by a particular oath, he might be estopped from retracing the step he had taken if his offer were acted on; but, in the present case, it is not contended that either the pleader or the agent of defendant No. 2 was so authorized.

We, therefore, confirm the order of remand, with costs.

Decree confirmed.

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APPELLATE CIVIL.

Before Mr. Justice Scott and Mr. Justice Telang.

FAKI ABDULLA AND ANOTHER (*Original Defendants*), *Appellants v.* BABAJI GUNGAJI (*Original Plaintiff*), *Respondent.**

[21st February, 1890.]

Limitation Act (XV of 1877), arts. 142, 144—Onus probandi.

In cases falling under art. 142 of the Limitation Act (XV of 1877) the plaintiff must, at the outset, show possession within twelve years, and cannot rest merely on a proof of title, while in cases falling under art. 144 the plaintiff may rest content with proof of title only in the first instance, and the burden lies on the defendants to show that they have had a possession inconsistent with the title of the plaintiff for more than twelve years before suit.

[459] The plaintiff sued to recover possession of certain land, together with mesne profits until recovery of possession, alleging that he had brought the land and obtained possession, and that his possession was obstructed by the defendants.

Held, that the suit fell under art. 142, and not 144, of the Limitation Act (XV of 1877), and that it was for the plaintiff to show that he, or those under whom he claimed, had been in possession within twelve years before suit.

Rao Karan Singh v. *Raja Bakar Ali Khan* (1) and *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neogi* (2) explained.

[F., 14 M. 96; Appr., 18 C. 513; R., 27 B. 43 (66); 35 B. 79=12 Bom. L. R. 956=8 Ind. Cas. 639; 2 L. B. R. 56; 5 Bom. L. R. 225 (229); 10 Bom. L. R. 571; 10 Ind. Cas. 554=5 S. L. R. 49; 2 N.L.R. 32; 65 P. R. 1901=105 P.L.R 1901; 123 P. W. R. 1908; U. B R. (1897—1901) 461.]

APPEAL from an order of remand made by Rao Bahadur G.A. Mankar, First Class Subordinate Judge of Thana, A. P., in appeal No. 355 of 1887 of the District File.

The plaintiff sued, in 1886, to recover possession of the land in dispute, alleging that he had purchased it from one Vithal Devasthale in 1885; that immediately after the purchase he had cut and stored 15,000 bundles of grass on the land; that he was prevented from cutting more by the defendants, who cut 15,000 bundles of grass, and carried them away, and also those cut by the plaintiff. The plaintiff claimed the value of 30,000 bundles of grass, together with mesne profits up to delivery of possession.

The defendants pleaded that the plaintiff's vendor had sold the land in dispute to defendant No. 2 about eighteen years before suit; that defendant No. 2 had been in possession ever since the date of the sale; and that the plaintiff had no title to the land in dispute.

The Subordinate Judge found that the sale to defendant No. 2 was proved, and that he had been in possession for more than twelve years.

* Appeal from Order No. 3 of 1889.

(1) 5 A. 1 = 9 I. A. 99. (2) 16 C. 473=16 I. A. 23.

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He also found that the plaintiff had not shown that either he or his vendor had been in possession within twelve years before suit. The suit was, therefore, dismissed as barred by limitation.

On appeal, the Subordinate Judge with appellate powers held that the sale to defendant No. 2 was not proved, and that the claim was not time-barred. The decree of the Court of first instance was, therefore, reversed, and the case remanded for trial on the remaining issues.

[460] On the question of limitation the appellate Court remarked as follows :—

"Though it is not satisfactorily proved that the plaintiff's vendor had possession within twelve years before the institution of the suit as found by the Subordinate Judge, that circumstance does not bar the plaintiff's claim to the possession of the land, on the ground of limitation at all. For the question is whether the possession of the defendants had been adverse to the plaintiff or his vendor for twelve years before the institution of the suit, and not whether the vendor was ever in possession within twelve years before that date, according to art. 144 of Sch. II of Act XV of 1877. Vithal says that defendant No. 2 had been in possession since Shake 1800 (1878-79 A. D.). On taking into consideration the evidence on the record, I don't think that it is satisfactorily proved that either of the defendants has been in possession for a longer period. Defendants' witnesses, who depose to the possession of defendant No. 2 for upwards of twelve years, are not, in my opinion, entitled to any credit at all.

The defendants appealed to the High Court against the order of remand.

Shantaram Narayan, for appellants.—This suit is governed by art. 142, and not 144 of the Limitation Act. The plaintiff alleges that while he was in possession he was dispossessed by the defendants. It lies on him to show that either he or his vendor had been in possession within twelve years before suit—*Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neogi* (1).

Manekshah Jehangirshah, for respondent :—Under the present Limitation Act the burden is upon the defendant to show that he has been in adverse possession for more than twelve years. Art. 144 applies to the present case—*Rao Karan Singh* v. *Raja Bakar Ali Khan* (2).

JUDGMENT.

TELANG, J.—The Subordinate Judge, with appellate powers, having held that the sale relied on by the defendants is not proved, the only question which arises on this appeal is whether the plaintiff's claim is barred by limitation. The Subordinate **[461]** Judge finds it "not satisfactorily proved that the plaintiff's vendor had possession within twelve years before the institution of the suit." But he holds that to be immaterial, for he says "the question is whether the possession of the defendants had been adverse to the plaintiff or his vendor for twelve years before the institution of the suit, and not whether the vendor was ever in possession within twelve years before the date." The view thus expressed by the Subordinate Judge would seem to be supported, to some extent, by the decision of the the Privy Council in *Rao Karan Singh* v. *Raja Bakar Ali Khan* (2). [see, however, *Gopaul Chunder* v. *Nilmoney Mitter* (3)]. But it is necessary, in connection with that case, to examine the later decision of the same tribunal in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neogi* (1), whichap pears

(1) 16 C. 473 = 16 I. A. 23. (2) 5 A. 1 = 9 I.A. 99. (3) 10 C. 374.

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to place the onus of proving possession within twelve years before suit on the plaintiff. Now it is to be remarked that in the case of *Rao Karan Singh* v. *Raja Bakar Ali Khan* (1) the plaintiff sued to have certain property sold to satisfy a mortgage, merely alleging a title as mortgagee in himself and a wrongful possession obtained by the defendants from the Revenue authorities, who had held possession before for the purpose of enforcing the Government claim for land revenue. There was thus no allegation of original possession in the plaintiff lost by dispossession or discontinuance of possession. That case, therefore, did not fall within the purview of art. 143 of sch. II of Act IX of 1871, which on this point is identical with the corresponding article in Act XV of 1877. And the Privy Council accordingly held that the article applicable to the case was the general one, namely, 144, under which the limitation dates from the time when the possession of the defendant becomes adverse. And they further held that under a provision of that character the party relying on adverse possession to displace a proved or admitted title must show when such adverse possession commenced. The later case of *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neogi*(2) arose upon a different state of facts, as the plaintiffs alleged that they had been in possession and were dispossessed by the defendants. The Privy Council held, under [462] those circumstances, that the case fell within art. 142, and that in cases falling under that article the plaintiff must show that he has had possession within twelve years before suit. Compare also the remarks of this Court in *Moro Desai* v. *Ramchandra Desai* (3).

The result of these two decisions of the Privy Council when compared with each other appears to be this, that in cases falling under art. 142 the plaintiff must, at the outset, show possession within twelve years, and cannot rest merely on a proof of title, while in cases falling under s. 144 the plaintiff may rest content with proof of title only in the first instance, and the burden lies on the defendants to show that they have had a possession inconsistent with the title of the plaintiff for more than twelve years before suit.

If that is the true rule, the view which the learned Subordinate Judge has taken in this case cannot be supported. The plaintiff in this case alleges that he got into possession under his sale, and that his possession was obstructed by the defendants, and by this suit he claims to recover possession from the defendants together with mesne profits until recovery of possession. That would seem to be a suit of the description contained in art. 142, and therefore art. 144 cannot be applied to it. (See *Nawab Muhammad Amanulla Khan* v. *Badan Singh* (4).) The plaintiff then must show that he, or those under whom he claims, have had possession within twelve years before suit. This point can be investigated on the fresh trial ordered by the Subordinate Judge, with appellate powers, as it has not really been dealt with properly in the trial already had. The order of the lower Court must, therefore, be confirmed, but without prejudice to the right of the defendants on the fresh trial to contend that the plaintiff's claim is barred by limitation. Costs in this Court to abide the result.

Order confirmed.

(1) 5 A. 1=9 I. A. 99.
(2) 16 C. 473=16 I. A. 23.
(3) 6 B. 508 (510).
(4) 17 C. 137=16 I. A. 148 (151).