Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

1877
Nov. 21.

KALI KISHORE ROY (DEFENDANT) *v.* DHUNUNJOY ROY (PLAINTIFF).*

Practice—Right of Appellant (respondent in lower Appellate Court) to prefer Appeal—Act VIII of 1859, *s.* 119—*Suit by Hindu excluded from Joint Family Property—Limitation—Act IX of* 1871, *Sched. II, arts.* 127, 143.

An appellant, who was respondent in a lower Court of appeal, is not precluded, by reason of his non-appearance in such Court, from preferring an appeal to the High Court.

In a suit by a Hindu excluded from joint family property, to enforce a right to a share therein, brought before the 1st of October 1877, the period of limitation must be computed under art. 127, and not under art. 143, of Sched. II of Act IX of 1871.

The facts are sufficiently stated in the judgment.

Baboo *Nilmadhub Bose* for the appellant.

Baboo *Porankristo Biswas* for the respondent.

The judgment of the Court was delivered by—

GARTH, C. J. (BIRCH, J., concurring). — A preliminary objection has been taken to the hearing of this appeal, that as the present appellant, who was the respondent in the Court below, did not then appear, he is not entitled to be heard in this Court; and s. 119 of the Code of Civil Procedure has been relied upon as an authority for that position. No case showing that s. 119 applies to such a case as the present has been cited; and looking at the language of the section, it appears to us to apply only to the case of a defendant who does not appear in the Court of first instance, and not to that of a respondent who does not appear in a lower Court of appeal. Moreover we find, that a

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Ainslie, dated the 30th of May 1877, in Special Appeal No. 39 of 1877, from the decree of C. B. Garrett, Esq., Judge of Dacca, dated 23rd October 1876, reversing the decree of Baboo Chundee Churn Sen, Second Munsif of Manikgunge, dated the 2nd December 1875.

Full Bench of the Bombay High Court, in the case of *Ramshet* v. *Balkrishna* (1), decided, that a special appeal lies where the respondent of first did not appear in the first appellate Court, and that s. 119 does not apply to such a case; and we also find, that in two cases before this Court,—one the case of *Omda Bibee* v. *Acourie Sing* (2), decided by Mr. Justice Jackson, and the other the case of *Tara Chand Ghose* v. *Anund Chunder Chowdhry* (3), decided by Mr. Justice Macpherson,—the same point has been ruled in the same way.

These authorities being quite in accordance with our own view, we consider that this preliminary point is untenable, and we proceed to decide the appeal upon the merits.

If we had only to consider the grounds upon which Mr. Justice Ainslie's judgment appears to have proceeded, we should have felt some doubt as to whether we could altogether agree with him. But there is a very important point which Mr. Justice Ainslie did not find it necessary to enter upon, which appears to us to disclose a very serious error of law which has pervaded this case from its commencement.

The plaintiff, who is a Hindu, claimed a four-anna share in a joint family property, of which he admitted that the defendant was one of the co-sharers; and he alleged that he had been excluded from his share by the defendant. The defendant, on the other hand, claimed the whole talook as his own, denying that the plaintiff had any share in it.

It seems to have escaped the attention of the Courts below that if the plaintiff were right upon the merits,—that is, if he were entitled to the four annas share which he claimed, and had in fact been excluded from it by the defendant,—the clause in the Limitation Act of 1871, which would be applicable to the case, would not be the ordinary one of twelve years under art. 143 of the second schedule, but the 127th article of that schedule, which provides for the case of a Hindu, excluded from joint family property, seeking to enforce a right to his share. That article provides, that the period of limitation shall be twelve years, not from the time of the plaintiff's exclusion, but twelve years from the time when the plaintiff claims and is refused

(1) 6 Bom. H. C. Rep., A. C., 161. (2) 7 W. R., 425. (3) 10 W. R., 450.

1877

KALI KISHORE ROY v. DHUNUNJOY ROY.

his share. Consequently, if a pl[illegible] has been excluded for fifty years, and he then claims his share [illegible]used, he would have twelve years from the time of such [illegible] bring his suit; or, in other words, he would have sixty-two years from the time of his exclusion; and if he never claims or is refused, the period within which he may bring his suit appears to be indefinite. This apparent inadvertence has been rectified in the present Limitation Act.

Now in this case the Munsif, instead of dealing with the question of limitation under art. 127, has raised an issue, "whether or not the plaintiff had been in possession of the disputed share of talook Mahadeb Rai at any time within twelve years next immediately before the institution of the suit." This evidently was an error of law. The Munsif then found upon the merits in favor of the plaintiff, and decreed his claim. The District Judge upon appeal says, that he is disposed to agree with the Munsif as regards the merits of the case, at least, that is what we understand him to mean. His words are: "the Munsif seems to have thought the plaintiff's case very plain, and decreed it. Now I agree so far, that it does appear that there is a just claim; but at the same time I do not think that the evidence on which the Munsif has relied is nearly as strong as he thinks." He goes on to comment upon the evidence, and finds that there is not sufficient proof that the plaintiff had been in possession of his share within twelve years before suit. He then, at the instance of the plaintiff, adjourns the case, in order that the defendant himself might be examined, and having heard his evidence, he says: "I see no reason to change the view I formerly took of the case—namely, that the plaintiff has failed to prove that he was in possession within twelve years before the date of suit;" and then he concludes his judgment in this way:—"It lies upon the plaintiff to prove that he was in possession within twelve years of the date of suit, and I am of opinion that, as he has entirely failed to show this, his suit must be dismissed." It is clear, therefore, from the way in which the issue as to limitation has been dealt with by both the lower Courts, that neither the Munsif nor the Judge was aware that art. 127 of the second schedule applied to a case of this kind,

1877

KALI KISHORE ROY v. DHUNUNJOY ROY.

and as this error has pervaded the whole of the proceedings from the first, the proper course will be, to send the case back for re-trial to the Court of first instance.

The attention of the Munsif must be drawn to the fact, that if the plaintiff is entitled upon the merits to any share in this joint property, and has at any time been excluded from it (which appears to have been the Munsif's finding on the trial) the plaintiff would have twelve years to bring his suit, not from the time of his exclusion, but from the time when he claimed and was refused his share, and if he has never claimed or been refused his share, then he might bring his suit at any time. The Munsif will frame a fresh issue or issues on the point of limitation, having regard to the judgment of this Court; and will re-try the case upon such issue or issues, both parties being at liberty to adduce further evidence upon the points so raised. In case of an appeal from the Munsif, the District Judge will, of course, be at liberty to re-hear the whole case upon the merits. The costs will abide the event.

Case remanded.

Before Mr. Justice Markby and Mr. Justice Prinsep.

MONOHUR DOSS (PLAINTIFF) *v.* McNAGHTEN (ONE OF THE DEFENDANTS).*

1877
Aug. 20.

Indigo Factories—Mortgage—Liability of Creditor of Factory—Lien by Custom.

A sold to *B*, the proprietor of an indigo concern, of which *C* was a mortgagee, certain bags of indigo seed. The agreement of sale contained no provision pledging the crop of indigo, the product of the seed, as a security for its price. Subsequent to the sale and after the seed had been planted, *C*, under a decree on his mortgage, obtained possession of *B's* factory. In a suit by *A* against *B* and *C* for the price of the indigo seed, *Held* that, in the absence of any agreement by *C* to pay the debts of *B*, *C* could not be held liable.

There is no lien by custom upon an indigo factory, or upon the produce of an indigo factory, in respect of any debt of the factory.

* Special Appeal, No. 1853 of 1876, against the decree of E. S. Mosley, Esq., Officiating Judge of Zilla Bhagalpore, dated the 6th of June 1876, affirming the decree of Baboo Mothura Nath Gupta, First Subordinate Judge of that district, dated the 25th of November 1875.