

think that the document passed by him amounts to an instrument of partition.

Similarly on the 2nd September, Waman Pandurang passed to his brother Govind a document in the form of a release whereby he and Govind divided the remaining family property by Govind handing over to Waman securities for money of the nominal value of Rs. 40,183 and of the estimated value of Rs. 12,500. That also, in our opinion, for the reasons already stated, amounts to an instrument of partition whereby the two remaining co-owners divide their property in severalty.

Our answer to the reference is, therefore, that both the documents are instruments of partition.

*Order accordingly.*

G. B. R.

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## APPELLATE CIVIL.

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*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

VASUDEO ATMARAM JOSHI AND ANOTHER (ORIGINAL PLAINTIFFS),  
APPELLANTS, v. EKNATH BALKRISHNA THITE AND OTHERS (ORIGINAL  
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*Limitation Act (XV of 1877), articles 142 and 144—Suit to recover possession—Dispossession—Discontinuance of possession—Possession as an agent of minors—Decree by the minors on attaining majority against the agent for possession of the property—Decree not executed and barred by limitation—Agent wrongfully dispossessed by a third person—Money decree against the original owners—Decree-holder seeking to attach property—Adverse possession—Civil Procedure Code (Act XIV of 1882), section 283.*

N died in 1879 leaving behind him two minor sons R and D, and a mistress A. The latter looked after the minors and managed their property. When they arrived at the age of majority they found that A claimed the property in her own right. In 1891, R and D sued A for the possession of the lands and obtained a decree on the 30th of August 1892, which was confirmed on appeal on the 15th of June 1894. This decree was sought to be executed on the 26th June 1897, but the application was dismissed as barred by limitation. A was

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then wrongfully deprived of the possession of the property by V, who sold it to B in 1898. B mortgaged the property to E in 1900. In the same year, the plaintiff obtained a money decree against R and D, and in execution of it he had an attachment placed on the property, but the attachment was removed in 1904 at the instance of B and E. In 1905, the plaintiff brought a suit for a declaration that the property was liable to be attached and sold in execution of his decree against R and D. The defendants B and E contended that the suit was barred under article 142 of the Limitation Act, 1877, inasmuch as neither the plaintiff nor his predecessors-in-title R and D were in possession of the property within twelve years preceding the suit.

*Held*, that the suit having been brought by the plaintiff, under section 283 of the Civil Procedure Code of 1882, to establish his right to attach and sell the property in dispute as that of his judgment-debtors R and D in execution of his money decree, all that he had to prove was that on the date of attachment the judgment-debtors had a subsisting right to the property; and that the suit must, therefore, be tried as if it were a suit for possession by the judgment-debtors.

*Held*, also, that as A's possession must be deemed to have begun in 1879 as that of bailiff or agent for the minors R and D, and to have continued as such until after they had arrived at the age of majority, and as there had never been any dispossession by A of R and D while they had been in possession, in a suit against A her plea of limitation would be decided by the application, not of article 142, but of article 144 of the Limitation Act, 1877.

*Morgan v. Morgan*<sup>(1)</sup>; *Taylor v. Horde*<sup>(2)</sup>; *Lallubhai Babubhai v. Man-kuwarbai*<sup>(3)</sup> and *Dadoba v. Krishna*<sup>(4)</sup>, followed.

*Held*, further, that though the decree for possession obtained by R and D against A had become incapable of execution by reason of their failure to apply to the Court for its execution within the period prescribed by the law of limitation, the right established by it remained; and though that right could not be enforced as against A by execution through the Court, the decree-holders could enter by ousting any trespasser, A included.

*Bandu v. Naba*<sup>(5)</sup>, followed.

*Held*, therefore, that there having been no allegation of possession in R and D lost by dispossession or discontinuance of possession, but the case put forward having been a title in them established by their decree against A and a wrongful possession obtained from her after the decree by V under whom B and E claimed, the limitation applicable to the suit was that provided by article 144, not article 142, of the Indian Limitation Act (XV of 1877).

(1) (1737) 1 Atk. 430.

(3) (1876) 2 Bom. 388, at p. 413.

(2) Sm. L. C., Vol. II (10th. Edn.),

(4) (1879) 7 Bom. 34.

pp. 644, 645.

(5) (1899) 15 Bom. 238.

*Faki Abdulla v. Babaji Gungaji*<sup>(1)</sup> and *Ganga ayal Nagu Kaval Mhatra v. Nago Dhaya Mhatra*, followed.

*Per* HEATON, J.—Article 142 of the Indian Limitation Act (XV. of 1877) has no application to claims which neither in terms nor in substance are claims to possession, made necessary by reason of dispossession or discontinuance of possession. It is a general principle that anyone suing in ejectment must prove possession within twelve years: the reason for this, however, is that possession is commonly the effective assertion of title which is relied on; but it is not the only one. There is another which in some cases is equally good, and that is an assertion of title made in Court and established by a decree. That is good against those who are party defendants to the suit; and if the same title is re-asserted and made good in a later suit against other opposing parties, it is good against them also and entitles to possession whether the title claimant has or has not been in possession within twelve years, unless the opponent can defeat the title by adverse possession.

APPEAL under the Letters Patent against the decision of Scott, C. J., which reversed the decree passed by Vaman M. Bodas, First Class Subordinate Judge with Appellate Powers at Sholapur, and restored the decree passed by C. R. Karkare, Subordinate Judge at Pandharpur.

This was a suit brought by a decree-holder to establish his right to attach and sell certain property as belonging to his judgment-debtors, brought under the provisions of section 283 of the Civil Procedure Code (Act XIV of 1882).

The decree in question was a money decree obtained in 1900 by Atmaram (the plaintiff), who having died was represented in these proceedings by his two sons, Vasudeo and Shankar, the appellants. In execution of this decree, the plaintiff attached certain lands as belonging to his judgment-debtors, Ramchandra (defendant No. 3) and Dnyaneshwar (father of Kondi, defendant No. 4), Eknath (defendant No. 1) intervened in those proceedings by putting forth his title to the property. The Court consequently raised the attachment on the 20th September 1904.

The claim which Eknath advanced against the property in dispute arose under the following circumstances. The property originally belonged to one Namdeo (father of Ramchandra and Dnyaneshwar). He died in 1879 leaving him surviving his two

(1) 1890 14 Bom. 458.

(2) (1887) P. J. 242.

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minor sons above named, and a mistress by name Ambu. After his death, Ambu brought up the minors and managed their property. When both the minors attained majority, they asked Ambu to deliver the property to them. She declined to do so claiming the property in her own right. The two sons, Ramchandra and Dnyaneshwar, sued her in 1891 to recover possession of the property, which included the lands now in dispute. The suit terminated in a decree passed in the plaintiff's favour on the 30th August 1892. It was confirmed on the 15th June 1894 by the appellate Court. The decree-holders Ramchandra and Dnyaneshwar applied to execute this decree on the 26th June 1897, but it was dismissed as barred by limitation having been made more than three years after the date of the decree. Ambu meanwhile continued in possession till 1898, when she was wrongfully dispossessed by a trespasser one Vithal, a cousin of Ramchandra and Dnyaneshwar. Vithal sold the lands to Bhau (defendant No. 2) on the 20th July 1898. Bhau mortgaged the same with Eknath (defendant No. 1) on the 1st August 1900.

The plaintiff Atmaram filed this suit on the 3rd July 1905 under the provisions of section 383 of the Civil Procedure Code (Act XIV of 1882) to obtain a declaration that the lands in suit were liable to attachment and sale in execution of his money decree against Ramchandra and Dnyaneshwar, and that Vithal, Bhau and Eknath had no interest in the lands.

Ramchandra and Dnyaneshwar's son Kondi (defendants Nos. 3 and 4) were absent.

Eknath and Bhau (defendants Nos. 1 and 2) contended in their written statement that Vithal had purchased the lands from Namdeo and was in possession of them as owner since 1879; that they themselves were in possession from 1898; and that as Ramchandra and Dnyaneshwar were out of possession from 1879, their claim was extinguished and the right of the plaintiff was barred by limitation.

The Subordinate Judge held that the sale by Namdeo to Vithal in 1879 was not proved, and that Vithal was not shown to have been in possession since 1879. He further held that Vithal's

adverse possession commenced in 1898, when he stepped into possession by wrongfully ousting Ambu, and dismissed the plaintiff's claim.

This decree was reversed on appeal by the lower appellate Court.

The defendants Nos. 1 and 2 appealed to the High Court.

The appeal was heard by Scott, C. J., who reversed the decree passed by the lower appellate Court and dismissed the suit. The judgment delivered by his Lordship ran as follows :

SCOTT, C. J. :—This is a suit brought by the plaintiff under the provisions of section 283 of the Civil Procedure Code of 1882 for the purpose of determining the respective rights of the 3rd and 4th defendants, the plaintiff's judgment-debtors, on the one hand and the 1st and 2nd defendants, the persons in possession, on the other hand in certain immoveable property attached by the plaintiff.

The material facts are that the property belonged to one Namdeo, father of the 3rd, and grandfather of the 4th, defendant till his death in 1879 ; thereafter it remained in the possession of Ambu who was his mistress and who attended to the wants of the 3rd defendant and Dnyaneshwar, father of defendant 4, during their minority. In 1891 the 3rd defendant and Dnyaneshwar sued Ambu for possession of eight survey numbers, five of which, she alleged, had been bequeathed to her by Namdeo and three of which including the land, the subject of this suit, she alleged that she held as tenant of Namdeo's brother Appaji. The first Court decided against Ambu as regards all the plots. She appealed as to the plots alleged to have been bequeathed to her but did not press her claim as to the other plots. The appellate Court in 1894 confirmed the decree as to these plots but dismissed the suit as regards the plots claimed by bequest.

The plaintiffs in that suit had, therefore, a decree for possession of three survey numbers, which included the land, the subject of this suit. They, however, failed to execute the decree within three years and their remedy against Ambu thus became barred in 1897. In 1898 Vithal Appaji, a nephew of Namdeo, wrong-

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fully dispossessed Ambu and sold the land to defendant No. 2. The defendant No. 1 is mortgagee of defendant No. 2.

The plaintiff, a judgment-creditor of defendants Nos. 3 and 4, attached the land but on the application of defendants Nos. 1 and 2 it was released under section 280 of the Code of 1883.

The plaintiff now sues for a declaration that the land in suit, described in the plaint, is liable to attachment and sale, in execution of decree No. 234 of 1900, obtained by him, against the defendant No. 3 and deceased Dnyaneshwar, the father of defendant No. 4, and that the defendants Nos. 1 and 2 and their vendor, Vithal Appaji Velapure, have no interest in that land, together with cost of suit.

This in substance raises the question which could arise, on a purchaser under a Court-sale under plaintiff's decree trying to obtain possession of the land in suit from the defendants Nos. 1 and 2 who are admittedly in possession and, it is contended by the appellants' pleader that this suit must be tried as if it were a suit for possession between the defendants Nos. 3 and 4 and defendants Nos. 1 and 2 falling under article 142 of the Limitation Act. This contention is, I think, correct as the title of the judgment-debtors comes from Namdeo and the defendant No. 3 and his brother Dnyaneshwar were out of possession when they sued Ambu in 1891.

It is clear law that defendants Nos. 1 and 2 cannot tack to their seven years' possession the possession of Ambu whom they have dispossessed. See Pollock and Wright on Possession, page 98, and *Lakshman v. Vitku*<sup>(1)</sup>—but although they cannot prove adverse possession for twelve years they are entitled to insist that the plaintiff should establish possession by the defendants Nos. 3 and 4 within twelve years of suit. The plaintiff's pleader seeks to satisfy this condition by pointing to the abandonment by Ambu in her appeal of her contention with regard to the property in suit. That, however, is not proof of the possession of the plaintiff's judgment-debtors in 1894. Her surrender upon that point resulted in the affirmation of their decree for posses-

(1) (1895) P. J. 216.

sion as regards the property now in question, but the facts found show that they never got possession by executing their decree. They and those claiming under them would, therefore, fail in a suit for possession falling under article 142 and this suit for the same reason must be dismissed.

I, therefore, reverse the decree of the lower appellate Court and dismiss the suit with costs throughout.

The plaintiff's legal representatives, his sons, appealed from this decision under the Letters Patent.

*Nadkarni*, with *M. V. Bhat*, for the appellants:—

The case is governed by article 144, not by article 142, of the Limitation Act, 1877, as defendants Nos. 1 and 2 did not set up a case of possession and dispossession by way of defence. See *Talskibhai v. Ranchhod*<sup>(1)</sup>; *Ganga v. Nago*<sup>(2)</sup>; *Harishankar v. Karsan*<sup>(3)</sup>; *Radhā Gobind Roy v. Inglis*<sup>(4)</sup>; *Rao Karam Singh v. Rajah Bakar Ali Khan*<sup>(5)</sup>; *Pandurang Govind v. Balkrishna Hari*<sup>(6)</sup>; *Hanmanta v. Mahadeo*<sup>(7)</sup>; *Faki Abdulla v. Babaji Gungaji*<sup>(8)</sup>; *Parmanand v. Sahib Ali*<sup>(9)</sup>; and *Muhammad v. Ghulam*<sup>(10)</sup>. The view taken in the decision appealed against as to the applicability of article 142 is opposed to the weight of authorities. See *Gobind Lall v. Debendronath*<sup>(11)</sup>; *Sheikh Sohnur v. Huttman*<sup>(12)</sup>. On the question of dispossession or discontinuance of possession the following cases were cited: *Rains v. Buxton*<sup>(13)</sup>; *Morgan v. Morgan*<sup>(14)</sup>; *Howard v. Earl of Shrewsbury*<sup>(15)</sup>; *Taylor v. Horde*<sup>(16)</sup>; *Leigh v. Jack*<sup>(17)</sup>; *M'Donnell v. M'Kinty*<sup>(18)</sup>; *Smith v. Lloyd*<sup>(19)</sup>.

Ambu's adverse possession commenced, if at all, in 1897, when the decree for possession obtained against her became barred by time. Nevertheless the right of ownership remained and the title continued with the owners Ramchandra and Dnyaneshwar.

(1) (1902) 26 Bom. 442.

(2) (1887) P. J. 242.

(3) (1893) 18 Bom. 260.

(4) (1880) 7 C. L. R. 364.

(5) (1882) 9 I. A. 99.

(6) (1899) 6 B. H. C. A. C. J. 125.

(7) (1893) 18 Bom. 513.

(8) (1890) 14 Bom. 458.

(9) (1889) 11 All. 433 at p. 447.

(10) (1884) P. R. No. 49 of 1884, p. 121.

(11) (1880) 6 Cal. 311.

(12) (1896) 1 C. W. N. 277.

(13) (1880) 14 Ch. D. 537.

(14) (1737) 1 Atk. 489.

(15) (1874) 17 Eq. 378.

(16) (1757) 1 Barr. 60.

(17) (1879) 5 Ex. D. 261.

(18) (1847) 10 Ir. L. R. 514.

(19) (1854) 9 Exch. 562.

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See *Bala v. Abai*<sup>(1)</sup>; *Rani Hemanta v. Maharaja Jagindra Nath Roy*<sup>(2)</sup>. The defendants Nos. 1 and 2 cannot get higher rights than Ambu against whom the article applicable would be article 144 and not article 142 of the Limitation Act (XV of 1877). See *Lallubhai Bapubhai v. Mankuvarbai*<sup>(3)</sup> and *Dadoba v. Krishna*<sup>(4)</sup>.

P. P. Khare, for the respondents:—

The decision appealed against is in accord with the Privy Council case of *Mohima Chunder v. Mohesh Chunder*<sup>(5)</sup>. Article 144 is a general article and applies only where no other article applies to the case. In a suit to eject trespassers, the plaintiff, in order to succeed, has to show that he, or the person under whom he claims, has been in possession of the property within twelve years of the date of the suit. See *Gopaul Chunder v. Nilmoney Mitter*<sup>(6)</sup>; *Rao Karan Singh v. Rajah Bakar Ali Khan*<sup>(7)</sup>; *Mahomed Ali Khan v. Khaja Abdul Gunny*<sup>(8)</sup>; *Mirza Shamsheer Bahadur v. Munshi Kunji Behari Lal*<sup>(9)</sup>.

The judgment-debtors' title was questioned by Ambu in 1891, when they instituted a suit against her to recover possession of the property. Her adverse possession dated therefore from 1891; and any suit to dispossess her would become time-barred in 1903. Ever since 1891, Ambu claimed and retained the property in her own right. The judgment-debtors having been out of possession for more than 12 years before suit, they were barred by article 142 from putting forth any claim to the lands in dispute.

*Nadkarni*, in reply, cited *Jagatjit Singh v. Sarabjit Singh*<sup>(10)</sup> and *Amrita Ravji v. Shridhar*<sup>(11)</sup>.

CHANDAVARKAR, J.:—The question of law for determination in this appeal is whether the suit brought by the father of the appellants, since deceased, to establish his right to attach and

(1) (1908) 11 Bom. L. R. 1093.

(2) (1906) 8 Bom. L. R. 400.

(3) (1876) 2 Bom. 388.

(4) (1879) 7 Bom. 34.

(5) (1883) 16 Cal. 473.

(6) (1884) 10 Cal. 574.

(7) (1882) 9 I. A. 99.

(8) (1883) 9 Cal. 714.

(9) (1907) 12 C. W. N. 273.

(10) (1891) 19 Cal. 159.

(11) (1908) 11 Bom. L. R. 51.

sell the property in dispute in execution of a money decree is, for the purposes of limitation, governed by article 142 or article 144 of Schedule I to the Limitation Act.

That question turns upon the following facts, which are not in dispute.

The father of the appellants, having obtained a decree for money against the 3rd respondent Ramchandra Namdeo and his brother Dnyaneshwar Namdeo, deceased, represented by his son Kondi, in suit No. 231 of 1900, attached the lands in dispute in execution as belonging to his judgment-debtors.

The 1st respondent, Eknath Balkrishna, thereupon intervened and applied to have the attachment raised on the ground that the land had belonged originally to one Vithal, who had sold it to the 2nd respondent, and that the latter had mortgaged it to the intervenor (the 1st respondent). The application having been allowed, the appellants' father brought the suit, which has given rise to the present appeal, for a declaration that the lands in dispute were liable to be attached as those of his judgment-debtors, the 1st respondent and Dnyaneshwar.

The defence was that the 2nd respondent's predecessor in title, one Vithal, had acquired a title to them by purchase from the father of the appellants' judgment-debtors in 1878, and that the title of the latter was barred by limitation.

The Courts below have found the purchase not proved. So the other defence, that of limitation, alone remains.

On that question it is found as a fact by those Courts that Vithal got into possession without any title only in 1898, so that the respondents, who claim under him and resist the appellants' right to attach and sell the property as belonging to their judgment-debtors, are mere trespassers. But it is contended for those respondents that, though they have acquired no title to the property by adverse possession for the statutory period of 12 years, the appellants are not entitled to succeed and recover possession unless they prove possession within twelve years next preceding this suit brought in 1905.

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And they maintain that, on the facts found by the lower Courts, the appellants were not in possession either by themselves or through their predecessors in title within the 12 years contemplated by article 142 of Schedule I to the Limitation Act. The facts are these. The property belonged to Namdeo, who died in 1879, leaving two sons, the 3rd respondent and his brother Dnyaneshwar (represented now by the 4th respondent), who were then minors. On Namdeo's death, his mistress Ambu, who had lived with him, took charge of his minor sons, administered to their wants, and entered into possession of the property, including that now in dispute, which they had inherited from their father. When they arrived at the age of majority, they found that Ambu claimed the property in her own right.

In 1891 the 3rd respondent and his brother Dnyaneshwar sued Ambu for possession of the lands and obtained a decree on the 30th of August 1892. That decree was confirmed in appeal on the 15th of June 1894. On the 26th of June 1897 the appellants' father applied for its execution, but the application was dismissed as barred by limitation and execution was refused.

Relying on these facts, the 1st and 2nd respondents urge that, from at least 1891 to 1897, Ambu was in possession; that from 1898 Vithal and after him they have been in possession; and that, therefore, the appellants' judgment-debtors have been out of possession for more than 12 years next preceding the suit.

That would be so, if article 142 of Schedule I to the Limitation Act applied. That article contemplates a suit "for possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession." The present suit has been brought by the appellants under section 283 of the old Code of Civil Procedure (Act XIV of 1882), to establish their right to attach and sell the property in dispute as that of their judgment-debtors, the 1st respondent and Dnyaneshwar (father of the 4th respondent), in execution of their money decree. In such a suit the appellants must prove that on the date of the attachment, which was subsequently raised by order of the Court on the

application of the 1st respondent, their judgment-debtors had a subsisting right to the property: *Harishankar Jebhai v. Naran Karsan*<sup>(1)</sup>. The suit must then be tried as if it were a suit for possession by the judgment-debtors.

So regarded, it is not the case here of the judgment-debtors having been dispossessed or having discontinued possession while in possession of the property. The allegation, which has been found proved, is that when Namdeo, father of the judgment-debtors, died, leaving them minors, his mistress Ambu looked after them by administering to their wants and entered into possession of their property.

The Subordinate Judge, who tried the suit, held that Ambu's possession had been from the beginning wrongful and he negatived the plea of the appellants' father that she had commenced her *vahivai* on behalf of his judgment-debtors, who had then been minors. The Subordinate Judge with appellate powers has recorded no finding on that plea. But the law is, as pointed out by Lord Hardwicke in *Morgan v. Morgan*<sup>(2)</sup> "where any person, whether a father or a stranger, enters upon the estate of an infant, and continues in possession, this Court will consider such person entering as a guardian to the infant": (see other decisions to the same effect collated in the notes to the case of *Taylor v. Horde*, Smiths' Leading Cases, Vol. II, 10th Edn., pp. 644 and 645). Ambu's possession must, therefore, be deemed to have begun as that of bailiff or agent for the minors and to have continued as such until, after the minors had arrived at the age of majority, she did something to convert it into a wrongful possession on her own account.

It was only in 1891 that she denied their title and in consequence she had to be sued. But there had never been any dispossession by Ambu of the appellants' judgment-debtors while they had been in possession, because it was she who had been in possession. "Dispossession is where a person comes in and drives out the others from possession" (per Fry, J., in *Rains v. Buxton*<sup>(3)</sup>).

(1) (1893) 18 Bom. 260.

(2) (1737) 1 Atk. 489.

(3) (1820) 14 Ch. D. 537, 539.

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In a suit against her, her plea of limitation would be decided by the application, not of article 142, but of article 144 (*Lallubhai Bapubhai v. Mankuvarbai*<sup>(1)</sup>; *Dadoba v. Krishna*<sup>(2)</sup>).

On the fact alleged and found proved, Ambu herself was wrongfully dispossessed in 1898 by Vithal, under whom the 1st respondent claims. The appellants' judgment-debtors do not claim under or through Ambu; rather they claim against and in spite of her; and it is found in the judgment under appeal that the respondents claiming under Vithal cannot tack on the period of their possession to Ambu's. That is not contested before us. So it cannot be said that the dispossession of Ambu by Vithal in 1898, when she was in possession of the property, was dispossession of the appellants' judgment-debtors. Article 142 is out of place in this respect also.

So much for the dispossession required to bring the case under article 142. But the article also contemplates discontinuance of possession by the person suing. As was said by Fry, J., in *Rains v. Buxton*<sup>(3)</sup>, "discontinuance is where the person goes out and is followed into possession by other persons." It implies that the person discontinuing has given up the land and left it to be possessed by anyone choosing to come in. In the present case there was, whether on the allegations in the pleadings or on the facts found, no such abandonment. It is not the case of any party and it is not the finding of the Courts below that the appellants' judgment-debtors, while in possession, relinquished it as if they did not care for it, and that in consequence the respondents followed *them* into possession.

The decree for possession obtained by the appellants' judgment-debtors (the 3rd respondent and Dnyaneshwar) against Ambu has no doubt become incapable of execution by reason of their failure to apply to the Court for its execution within the period prescribed by the law of limitation. But nevertheless the right established by it remains; and though that right cannot be enforced as against Ambu by execution through the Court, the decree-holders can enter by ousting any trespasser, Ambu included: *Bandu v. Naba*<sup>(4)</sup>.

(1) (1876) 2 Bom. 413.

(2) (1879) 7 Bom. 34.

(3) (1880) 14 Ch. D. 537, 539.

(4) (1890) 15 Bom. 233.

Under these circumstances, there being no allegation of possession in the appellants' judgment-debtors lost by dispossession or discontinuance of possession, but the case put forward being a title in them established by their decree against Ambu and a wrongful possession obtained from her after the decree by Vithal, under whom the 1st and 2nd respondents claim, the limitation applicable to the suit is that provided by article 144, not article 142 of the statute, according to the ruling of this Court in *Faki Abdulla v. Babaji Gungaji*<sup>(1)</sup>, where the distinction between the two articles is explained. The first two respondents admitted in their written statement the original title of Namdeo, from whom as heirs the appellants' judgment-debtors derive their ownership, but they pleaded that the title had become extinct by reason of the alleged purchase by Vithal from Namdeo in 1878 and of Vithal's adverse possession for 12 years from that year. The purchase being found not proved, the respondents in question can succeed only by proving their right by adverse possession for 12 years. They have failed to prove it. In this respect the case resembles in its pleadings *Gangaiyal Nago Kaval Mhatra v. Nagu Dhaya Mhatra and others*<sup>(2)</sup>. There the plaintiff, who sued for possession on the strength of her title and defendants' tenancy under her, was met by the defence that the defendants had obtained the land from her, first, under a certain agreement, and afterwards under a mortgage, and that they had been in adverse possession for more than 12 years. This Court held that, though the plaintiff had failed to prove the tenancy of the defendants set up by her, yet, as the defendants had admitted the plaintiff's title but alleged having come into possession under her, the defendants "cannot claim to retain the land except by proving that they are entitled to do so in virtue of one or other of the alleged transactions with the plaintiff or that their possession has been in fact adverse for twelve years."

For these reasons the decree appealed from must be set aside and that of the Subordinate Judge with appellate powers restored, with the costs of the second appeal and this appeal

(1) (1890) 14 Bom. 458.

(2) (1887) P. J. 242.

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under the Letters Patent on the 1st and the 2nd respondent, who were respectively defendants 1 and 2 in the suit.

HEATON, J :—The facts are recited in the judgment of the learned Chief Justice from whose decision this is an appeal under the Letters Patent.

The plaintiff's claim is to make good the ownership of defendants 3 and 4 over the land in suit. It was opposed by defendants 1 and 2 who claimed independent ownership. It was objected that the claim to establish the title of defendants 3 and 4 was barred by article 142 of the Schedule to the Indian Limitation Act. But it seems to me that neither in form nor in substance is this claim of the kind contemplated by article 142. It is a claim by an owner for his land, against a trespasser; and the cause of action is not based on dispossession or discontinuance of possession, but simply on the allegations that defendants 3 and 4 are the owners of the land and that defendants 1 and 2 have no right to be there. It is established that defendants 3 and 4 are the owners and that defendants 1 and 2 have no right to be there. It is also established that defendants 1 and 2 first came into possession within 12 years of the institution of the suit and that there is no title made good by adverse possession against defendants 3 and 4. These defendants have the title and their title still subsisted when this suit was brought: it had not been extinguished.

I do not think that article 142 has any application to claims which neither in terms nor in substance are claims to possession, made necessary by reason of dispossession or discontinuance of possession. It was indeed urged that it is a general principle that anyone suing in ejectment must prove possession within twelve years and the authorities seem to bear out that contention: but the reason for this is that possession is commonly the effective assertion of title which is relied on and the cases accordingly deal with that particular kind of assertion of title. But it is not the only one; there is another which in some cases is equally good; and that is an assertion of title made in Court and established by a decree. That is good against those who

are party defendants to the suit, and if the same title is reasserted and made good, as here in a later suit against other opposing parties, it is good against them also and entitles to possession whether the title-claimant has or has not been in possession within twelve years; unless the opponent can defeat the title by adverse possession. There is no such defeat in this case.

Therefore I am of opinion that the appeal must succeed.

*Appeal allowed.*

B. R.

1910.

VASUDEO  
ATMARAM  
JOSHI  
v.  
EKNATH  
BALKRISHNA  
THITE.

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

\* DAGDU VALAD SADU (ORIGINAL DEFENDANT), APPELLANT, v. NANA VALAD SALU (ORIGINAL PLAINTIFF), RESPONDENT.\*

1910.

August 25.

*Evidence Act (I of 1872), section 92, proviso 1—Sale-deed—Contemporaneous agreement—Admissibility—Fraud.*

A desired to set aside an ostensible sale-deed by proving that a representation, agreement or promise was made to him at the time of execution that the deed would not be enforced as a sale-deed.

*Held*, no evidence of such a representation, agreement or promise could be admitted for this purpose.

*Dattoo v. Ramchandra*(1) and *Keshavrao v. Raya*(2) followed.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, confirming the decree of B. K. Bal, Subordinate Judge of Sinnar.

The properties in suit originally belonged to one Dagdu valad Lakshman Sonavai. They were put up to auction sale in execution of a decree against him and were purchased by the plaintiff who sold them to the defendant on the 25th September 1901.

In the year 1907 the plaintiff brought the present suit for a declaration that the sale-deed passed by him to the defendant

\* Second Appeal No. 797 of 1909.

(1) (1905) 20 Bom. 119.

(2) (1906) 8 Bom. L. R. 287.