Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bijoy Gopal Mukerji and others v. *Srimati Krishna Mahishi Debi* (*legal representative of of Nil Ratan Mukerji, deceased*) *and others, from the High Court of Judicature at Fort William in Bengal; delivered the 7th February* 1907.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD ATKINSON.

[*Delivered by Lord Davey.*]

The only question on this Appeal is whether the suit out of which it arises is barred by limitation. The Appellants (Plaintiffs in the suit) are four of the reversionary heirs of one Chandra Bhusan Mukerji, who died childless so long ago as the year 1832. He was succeeded by his widow Soyamoni Debi, who died on the 21st October 1893. The principal Defendants to the suit or their successors in title, being Respondents 1 to 68, are in possession of the property in suit and claim to be entitled thereto either directly or by derivative titles under an ijara, or lease, of the whole of Chandra Bhusan's property for a term of sixty years, executed by Soyamoni on the 7th September 1863. The other Defendants or their successors in title, being the last three Respondents, are the other reversionary heirs, who have not joined the Appellants as Plaintiffs. By their plaint the Appellants prayed a declaration that the ijara in

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question, and all the rights subordinate thereto mentioned in the plaint, have become inoperative as against the Appellants since Soyamoni's death, and for khas possession of the disputed properties with mesne profits.

The Subordinate Judge, on the trial of certain preliminary issues, held, on the authority of *Sheo Shankar Gir* v. *Ram Shewak Chowdhri* (I.L.R., 24 Calc. 77), that Article 91 of Schedule 2 to the Indian Limitation Act had no application to the present suit, and that it was governed by the twelve years' limitation prescribed by Articles 140 and 141. No limitation therefore applied to the suit, and he found the issue as to limitation in the Appellants' favour. At the subsequent trial of the other issues on their merits, the Subordinate Judge's judgment was in favour of the Appellants, except as to certain Defendants, and he made a decree, dated the 28th November 1898, in accordance with his findings.

No less than six appeals against the decree of the Subordinate Judge were presented to the High Court of Calcutta, and on the hearing of the appeals the Court reversed the finding of the Subordinate Judge on the preliminary point as to limitation, holding that Article 91 was applicable to the case and that consequently the suit was barred, and must be dismissed with costs.

By Article 91 of Schedule 2 to the Limitation Act, the period of limitation for a suit "to "cancel or set aside an instrument not otherwise "provided for" is "three years from the time "when the facts entitling the Plaintiff to have "the instrument cancelled or set aside become "known to him." By Article 141 it is prescribed that in a suit for possession of immoveable property on the death of a Hindu female, the period of limitation is twelve years from the female's death.

The learned Chief Justice in his Judgment observes that the Court had first to consider whether the lease in question was void or voidable, and that this was set at rest by this Board in the case of *Modhu Sudan Singh* v. *Rooke*, 24 Ind. Ap. 164. The learned Judge quoted from the judgment delivered by Sir Richard Couch the following words :—

> " In considering their effect it must be observed that the " putni was not void, it was only voidable; the Raja might " elect to assent to it and treat it as valid. Its validity " depended on the circumstances in which it was made. The " learned Judges of the High Court appear to have fallen into " the error of treating the putni as if it absolutely came to an " end at the death of the widow."

The Chief Justice subsequently observes (not with perfect accuracy) that in the case before the Court the Plaintiffs expressly asked to have the ijara lease set aside, and cannot recover possession unless it is set aside. From the authorities which had been cited by him, he says, it would appear that if the Plaintiffs can recover possession without setting aside the lease, then Article 141 would apply and not Article 91, but if they cannot so succeed without getting rid of the lease, then the case would fall within Article 91.

Their Lordships think that the learned Chief Justice correctly stated the question in the words last quoted. But they differ from the learned Judge as to the answer to be given to the question so put, and they think that it is not answered by merely saying that the ijara was voidable only and not void. In the case before this Board cited by the learned Judge the question was whether the acceptance of rent payable under the putni and other circumstances afforded evidence of an election by the Raja to confirm the putni and treat it as valid. If it was *ipso facto* void it could not of course be confirmed, and the acceptance of rent would be

evidence only of the creation of a new tenancy. A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *primâ facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. It is true that the Appellants prayed by their plaint a declaration that the ijara was inoperative as against them, as leading up to their prayer for delivery to them of khas possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the Defendants to plead and (if they could) prove the circumstances which they relied on for showing that the ijara or any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs.

Their Lordships are of opinion that the Article in the Schedule to the Limitation Act applicable to this case is Article 141, and the suit is not therefore barred, and that it should therefore be sent back to the High Court to inquire into and decide the other points mentioned by Counsel for the Respondents.

The High Court made altogether five decrees, all dated the 16th June 1903, on the Appeals before it. In Appeal No. 71 of 1899, by the present Appellants, the Appeal was dismissed

with costs except as to Defendants Respondents Nos. 18 to 24, both inclusive, who had entered into a compromise and had obtained a decree to that effect on the 2nd June 1903. By the other four decrees the suit was dismissed with costs. The sixth Appeal, No. 175, by Defendant No. 5, is also stated to have been compromised.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court, dated the 16th June 1903, in Appeal No. 71 of 1899, be reversed except as to Defendants Respondents Nos. 18 to 24 both inclusive therein mentioned, and that the four other decrees of the High Court of the same date also be reversed, and the finding of the Subordinate Judge on the third issue as to limitation be affirmed, and with this direction the cause be remitted to the High Court to proceed with the consideration of the Appeals to that Court from the decree of the Subordinate Judge, dated the 28th November 1898, other than such as have been compromised. The Respondents other than those with whom compromises have been made as aforesaid, and Respondent No. 59 who is dead and whose representative is not a party to the record, and except such as are *pro formâ* Defendants only, will pay the costs of this Appeal.

Their Lordships must again express their regret at the bulk of the papers included in the record which are for the most part absolutely irrelevant to the only question raised by the Appeal. As, however, there is nothing in the Record to show that the Respondents objected to the inclusion of any of these papers, their Lordships cannot deprive the Appellants of any part of their costs.