

“village by village was a very material fact which should have been mentioned together with particulars of the income derived from the zamindari in gross and in lots. All these points were ignored, and the application for the sale of the whole estate in one lot practically gave the go-by to the orders of the High Court. Intending purchasers would inevitably feel apprehensive as to the legal effect of a sale in gross by a District Court when the High Court had ordered the sale to be in separate lots, and their apprehension would be increased by all allusion to the order of the High Court being suppressed. The omission to notify the facts which I have now mentioned was, in my opinion, a material irregularity which has resulted in substantial injury to the petitioners.”

ATHAPPA
CHETTI
T.
RAMAKRISHNA
NAYAKAN

The purchaser preferred this appeal.

Pattabhiramu Ayyar, Sundara Ayyar and Sesa Chariar for appellant.

Respondent was not represented.

JUDGMENT.—We agree with the District Judge that there were material irregularities in publishing the sale and that these irregularities caused substantial injury to the respondents, who are decree-holders, within the meaning of section 311, Civil Procedure Code (*Lakshmi v. Kuttunni*(1)).

We, therefore, dismiss the appeal.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Benson.*

CHOKKALINGA NAICKEN (PLAINTIFF), APPELLANT,

v.

MUTHUSAMI NAICKEN AND OTHERS (DEFENDANTS),
RESPONDENTS.*

*Limitation Act—Act XV of 1877, schedule II, Arts. 142, 144—Adverse
possession—Acts of ownership.*

1897.
August 9.

The defendant had used as a backyard a small piece of land situated between his house and that of the plaintiff, who was his brother, for a period of more than

(1) I.L.R., 10 Mad., 57.

* Second Appeal No. 1170 of 1896.

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twelve years. In 1894 the defendant began to build on it, whereupon the plaintiff protested and now sued for possession:

Held, that the suit was not barred by limitation.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in Appeal Suit No. 3 of 1896, reversing the decree of S. Ramasami Ayyengar, District Munsif of Madura, in Original Suit No. 342 of 1895.

Plaintiff sued to recover a small piece of land. The defendants raised *inter alia* a plea of limitation. The District Munsif passed a decree for plaintiff. The District Judge, on appeal, held that the suit was barred. He said:—"It has to be decided whether "the plaintiff was, as he alleges, dispossessed only in 1894, or "whether the suit is barred by limitation. The facts are that the "plaintiff built a house on the disputed site, that the house was "burned down in 1876, that the plaintiff had migrated to Siva- "gunga shortly before the fire, that the house-site has been vacant "since the fire and that the first defendant came out of jail in "1878, built a house on the sixth defendant's portion of land "about 1880, and has since then used the disputed site as his "backyard.

"Here, there is no doubt that the first defendant has been in "possession of the disputed land for more than twelve years on "his own behalf, and not on behalf of the true owner, the plaintiff, "and has used the land as an appurtenance of his house. In "*Framji Cursetji v. Goculdas Madhooji*(1) it was held, upon the "facts, that there had been no user intended to denote or under- "stood as denoting a claim to ownership, but here the first "defendant clearly intended to claim ownership. It cannot be "supposed that the plaintiff was ignorant of the fact that the first "defendant had occupied the land, and I would, therefore, hold "that his suit is barred under article 144 of the second schedule "of the Indian Limitation Act. But that article applies only when, "there is no other article which specially provides for the case, and "this case is, in my judgment, specially provided for by article 142. "Mere absence of possession by the plaintiff would, of course, "not be sufficient to bar his suit, because 'the statute applies not "to cases of want of actual possession by the plaintiff, but to cases "where he has been out, and another in, for the prescribed time'

(1) I.L.R., 16 Bom., 333.

“(per Parke, B. *Smith v. Lloyd*(1)), and the term discontinuance of possession, used in article 142, means abandonment of possession by one person followed by the actual possession of another person. This is precisely the state of things in this case. And in *Mohina Chunder Mozoomdar v. Mohesh Chunder Neoghi*(2), the Privy Council held that a case in which the plaintiff alleges that he was dispossessed and sues to recover possession, falls within article 142 and that, in such a case, the plaintiff must show that he has had possession within twelve years before suit. The present plaintiff has not shown such possession, and I am of opinion that the suit is barred by limitation under article 142. For these reasons I must reverse the Lower Court’s decree and direct that the suit be dismissed with costs throughout.”

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The plaintiff preferred this second appeal.

Desikachariar for appellant.

Seshachariar for respondents.

JUDGMENT.—We are unable to agree with the District Judge that the principle in the Calcutta case quoted by him is applicable to the present case.

There the suit was for a large area of land paying rent. Here the suit is for a few square yards of vacant land used as vacant house-site or backyard in a town. The acts necessary to establish adverse possession in the two cases are very different. The use of the land by the defendant for the purposes of a backyard would not, under the circumstances, be sufficient to constitute adverse possession, especially when it is remembered that the parties are brothers. The case reported as *Framji Cursetji v. Goculdas Madhoyji*(3) is in point. Plaintiff having the title to the land must be held to have been in possession until first defendant began to build on it in 1894. Plaintiff then immediately protested and brought this suit in 1895. Plaintiff’s suit is not barred by limitation.

We must reverse the decree of the District Judge and restore that of the District Munsif with costs throughout in favour of plaintiff.

(1) 9 Exch., 562.

(2) I.L.R., 16 Cal., 473.

(3) I.L.R., 16 Bom., 398.