

(1895) 08 CAL CK 0020
In the Calcutta High Court

Mahomed Akram Shaha and Others

APPELLANT

Vs

Anarbi Chowdhrani and Another

RESPONDENT

Date of Decision : 16-08-1895

Acts Referred:

Limitation Act, 1963 — Article 127

Citation : (1895) 08 CAL CK 0020

Hon'ble Judges : Norris, J;Gordon, J

Bench : Division Bench

Judgement

Gordon, J.—The subject-matter of this suit is a share of certain properties which belonged to one Panchu Shaha. Panchu died in 1264, leaving him surviving a widow, Bibi Anarbi, and two minor daughters, Zinnatunnessa and Izatunnessa. Izatunnessa married Akram Shaha, who is plaintiff No 1 in this suit. She died in 1287 leaving two minor sons and a minor daughter, who are plaintiffs Nos. 2, 3 and 4. The plaintiffs allege that on the death of Panchu his widow and two daughters inherited his properties and were in joint possession and enjoyment of the same; that on the death of Izatunnessa, whose share was 7 annas the plaintiffs inherited a share of 5 ans. 6 gundas 2 karas and 2 kranii 11, and were in joint possession of it with the defendants Bibi Anarbi and Zinnatunnessa up to 1293, when they were dispossessed. They accordingly sue to recover possession of their share. The defence is that on the death of Panchu Shaha his widow Anarbi took possession of all his properties, and has been ever since in sole and exclusive possession of them as proprietor, and hence that the suit is barred by limitation. The Subordinate Judge gave the plaintiffs a decree for the Immovable properties claimed. He held that the plaintiffs were not excluded from or out of possession of these properties prior to 1293, and therefore whether Articles 127, 142 or 144 of Schedule II of the Limitation Act applied, the suit in any case could not be barred. On appeal the District Judge reversed the Subordinate Judge's decree and dismissed the suit. He found that neither Izatunnessa, nor the plaintiffs, were ever in possession of the properties claimed; that on Panchu's death Anarbi alone entered into possession and continued in exclusive possession

as proprietor; that such possession has all along been adverse and hostile to the plaintiffs, and that, therefore, the suit is barred by limitation. He further held that under Mahomedan law, on the death of Panchu, Izatunnessa and the defendants did not constitute a joint family, and the property they inherited was not joint family property in the sense in which these terms are understood in the Hindu system of jurisprudence.

2. In second appeal Mr. Hill contended that the decision of the learned District Judge is based on an erroneous view of the Law of Limitation as applicable to the facts of the case. He argued that, inasmuch as it is proved that after the death of Panchu his daughters Zinnatunnessa and Izatunnessa lived with, and were supported by, their mother, they all formed a joint family, and that the property they inherited from Panchu was joint family property within the meaning of Article 127 of the second schedule of the Limitation Act of 1877; that the possession by Anarbi was possession by her as manager or trustee on behalf of her minor daughters, and that such possession could not be hostile or antagonistic to them as the District Judge has found. Mr. Hill admitted that if Article 142 or Article 144 of the Limitation Act applies, then the suit is barred, and therefore the only question we have to determine is whether Article 127 applies to the present case. Mr. Hill in the course of his argument referred to the following authorities: *Khyroonissa v. Salehoonissa Khatoon* 5 W.R. 238, *Achina Bibee v. Ajeejoonnissa Bibee* 11 W.R. 45, *Bavasha v. Masumsha* ILR 14 Bom. 70, *Amme Raham v. Zia Ahmad* ILR All. 282, *Patcha v. Mohidin* ILR Mad. 57, *Chunder Monee Debia v. Meharjan Bibee* 22 W.R. 185, and *Moonshee Sirdar v. Molungo Sirdar* 24 W.R. 1. There is, as far as we are aware, no decision of this Court under Article 127 which touches the question now raised, that is to say, whether the words "joint family property" in that Article apply to the property of Mahomedans strictly governed by the principles of Mahomedan law. The case of *Khyroonissa v. Salehoonissa Khatoon* 5 W.R. 238 was decided with reference to Clause 13, Section 1 of Act XIV of 1859, and it was held that the words "joint family property" in that clause applied to Mahomedan as well as to Hindu families. But it does not appear whether the Mahomedan family in this case was or was not governed by any special custom, under which the rules of Hindu law as to joint family property would apply, and therefore we think that this decision is not conclusive on the point now raised. The only cases which bear directly on the question are *Bavasha v. Masumsha* ILR 14 Bom. 70, *Amme Raham v. Zia Ahmad* ILR All. 282 and *Patcha v. Mohidin* ILR Mad. 57. The Bombay High Court held that Article 127 applies to a suit by a Mahomedan for partition of joint family property, while the Allahabad and Madras High Courts take the opposite view, and on giving our best consideration to these decisions we think that the view adopted by the Allahabad and Madras High Courts is correct. It appears to us that, strictly speaking, there is no joint family and no joint family property under Mahomedan law in the sense in which these expressions are understood in the Hindu system of law. It is true that in some parts of India Mahomedan families have adopted Hindu customs and usages, and where they have done so,

they may be governed by principles of Hindu law as to joint family property. But a special custom of this kind, being entirely opposed and unknown to Mahomedan law, must be alleged and proved before it can be held to be applicable to any particular case. In the present case no such custom is alleged or even alluded to in the plaint or in the issues, and it is also noticeable that the suit as framed is to recover possession of a specific share of the property left by Panchu Shaha and not for restoration to joint possession and enjoyment of that share with the defendants, which, as pointed out by some of the learned Judges of the Allahabad High Court, is the object of the suit contemplated by Article 127. On this ground alone, therefore, we think we should be justified in holding that Article 127 does not apply to the present case, but we are also of opinion that in the absence of any allegation or proof of any special custom the parties in the present suit are governed by the principles of Mahomedan and not of Hindu law relating to joint family property. In this view, and the suit on the findings of fact arrived at by the learned District Judge being admittedly barred under Articles 142 and 144 of the second schedule of the Limitation Act, we think the appeal fails, and that it is unnecessary to consider the other matters which were pressed on our attention by Mr. Hill. The appeal is dismissed with costs.