"Whether the first plaintiff was aware, prior to the date of the "sale, of the Suit No. 340 of 1892, or of the execution proceedings "therein."

[In compliance with the above order, the District Judge submitted the following finding:—

"On the evidence of the defendants, first and second witnesses, "I find that the first plaintiff was aware of the Suit No. 340 of "1892 from the date when the third defendant was first served "with notice of the suit."]

JUDGMENT.—The evidence relied on by the Judge, together with the probabilities of the case, coupled with the circumstance that the first plaintiff never denied that he was aware of the suit and subsequent proceedings, are sufficient to support the finding. The sale is therefore binding on the first plaintiff also. The result is that the decree of the Lower Appellate Court is reversed with costs in this and in that Court, and the decree of the Munsif dismissing the suit with costs is restored.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

MUNIAPPAN CHETTI AND OTHERS (DEFENDANTS NOS. 5 to 8), APPELLANTS,

v.

MUPPIL NAYAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1898. January 13, 19.

Limitation—Adverse possession—Suit for ejectment by a jenmi—Defendant in possession under Government cowle.

The plaintiffs sued for possession of land which was found to be their jenm. It appeared that the defendant had been in possession for more than twelve years under a cowle from Government, which provided that the grant of the cowle should not affect the jenmi's right, but that the defendant had never recognized the plaintiffs' title:

Held, that the suit was barred by limitation.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in Appeal Suit No. 189 of 1895, confirming the decree of P. P. Raman Menon, District Munsif of Nedunganad, in Original Suit No. 366 of 1892.

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* Second Appeal No. 1203 of 1896.

MUNIAPPAN CHETTI v. MUPPIL NAYAR.

The plaintiffs sued to recover possession of certain land which was found to be their jenm property. It was alleged that the plaintiffs' predecessor in title had demised the land in 1862 to one Koru, the predecessor in title of defendants Nos. 1 to 3. It appeared that in the following year Koru obtained from Government a cowle and that he and the defendants who were his assignees had been in possession ever since. The District Munsif passed a decree for the plaintiff which was affirmed on appeal by the Subordinate Judge, who held that, whether or not the land had been demised to Koru in 1862 as alleged, there had been no possession adverse to the plaintiffs.

Defendants Nos. 5 to 8 preferred this second appeal.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), *Pattabhirama Ayyar*, and *Subramania Sastri* for appellants.

Sankaran Nayar for respondent No. 1.

Ryru Nambiar for respondent No. 2.

JUDGMENT.—In this case it has been found that the jenm title to the plaint land was in the plaintiffs, and that in 1863 one Koru obtained from Government a cowle to cultivate the land, and that he and his assignees (defendants Nos. 5 to 8), have been in possession ever since. It was alleged that Koru originally got possession of the land under an oral lease from the first plaintiff in 1861–62, but the Subordinate Judge did not decide that question, holding that even if Koru took possession of the land on the strength of the Government cowle and without reference to the jenmi, such possession must be regarded as not hostile to the jenmi, who was, therefore, entitled to recover at any time on the strength of his title. The Subordinate Judge therefore decreed that plaintiffs should recover possession on payment of compensation for improvements.

Against this decree the defendants Nos. 5 to 8 appealed on the ground that the plaintiffs' suit is barred by limitation. We have no doubt but that this is so, unless the letting to Koru in 1861–62 alleged by the plaintiffs is proved. The effect of the grant of a cowle *quoad* the jenmi has often formed the subject of judicial decision (Wigram's 'Malabar Law and Custom', 137) and is well laid down in the case of the *Secretary of State* v. *Ashtamurthi*(1). It is expressly provided in the cowle that the jenmi's rights are

(1) I.L.R., 13 Mad., 118.

not affected by the grant of the cowle, and it is usual for the holder of the cowle to settle with the jenmi at the same time when he receives the cowle from Government. The cowle merely insures a favourable assessment of the Government dues on cultivation. Should the holder of the cowle fail to settle with the jenmi he may be evicted. Should he, however, be left in possession for more than twelve years without any recognition of the jenmi's right, he would like any other trespasser acquire a valid title by prescription. In the present case there was no recognition of the first plaintiff's right as jenmi. The learned pleader for the respondents contends that exhibits 18 and 19 only convey Koru's right to improvements, and that this fact, together with the attornment by Koru to the twelfth defendant as jenmi in 1880, indicate that Koru did not claim the land as owner, and argues that unless he claimed to hold the land as owner the plaintiff's right could not become barred. He relies on a passage in *Sivasubramanya* v. *Secretary of State for India*(1) to the effect that possession will not generate a prescriptive right unless it is a possession with the intention to hold exclusively and as owner. This argument is untenable. The language must be understood in the light of the facts and arguments in that case, and when so understood, it has no reference to the present case. There the question was whether certain acts were evidence of ownership or merely of an easement. In the present case there is no question of easement at all. Moreover, there is nothing in exhibits 18 or 19 or 1 to indicate that Koru at any time recognized the first plaintiff as jenmi. Exhibits 18 and 19 are as consistent with Koru's recognition of the rival jenmi (the twelfth defendant) as with his recognition of the plaintiff, and exhibit I, by recognizing the latter, affords ground for supposing that Koru, if he meant to recognize any jenmi, meant to recognize the twelfth defendant rather than the first plaintiff. The first plaintiff then was out of possession and Koru was in possession for more than twelve years without any recognition of first plaintiff's right, and the plaintiff's right is therefore barred under articles 142 of schedule II of the Limitation Act (*Kunchu Achen* v. *Sundaram Patter*(2)), unless as already stated, Koru's possession was that of a tenant under the oral letting alleged by the plaintiff.

We must therefore ask the Subordinate Judge to return a finding on this issue on the evidence on record within six weeks

(1) I.L.R., 9 Mad., 302. (2) Second Appeal No. 785 of 1894 (unreported).

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of the date of receipt of this order. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

The appellant's objection to the finding of the Subordinate Judge in regard to improvements are untenable. He did not, in the Lower Appellate Court, claim compensation for the kalam for which he now seeks compensation, nor did he, in the Court of First Instance, object to the principle on which the compensation for reclamation was calculated. He, in fact, accepted that principle, and he cannot now be allowed to object to it.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

1897. December 10. 1898. February 1.

MADRAS RAILWAY COMPANY (DEFENDANT), PETITIONER,

v.

GOVINDA RAU (PLAINTIFF), RESPONDENT.*

Contract Act—Act IX of 1872, *s.* 73—*Railways Act—Act IX of* 1890, *s.* 72—*Condition under which goods despatched by Railway—Deterioration—Remoteness of damage.*

The plaintiff who was a tailor delivered a sewing machine and some cloths to the Madras Railway Company (the defendant) to be sent to a place where he expected to carry on his business with special profit by reason of a forthcoming festival. Through the fault of the Company's servants the goods were delayed in transmission and were not delivered until some days after the conclusion of the festival. The plaintiff had given no notice to the Company that the goods were required to be delivered within a fixed time for any special purpose, and he had signed a forwarding note under a statement that he agreed to be bound by the conditions at the back and one of those conditions was to the effect that the company is not liable "for any loss of or damage to any goods whatever by reason of accidental or unavoidable delays in transit or otherwise." The plaintiff now sued to recover from the Company a sum on account of his estimated profits and the travelling expenses of himself and his assistant at the place of delivery and their expenses for food and lodging while there:

Held (1), that as the plaintiff had not shown that the goods had undergone deterioration in value or otherwise the condition above cited was not void under Railways Act, 1890, section 72, although it had not been approved by the Governor-General in Council.

(2) that the plaintiff was bound by the condition even if he was in fact ignorant of its effect.

(3) that the damages claimed were too remote.

* Civil Revision Petition No. 80 of 1897.