

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ramkishore Kedarnath and others v. Jainarayan Ramrachhpal and others, from the Court of the Judicial Commissioner, Central Provinces, India (Privy Council Appeal No. 43 of 1912); delivered the 11th July 1913.

PRESENT AT THE HEARING:

LORD ATKINSON.

LORD PARKER OF WADDINGTON.

SIR SAMUEL GRIFFITH.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY SIR SAMUEL GRIFFITH.]

This was a suit instituted—to use the words of Art. 126, of Schedule 2, to the Indian Limitations Act of 1877—“by a Hindu governed by the law of the Mitakshara, to set aside his father’s alienation of ancestral property.”

The Plaintiffs, the Appellants, are the four sons of the Defendant Kedarnath. The Defendants are one Jainarayan, Kedarnath, and certain assignees from the former. The case made by the plaint, so far as material to the present Appeal, is that the Plaintiffs and their father were the owners of a joint undivided ancestral estate subject to the Mitakshara law, and that Kedarnath, in October 1898, improperly made a disposition of part of it by way of partition to the Defendant Jainarayan. The relief formally claimed was that “each of the Defendants may be ordered to deliver them

“ the possession of whatever property he has
“ with him out of that mentioned in para-
“ graph 11,” with consequential relief.

The suit was instituted on 20th December 1907. The first Plaintiff was alleged to have been born on 20th December 1886, the other Plaintiffs being younger. The Plaintiffs alleged that the estate had descended to two brothers, Ramnath and Rambilas, neither of whom had issue, that in 1877 the former adopted the Defendant Kedarnath, that Rambilas died in 1881 and Ramnath in 1883, whereupon Kedarnath became solely entitled, that about 1886 or 1887 the widow of Rambilas, whose name had previously, with the consent of Ramnath, been entered in the local register as a joint owner in place of Rambilas, adopted Jainarayan as the son of Rambilas, and that his name was thereupon entered as owner in her place, that the adoption of Jainarayan was invalid for various reasons stated, and that in 1898 Kedarnath “gave” a specific part of the estate to Jainarayan, who has since claimed and enjoyed the separate possession of it. Under these circumstances, the Plaintiffs claimed restitution of the part so given.

Amongst other defences, Jainarayan set up that the Plaintiffs are bound by the acquiescence of their father Kedarnath in the admission of Jainarayan to the family, and that the suit is barred by the Limitations Act.

In proceedings before the District Judge for the purpose of settling preliminary issues of law, the Plaintiffs' pleader admitted that “ Plaintiffs' father had actually given possession
“ of the property in suit to Defendant No. 1
“ (Jainarayan) to enjoy it exclusively by
“ himself in 1898. Previously he was living
“ as a joint member and jointly enjoying the

“ property by reason of Plaintiffs’ father’s inaction and acquiescence in this mode of enjoyment.” The case was decided in the Courts below upon the allegations in the plaint, together with this admission. The first three issues were finally settled as follows:—

1. Whether Plaintiffs can maintain the suit in its present form without suing for partition?

2. Are plaintiffs bound by the acquiescence of their father in admitting Defendant No. 1 into the family and allowing him a share in the property?

3. Since Defendant No. 1 has been in joint possession of property with Kedarnath since 1887 and in separate possession of his share since 1897–98, has he acquired an absolute title to the property in dispute? If Plaintiffs’ father’s claim is time-barred, has their claim become time-barred also?

There was some controversy as to the effect of the admission already stated. But their Lordships think that, as the issues were settled in presence of the parties, it must be construed in the sense recited in the third issue. The learned Judge of First Instance answered the first and second issues in the affirmative, and as to the third issue held that the Defendant Jainarayan had acquired an absolute title to the property in suit by adverse possession for more than 12 years.

On appeal to the Court of the Judicial Commissioner, the learned Additional Commissioner held that as the first Plaintiff had instituted the suit within three years of attaining the age of 21, he was entitled to the benefit of Section 7 of the Limitations Act of 1877 and the suit was not barred as against him, but he held that it was barred as against his younger brothers, who were born after the commencement of what he regarded as the adverse possession of the

Defendant Jainarayan. It was, however, conceded before this Board, and, as their Lordships think, rightly conceded, that if the first Plaintiff succeeds in the suit his younger brothers born before a partition of the estate will be entitled to share in the relief.

The learned Additional Commissioner also held that the first Plaintiff was bound by his father Kedarnath's acquiescence in Jainarayan's joint enjoyment of the family property and consent to a partition with him, since in such acquiescence and consent he must be held to have acted in a representative and not in a personal capacity.

The basis of the suit is that the adoption of Jainarayan was wholly invalid, in which case he was in the view of the law an absolute stranger. It is not disputed that the validity of an adoption may be contested by persons prejudicially affected by it. And it seems to their Lordships to be clear that, although a partition made by a Hindu father may under some circumstances bind his minor sons, as was held by this Board in *Balkishen Das and others v. Ram Narain Sahu and others* (30 Ind. App. 139, 150), yet if on the partition a share is given to an absolute stranger the partition may be impeached as a disposition of property made without consideration, unless it can be supported as a *bonâ fide* compromise of a disputed claim. There are no materials before the Board to enable them to form a conclusion in favour of the Respondent on this ground, as suggested by the learned Additional Judicial Commissioner, even if such a case had been set up by him.

Their Lordships are therefore of opinion that if the adoption of Jainarayan was wholly invalid the Plaintiffs would be entitled to succeed in the absence of any other defence.

With respect to the form of suit, it was rightly pointed out by the learned Counsel for the Appellants that to deny any relief except in a suit for partition would be to deny the right of relief altogether, since the basis of their claim is that they are still entitled to the estate as a joint undivided estate, and desire to enjoy it as such. It may well be, however, that, as between Kedarnath and Jainarayan, the latter may be entitled to insist that he stands in the shoes of the former as to the share which would come to Kedarnath upon a partition; and that the Court, if that position were established, would itself, at Jainarayan's instance, decree a partition as between the Plaintiffs on the one hand and Kedarnath on the other. Their Lordships think that on the present pleadings it is open to Jainarayan to set up such a case, but express no opinion as to its validity either in law or fact.

Under these circumstances, their Lordships, being of opinion that they cannot, on the materials before them, finally determine the rights of the parties, will humbly advise His Majesty to set aside the judgments and decrees appealed from, and remand the suit for trial, with a declaration that it is competent for the Court, in the event of the Respondent Jainarayan failing in his other defences, to make the whole or any part of the relief granted to the Plaintiffs conditional on their assenting to a partition so far as regards Kedarnath's interest in the estate, so as to give effect to any right to which the Respondent may be entitled claiming through Kedarnath.

The Respondents must pay the costs of the hearing on the preliminary issues in the District Court, and the costs of the Appeal to the Judicial Commissioner, but there will be no order as to the costs of this Appeal.

In the Privy Council.

RAMKISHORE KEDARNATH AND
OTHERS

v.

JAINARAYAN RAMRACHHPAL AND
OTHERS.

DELIVERED BY SIR SAMUEL GRIFFITH.

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