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application. Whatever it was, whether contract or offer to take shares, it was addressed to the promoters, and not to the company, and the company could not subsequently adopt it, as they were not in existence when it was made, and it was not renewed when the company was established. It was argued that, although ratification was not possible under English law, the Specific Relief Act (s. 23, cl. (*h*), and 27, cl. (*e*)) made it admissible. But these sections were not intended to apply to contracts to take shares, but only to contracts for the working purposes of the company such as would be, in the present case, a contract for the supply of machinery for making ice. They only crystallize the English law as to cases where the company has taken the benefit of a contract, but refuses to carry it into full effect:—see cases collected in Fry on Specific Performance, (2nd ed.) Part II, c. 5, and especially pl. 228 and 229. Moreover, if these sections of the Specific Relief Act had been made to cover contracts regarding shares with promoters, s. 45 of the Companies Act, which is a more recent enactment, could not have been framed in its present language. As the section stands, it could not be taken to include a contract made with the promoters. The addition of the words "with a Company" in the Act of 1882 shows clearly that such contracts were not within the intention of the Legislature, nor are they within the plain meaning of the words. We are of opinion, therefore, that the view taken by the Judge as to the effect of the defendant's agreement in February, 1886, is correct, and that he rightly disposed of the case by his order dismissing the suit with costs. The plaintiff must pay the costs of this reference.

Attorneys for the plaintiffs:—Messrs. *Bamanji and Hormasji.*

Attorneys for the defendant:—Messrs. *Macfarlane, Edgelow, and Hemming.*

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[424] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

SAYAD NYAMTULA (*Original Plaintiff*), *Appellant v.* NANA VALAD FARIDSHA (*Original Defendant*), *Respondent.**

[17th July, 1888.]

Dekkhan Agriculturists' Relief Act (*XVII of* 1879), *ss.* 39, 46, 47, 48—*Village conciliator—Proceedings before a conciliator—Certificate of a conciliator—Exclusion of the time occupied in proceedings before a conciliator in computing the period of limitation—Limitation—Limitation Act* (*XV of* 1877), *art.* 144—*Adverse possession*—Onus probandi—*Practice—Objection to the jurisdiction of a Court taken for the first time in second appeal.*

Under s. 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the conciliator to whom application is to be made for an amicable settlement of a dispute must be the one appointed for the local area in which the agriculturist is residing, and not for the district in which the land in dispute is situated.

The plaintiff was an agriculturist residing in the Kopargaon Taluka. He purchased the house in dispute from the defendant on the 30th January, 1872, but did not get possession.

On the 12th December, 1883, the plaintiff applied to be put into possession under s. 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the

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conciliator appointed for the Khatav Taluka where the house in dispute was situate. The proceedings before the conciliator lasted until the 19th February, 1884, on which day a certificate under s. 46 of the Act was granted to the plaintiff.

On the 20th February, 1884, the plaintiff brought this suit to recover possession of the house. The defendant pleaded limitation. The plaintiff contended that under s. 48 of Act XVII of 1879 the time occupied in the proceedings before the conciliator should be deducted in computing the period of limitation.

Held, that the plaintiff was not entitled to such deduction, as the conciliator, before whom the proceedings had been instituted, was not one appointed for the local area in which the plaintiff was residing, as required by s. 39 of Act XVII of 1879, and had, therefore, no jurisdiction to deal with plaintiff's application.

Held, also, that the certificate obtained by the plaintiff was not such a certificate as is required by s. 47 of the Act.

Held, also, that the want of a proper certificate was not fatal to the suit. As soon as a defect in a certificate becomes apparent, the proper course is for a Court to stay proceedings, to enable the plaintiff to make good the defect by producing the requisite certificate.

Held, further, that the objection to the suit, on the ground that a proper certificate had not been obtained, could be taken for the first time in second appeal, as it was an objection affecting the jurisdiction of the Courts below.

Held, further, that under art. 144 of the Limitation Act (XV of 1877) it is not for the plaintiff to prove that he has been in possession within twelve years [425] before suit, but it is for the defendant to show that he has held adversely to the plaintiff for twelve years.

[F., 14 M. 96 (97); 2 N.L.R. 32 (33); R., 13 C.P.L.R. 99 (101).]

SECOND appeal from the decree of W. H. Crowe, District Judge of Satara, in appeal No. 385 of 1884 of the District File.

The plaintiff sued to recover possession of a house which he had purchased from the defendant on the 30th January, 1872. He had never obtained possession.

The plaintiff was an agriculturist residing in the Kopargaon Taluka. The house in question was situated in the Khatav Taluka. On the 12th December, 1883, the plaintiff applied, under s. 39 (1) of the Dekkhan Agriculturists' Relief Act (XVII of 1879), to the conciliator of the Khatav Taluka to effect an amicable settlement of the matters in dispute between him and the defendant. On the 19th February, 1884, the plaintiff obtained from the conciliator a certificate under s. 46 (2) of the Act. On the 20th February, 1884, the present suit was filed.

The defendant pleaded that the suit was time-barred; that he had received no consideration for the sale; and that the house in dispute had been in the possession of one Shahabudin since a time long anterior to the sale.

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(1) Section 39 of Act XVII of 1879 provides as follows:—"When any dispute arises as to, or there is a prospect of litigation regarding, any matter within the cognizance of a Civil Court between two or more parties one of whom is an agriculturist residing within any local area for which a Conciliator has been appointed, or when application for execution of any decree in any suit to which any such agriculturist is a party, and which was passed before the date on which this Act comes into force, is contemplated, any of the parties may apply to such Conciliator to effect an amicable settlement between them."

(2) Section 46 provides—"If the person against whom any application is made before a Conciliator cannot after reasonable search be found, or if he refuses or neglects, after a reasonable period has been allowed for his appearance, to appear before the Conciliator, or if he appears, but the endeavour to induce the parties to agree to an amicable settlement or to submit the matter in question to arbitration fails, the Conciliator shall, on demand, give to the applicant, or, when there are several applicants, to each applicant, a certificate under his hand to that effect."

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The plaintiff contended that under s. 48 (1) of the Dekkhan Agriculturists' Relief Act the time occupied in the proceedings [426] before the conciliator from 12th December, 1883, to 19th February, 1884, should be excluded from computation, and that the suit was not barred.

The Subordinate Judge who tried the case held that the suit was barred by limitation. He was of opinion that as there were conciliators appointed both for the Khatav and the Koregaon talukas, the plaintiff should have applied to the conciliator of the Koregaon Taluka where he resided, and not to the conciliator of the Khatav Taluka, who had no jurisdiction to entertain the plaintiff's application under s. 39, or to grant him a certificate under s. 46 of the Dekkhan Agriculturists' Relief Act. He, therefore, held that the plaintiff was not entitled to a deduction of the time occupied in the proceedings before the conciliator ; and that as the plaintiff had never taken possession of the house, his claim was now barred by limitation.

This decision was confirmed on appeal by the District Judge of Satara.

The plaintiff thereupon preferred a second appeal to the High Court.

G. R. Kirloskar, for the appellant.—Under art. 144 of the Limitation Act (XV of 1877) time begins to run from the date when the adverse possession commences. The *onus* lies on the defendant to show when such adverse possession began. The lower Courts have cast the *onus* on the wrong party. The defendant himself admits that he has not been in possession within the last twelve years. The plea of limitation does not, therefore, avail him.

M. B. Chowbal, for respondent.—The suit cannot be entertained. The necessary certificate has not been obtained : see s. 47 (2) of Act XVII of 1879. The Court has no jurisdiction to try this suit without the certificate—*Durgaram Maniram* v. *Shripati* (3).

[427] *G. R. Kirloskar*, in reply.—No objection was taken to the certificate in either of the Courts below. It is too late to raise it now for the first time in second appeal. Assuming that it is still open to take this point, the plaintiff can even now be permitted to produce the requisite —certificate—*Mahammad Azmat Ali Khan* v. *Lalli Begum* (4).

JUDGMENT.

The judgment of the Court (BIRDWOOD and PARSONS, JJ.), was delivered by

BIRDWOOD, J.—We are of opinion that the lower Courts have rightly held that the time occupied by the plaintiff in proceedings before a conciliator who had no jurisdiction to deal with the dispute between him and the defendant cannot be excluded, under s. 48 of the Dekkhan Agriculturists' Relief Act XVII of 1879 in computing the period of limitation prescribed for the present suit by art. 144 of sch. II of the Limitation Act, 1877 : for, under s. 48 of the Dekkhan Agriculturists' Relief Act,

(1) Section 48.—In computing the period of limitation prescribed for any such suit the time intervening between the application made by the plaintiff under section thirty-nine and the grant of the certificate under section forty six shall be excluded."

(2) Section 47.—No suit, and no application for execution for a decree passed before the date on which this Act comes into force, to which any agriculturist residing within any local area for which a Conciliator has been appointed is a party, shall be entertained by any Civil Court unless the plaintiff produces such certificate as aforesaid in reference thereto.

(3) 8 B. 411. (4) 8 C. 422.

it is only the period intervening between the application made by the plaintiff under s. 39 and the grant of the certificate under s. 46 which can be so excluded, and, under s. 39, the conciliator to whom application is to be made must be the one appointed for the local area in which the agriculturist is residing. In the present case the plaintiff applied to, and obtained a certificate from, the conciliator appointed for the local area in which the land in dispute is situated. His application was not, therefore, such an application as is contemplated in s. 48. For the same reason, the certificate that the plaintiff obtained is not such a certificate as is required by s. 47 of the Act.

This objection was not taken in the Courts below; but we feel bound to consider it here, as it is one affecting the jurisdiction of the Courts below. We do not, however, think it absolutely fatal to the plaintiff's suit; for so soon as such a defect in a certificate becomes apparent, the proper course is for a Court to stay proceedings, to enable the plaintiff to make good the defect by producing a certificate from a conciliator competent to deal with his application under s. 39 of the Act. This was the course [428] followed in *Raghunath Dadaji Khade* v. *Anant Govind Bhople* (1), and should, we think, be now adopted by the Courts below, to which, we are of opinion, the suit must be remanded for retrial (after a proper certificate has been produced), because the question of limitation has been wrongly dealt with by both those Courts.

The suit is one by a vendee to recover possession of land from his vendor. The sale took place on the 30th January, 1872. The plaint was filed on the 20th February, 1884. If the vendor was in possession at and from the time of the sale, his possession must have been adverse for more than twelve years, and the suit would be barred—*Anand Coomari* v. *Ali Jamin* (2). The defendant denies that he has been in possession at all. The plaintiff says in his deposition that, at the time of the sale, the defendant was in possession. The parties were clearly at issue on this question of fact, upon the right determination of which the decision as to limitation depended. But though the issue was raised, neither of the Courts below decided the question. The lower appellate Court held that, as the plaintiff had not been in possession for twelve years, the suit was barred. But that is not the law, as found in art. 144 of sch. II of the Limitation Act, which prescribes that the period shall run from the date when the possession *of the defendant becomes adverse to the plaintiff.* It is clear that, until a defendant has possession, he cannot have adverse possession; and if the defendant in the present case was out of possession at the time of the sale, and subsequently obtained possession, it can only have been adverse from the time when he entered on the property—*Ram Prosad Janna* v. *Lakhi Narain* (3) and *Sheo Prasad* v. *Udai Singh* (4).

We must, therefore, reverse the decisions of the Courts below, and remand the case for retrial with reference to the foregoing remarks. Costs to abide the result.

Decree reversed, and case remanded.

(1) Printed Judgments for 1882, p. 368.
(2) 11 C. 229.
(3) 12 C. 197.
(4) 2 A. 718.