case to be one of theft rather than rioting, abandoned the sentence under section 147, but upheld the conviction under section 379 of the Penal Code and sentenced them to six months' rigorous imprisonment,

Held that what the District Magistrate had in effect done was to enhance the sentence under section 379 of the Penal Code, which he had no power to do under section 423, cl. (*b*), sub-section 3 of the Code of Criminal Procedure.

THIS was a Reference by the Sessions Judge of Shahabad to this Court asking for an authoritative decision on the following point:—

On 28th August 1896 Ramkhelawan Chowbe, Ramgad Chowbe, and Mohipat Ahir, were convicted by the Deputy Magistrate of

* Criminal Reference No. 294 of 1896, made by F. H. Harding, Esq., Sessions Judge of Shahabad, dated the 30th of December 1896.