(1879) 11 PRI CK 0002

Privy Council

Case No: None

Diwan Manwar Ali		APPELLANT
	Vs	
Annodapersad Rai		RESPONDENT

Date of Decision: Nov. 14, 1879

Citation: (1880) 5 ILRPC 644

Hon'ble Judges: J. W. Colvile, B. Peacock, M. E. Smith, R. P. Collier, JJ.

Judgement

J.W. Colvile, J.

1. The facts of this case are complicated, but when fully stated and explained, they do not appear to their Lordships to present any great difficulty. The first, if not the only question, on the appeal, is, whether the plaintiff''s right to sue has been barred by the Statute of Limitation. That was the only question decided by the High Court, and their Lordships may at once say that if that has been improperly decided, they can see no ground what-ever for doubting the correctness of the decision of the lower Court, which, upon the other material issue in the suit, held that there was no pretence for saying that the lands in dispute were not khalisha lands, that is, lands appertaining to the zamindari, but lakhiraj lands held under some title other than that of the zamindars.

2. The facts are shortly these: The estate in question, which is a fractional part of Parganna Surail was derived from a Mahomedan lady by her husband and two sons, and was held by them in the following proportions: the plaintiff, who was one of those sons, had a ten-anna share, his father had a two-anna share, and his brother, or half-brother Samdal, had a four-anna share. Their enjoyment of the property was, up to the year 1839, what has been termed ijmali, or joint, that is, they divided the rents of each village in proportion to their above-mentioned shares in the estate. In 1839 the family arrangement, which has been called a batwara, is said to have taken place. Their Lordships see no reason to doubt that such a transaction did take place. Under it the different villages constituting the estate were divided,--the plaintiff taking solely certain specified villages as his ten annas share, and his father and

Samdal taking jointly certain other villages, which were allotted to them as representing a six-anna share. That state of things seems to have continued, and to have been acted upon up to the year 1856. In 1856, Samdal being in embarrassed circumstances, an execution issued against his four annas of the estate at the suit of one Nasiruddin. It should be mentioned, however, that before this, Masnad Ali, the father, had died in February, 1842, and that, in different ways, his two annas had come to be vested in the plaintiff, so that, at the time of the execution, the elder brother, the plaintiff, had a twelve-anna share, and Samdal only a four-anna share in the zamindari. There seems to have been the usual resistance to execution on the part of Samdal, and a suit was brought by Nasiruddin, who was execution-purchaser as well as judgment-creditor, in the year 1858, to enforce his rights. The first judgment in that suit was pronounced on the 3rd of December, 1860. It was a judgment of a somewhat peculiar character. Nasiruddin had brought the suit, not only against Samdal and certain persons in whom Samdal alleged his four annas had become vested prior to the execution, but also against the present plaintiff, the owner of the twelve annas share; and it was decided not only that the four annas share had continued to be the property of Samdal at the date of the execution, and had passed under the sale in execution, but further, that the family arrangement, or batwara, which had been acted on so long, and had been pleaded by the plaintiff, had not been proved against, and was not binding upon, Nasiruddin, and that he was accordingly entitled to hold the four annas of Samdal, purchased by him in ijmali enjoyment with the plaintiff. The High Court has held that the right of the plaintiff to assert the rights which he has asserted in this suit accrued to him at the date of this decree, and that therefore the decree having been passed in 1860, the present suit, which was instituted on the 17th of September 1873, is out of time.

3. It appears that Samdal, but not the plaintiff, appealed against this decree, and that his appeal was not finally disposed of until the 19th June 1863, Execution was then taken out by Nasiruddin against Samdal, but there were fresh delays, and the heirs of Nasiruddin, who had died in the meantime, did not obtain constructive possession of Samdal''s four annas until July 1864. Samdal then set up a title to hold as lakhiraj the lands in question in this suit which had formed part of the villages allotted by the batwara, as the six annas share, treating them as no part of the khalisha lands, his interest wherein had passed under the execution.

4. It appears to their Lordships that this, or, at all events, the date of the dismissal of the appeal, is the earliest at which it can be said that the title of the plaintiff to the relief which he seeks in the present suit accrued. The effect of the decree in Nasiruddin''s suit, in so far as it set aside the partition, was to give to him a right to take from the plaintiff four annas of the rents of all the villages previously allotted to him, and to give to the plaintiff a corresponding equity or right to have the twelve annas of the rents of the villages which had formerly belonged to Samdal. It cannot, their Lordships think, be said that the plaintiff was bound to assert this right in 1860, because, Samdal having appealed against the decree, there was of course a

possibility of its being reversed or altered, and of Nasiruddin''s suit being dismissed altogether. It was therefore uncertain against whom the right to receive the twelve annas share of the villages in question was to be asserted; nor did it follow that because the batwara, or family arrangement, had been declared to be of no effect as between Nasiruddin and the present plaintiff, it was of no effect as between the plaintiff and his brother, who were co-defendants in Nasiruddin''s suit. Again, it appears that no attempt was made by Nasiruddin to take out execution pending the appeal, and it may fairly be supposed that, by arrangement between the brothers, there was an agreement that the property should continue to be enjoyed as it had been under the partition. In these circumstances it seems to their Lordships that even if, technically, the lands now in question remained, pending the appeal, in Samdal, there was no necessity or duty lying upon the plaintiff to assert his rights in those lands until Nasiruddin''s heirs were put into possession, or, at all events, until the rights of the parties had been finally determined by the dismissal of the appeal. These considerations are alone sufficient to bring the plaintiff''s suit within the twelve years, and to dispose of this question of limitation. The provision of the Act of 1871, which seems to their Lordships to govern the case, is the 145th article of the 2nd schedule, which says, that the time from which the period of twelve years is to be calculated, is that, when the possession of the defendant or of some person through whom he claims became adverse to the plaintiff. Their Lordships think, for the reasons above stated, that there was no possession adverse to the plaintiff before 1863. A question has been raised at the bar whether the possession adverse to the plaintiff did not really begin when Samdal, driven to his last shift, and unable to resist the execution on the part of Nasirudden his zamindari interest, first set up the claim to the lands in question in this suit as lakhiraj lands held by a title other than his zamindari title, and therefore capable of being held by him, although all his interest in the zamindari had passed away. There is some evidence on the part of the plaintiff that the ijaradars of his two annas interest in those lands were then actually and forcibly dispossessed under colour of this title. It is not, however, necessary to decide this question. It is sufficient to say that their Lordships cannot concur with the High Court in thinking that the twelve years are to be calculated from the 3rd December 1860, or from any time previous to the year 1863.

5. It has already been intimated that, in their Lordship''s opinion, the defendant has wholly failed to establish a title as lakhirajdar to the lands in question. Their Lordships must, therefore, humbly advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and in lieu thereof to order that the appeal to that Court be dismissed, and the decree of the Subordinate Judge affirmed with costs.

6. The appellant will also be entitled to the costs of this appeal.