

(1912) 03 CAL CK 0001

Calcutta High Court

Case No: None

Ayennessa Bibi

APPELLANT

Vs

Sheikh Isuf and Others

RESPONDENT

Date of Decision: March 29, 1912**Acts Referred:**

- Limitation Act, 1908 - Section 28

Citation: 14 Ind. Cas. 722**Hon'ble Judges:** Lawrence Jenkins, C.J; N. Chatterjea, J**Bench:** Division Bench

Judgement

1. This appeal arises out of a suit for exclusive possession of land or partition, and the real question in dispute between the parties is what is the amount of the shares of the respective litigants. This, as the case has been placed before us, depends solely and exclusively on the question how far defendant No. 1 can claim the benefit of the Statute of Limitations. The claim under the Statute of Limitations arises as follows: Defendant No. 1 is the brother of the plaintiff, and on their father's death, which occurred many years ago, the property devolved on the father's widow, his son defendant No. 1 and three daughters of whom the plaintiff is one. It is the case of defendant No. 1 that he has been in exclusive possession of the land in dispute from his father's death, or, at any rate, in possession to the exclusion of his sisters, And on that ground he claims to have acquired a title by adverse possession, urging that their interests have become extinguished by virtue of Section 28 of the Indian Limitation Act. Both the lower Courts have decided in his favour, and from the decree of the lower Appellate Court, the plaintiff, one of the sisters, has preferred the present appeal.

s

2. It is urged that there are,, no materials on which the lower Courts were entitled to hold that there was an adverse possession by defendant No. 1. The law on the subject I take to be well settled. In order to establish adverse possession by one tenant-in-common

against his co-tenants there must be exclusion or ouster, and the possession subsequent to that exclusion or ouster must be for the statutory period. The findings of the lower Appellate Court would go to satisfy these conditions, but I do not read the judgment of the Subordinate Judge as satisfying both those conditions, that is to say, first of all, that there has been an exclusion, and secondly, that subsequently to that exclusion, there has been an adverse possession for the statutory period of 12 years or upwards.

3. Accepting this statement as the legal position, the only other question that arises is what is sufficient evidence of exclusion. To my mind, this must depend upon the circumstances of each case. I am prepared to repeat what I have said in a previous case that mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession, but such non-participation or non-possession may, in the circumstances of a particular case, amount to an adverse possession. Regard must be had to all the circumstances, a most important element is the length of time: In this connection, I cannot do better than refer to what was said by Lord Mansfield and the other Judges in *Doe den Fishar and Tayler v. Prosser* 1 Cowp. 217 and the statement of the law by Lord Danman in *Culley v. Doe dem Taylerson* 11 Ad. & El. 1008 at p. 1014 : 3 P. & D. 539 : 9 L.J. (N.S.) Q.B. 288 : 52 R.R. 566. For convenience of reference, I may say that quotations from these cases may be found in *Gangadhar v. Parashram* 29 B. 300 : 7 Bom. L.R. 252 ; *Bandacharya v. Shrinivasacharya* 5 Bom. L.R. 742 . The circumstances that have to be taken into consideration appear to me to be these, among others,--the relationship of the parties, their position, the mode of life in the particular community to which the parties belong, the character of the property, and other circumstances of a similar character. What has to be seen is whether, having regard to the long possession and to all the circumstances, it can be said that there has been such an exclusive possession or participation of profits by the brother in this case as to afford an indication of a denial of the rights of the other co-tenants, and whether, on the facts as found, it would be right and reasonable to hold that there had been not only an exclusion of the co-tenants but an exclusion so distant in date as to justify the view that there had been twelve years' adverse possession on the part of defendant No. 1 at the time when this suit was instituted.

4. There is a subsidiary point in this case which has to be considered. It is urged on the part of the plaintiff that in addition to the share to which she succeeded as part of her mother's original share, the mother's estate was augmented by a portion derived by her from a predeceased daughter. When that daughter died, does not precisely appear. The plaintiff stated that she died five or six years ago; we are told that the evidence is that she died. 15 years prior to the institution of the suit. Now, with reference to this daughter and the share alleged to have been derived by the mother from that daughter, it will be necessary for the Court to consider whether, at the date of the daughter's death, there had been twelve years' adverse possession against the daughter in the sense that I have indicated, for if there had been none, then the daughter's share was not extinguished and a portion of it came to the mother and from the mother there would be a devolution in

respect of it on the plaintiff, for it is not suggested that there was any adverse possession on the part of defendant No. 1 against his mother.

5. We think that, in the circumstances, the proper course will be to send down the following issues for determination by the lower Appellate Court: (1) Whether, having regard to all the circumstances, it is to be inferred that there was an exclusion by defendant No. 1 of the plaintiff and her deceased sister? (2) If so, whether by adverse possession (a) the plaintiff's right to her share and (b) Tasarunnisa's right to her share became extinguished? This must be decided on the record as it stands and the return should be made within two months.