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which was described in the sale notification. All that is contended for is, that the property was so misdescribed, or that there was that concealment of the incumbrances upon it, that the purchaser has bought a totally different thing from that which he intended to buy; or in other words, that he has brought a property charged with heavy incumbrances, instead of a property free from incumbrances.

Then Mr. Bell has further argued, that although we may have no power to entertain the question on appeal, we may do so under s. 622 of the Code of Civil Procedure.

The answer is, that we have not before us any application under s. 622, but an appeal against the District Judge's order. And even if this were such an application, I, for one, should not be disposed to grant it. The Judge in the Court below has not acted without jurisdiction; and, so far as I can see, he has been guilty of no irregularity.

We think, therefore, that there is no ground for this appeal, and that it should be dismissed with costs, which we assess at Rs. 150.

Appeal dismissed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

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January 11.

GOPAL CHUNDER CHUCKERBUTTY (PLAINTIFF) v. NILMONEY MITTER AND OTHER (DEFENDANTS)*

Onus Probandi—Ejectment, Suit for.

When a plaintiff seeks to eject persons from premises claimed by him, on the ground that they are in wrongful possession of the premises, he is bound to show that he or some of the persons under whom he claims have been in possession of the property within twelve years before suit. A mere allegation in the plaint that the persons sought to be ejected were the tenants of the person through whom the plaintiff claims, will not shift the burden of proof.

Rao Karan Singh v. Babar Ali Khan, (1) explained and distinguished.

Appeal from a decision of PIGOT, J., dated 8th February 1888.

THE plaintiff stated that in 1865 the house and premises known as No. 150, Chitpore Road, Sobabazaar, belonged to one Mittunjoy

(1) L. R. 9 I. A. 99.

Chuckerbutty, and that in that year Messrs. Dodd & Co., obtained a decree against Mittunjoy for Rs. 23,000, but shortly afterwards became insolvent; the decree then vested in the Official Assignee, who attached the house, No. 150, Chitpore Road, in execution of that decree; in September 1869, one Sreenarain Chuckerbutty (defendant No. 8) the surviving brother of Mittunjoy, put in a claim to the property attached, but the claim was rejected; whereupon Sreenarain brought a suit against the Official Assignee asking for a declaration of his right to the property, and for an injunction to stop the sale, but on July 11th, 1870, his suit was dismissed, and on the 24th March 1871 his appeal against the judgment of the 10th July 1870 was also dismissed, and on the 25th February 1881 the Official Assignee sold the houses, and premises, to the plaintiff. The latter on 19th December 1881 brought this suit against the defendants 1 to 7, who were alleged to be the tenants of Mittunjoy, for possession of the premises. And on the 16th March 1882, he amended his plaint, and made defendant No. 8 above-mentioned a party to the suit.

Defendants Nos. 2, 5, 6, and 7 contended that they were the monthly tenants of Sreenarain Chuckerbutty, who, they stated to be the owner, if not of the whole, of a greater portion of the premises, and in possession thereof. Defendant No. 2 asserted that he had paid rent to Sreenarain for the last 20 years. And the defendants 5, 6 and 7, asserted that they had paid rent to Sreenarain for the last three years, and contended that even if the plaintiff was the owner of the premises, which they denied, they were entitled to notice to quit.

Sreenarain (defendant No. 8), contended that he had been in possession of the premises by purchase since 1241 (1834-35), and that defendants 1 to 7 were his tenants, and submitted that supposing Mittunjoy ever to have been in possession of the property, his right and interest was barred by limitation.

At the hearing of the case on the 8th February 1883, the plaintiff put in the deed of sale of the 25th February 1881, the order in the claim made by Sreenarain against the Official Assignee and the decrees in the suit of *Sreenarain v. The Official Assignee*. He also called one Tariny Churn Bannerjee, who stated that he had been a servant of Mittunjoy, that he entered his service when he

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(the witness) was fourteen or fifteen years old, and that he was now 51 years old, and that Mittunjoy died eight or nine years ago; that during this service he had collected rents of the premises in dispute for Mittunjoy, but could not specify any particular dates of such collections.

Mr. T. A. Apcar and Mr. M. P. Gasper for the plaintiff.

Mr. Bonnerjee and Mr. Palit for the defendants.

PIGOT J. dismissed the suit with costs, observing that though the plaintiff's witnesses seemed reliable, they proved no title, or at all events not sufficient to justify a decree for ejectment.

The plaintiff appealed.

Mr. Phillips (with him Mr. T. A. Apcar) for the appellant—

The onus was on the defendants to show that they have been in possession for twelve years. We allege in our plaint that the defendants were the tenants of Mittunjoy. The case of *Karan Singh v. Bakar Ali Khan*, (1) overrules the decision of the Full Bench in *Mahomed Ali Khan v. Khaja Abdul Gunny*, (2).

Mr. Trevelyan for the respondents was not called upon.

The following judgments were delivered by the Court, (GARTE, C.J., and CUNNINGHAM, J.)

GARTE, C.J.—I entirely agree with the learned Judge in the Court below, that the plaintiff has made out no case; and the only reason, why I think it necessary to say a few words, is to explain my view of the argument, which has been addressed to us by Mr. Phillips, upon the plea of limitation. I think it very desirable that there should be no misunderstanding upon that subject.

The suit is brought to recover possession of a house and premises in Calcutta. The plaintiff claims the property, having purchased it, as he contends, from the Official Assignee, as belonging to a person named Mittunjoy Chuckerbutty (deceased), who is said to have been the absolute owner. The plaintiff's case is that the defendants Nos. 1 to 7, who are now in possession, were tenants on sufferance of Mittunjoy; and consequently that he, claiming through Mittunjoy is entitled to eject them.

(1) L. R. 9 I. A. 99.

(2) I. L. R. 9 Calo. 744 : 12 C. L. R. 257.

These defendants say, that they do not hold under Mittunjoy at all, that they are the tenants of the defendant Sreenarain Chuckerbutty, who is a brother of Mittunjoy, and all the defendants contend, that Mittunjoy had never any title to, or possession of, the property.

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This being the nature of the case, the plaintiff, in order to prove a title and possession in Mittunjoy, has called a witness named Tariney Churn Bannerjee, who professes to have been Mittunjoy's servant for a great many years. He says, that Mittunjoy and his brothers had no ancestral property; but that he (the witness) and Mittunjoy used to come to Calcutta, and when there, that they used to collect the rents of certain houses, and among them, of the house in question. But his evidence in this respect is of the vaguest character; he cannot say when it was that he received the rents, he certainly never received them from the defendants Nos. 1 to 7, and the utmost that his evidence amounts to, is, that he received some rent for this house at some time or other, but when, he cannot say.

Under these circumstances, Mr. Phillips has contended that the onus is upon the defendants to show that they have been in possession for upwards of twelve years.

It seems to me, that there is no ground for that contention. The suit, as I take it, is brought to recover possession of property as upon a dispossession. The plaintiff claims under Mittunjoy; his case is, that Mittunjoy was the owner in possession, that he has bought Mittunjoy's right and title; and that consequently he is entitled to treat the defendants 1 to 7, who were Mittunjoy's tenants, as trespassers.

Of course, if the plaintiff could have shown, that these people, (the defendants 1 to 7) were really Mittunjoy's tenants, he would have had the same rights against them that Mittunjoy had. But he has not attempted to prove, and certainly he has not succeeded in proving that they were Mittunjoy's tenants. They are therefore holding adversely to the plaintiff, and the plaintiff is seeking to eject them upon the ground that they are in wrongful possession of his, (the plaintiff's property.)

That being so, I consider that the plaintiff is bound to show,

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that he or some or one of the persons under whom he claims, have been in possession of the property within twelve years before suit.

Mr. Phillips contends, that this is not so, because the plaintiff has alleged in his plaint, that the defendants Nos. 1 to 7 were the tenants of Mittunjoy. But if a mere allegation of that kind could relieve a plaintiff from the burthen of proving, that he or those under whom he claims had been in possession within twelve years, that device might always be resorted to for the purpose of evading the law of limitation.

Then, again, Mr. Phillips, in support of his argument has referred us to the case of *Rao Karan Singh v. Bakar Ali Khan*, (1) decided by the Privy Council, the effect of which he contends, is to overrule the law laid down by the Full Bench of this Court in *Mahomed Ali Khan v. Khaja Abdull Gunny* (2).

In this it seems to me, he is in error. That decision of the Privy Council was duly considered by this Court in the Full Bench case, but we did not notice it in our judgment, because we thought it did not apply.

That suit in point of fact was not for possession at all. It was brought by the plaintiff, a mortgagee, to recover the principal and interest due upon two mortgage bonds; and to enforce that claim, by a sale of the mortgaged property. The plaintiff, so far as appears, had never been in possession, nor did he ask for possession of that property. If he had, article 138 of the Limitation Act would have applied.

The defendant's answer was, that the mortgagee (the plaintiff) could not enforce his right as against him, because he had been in possession of the property adversely to the plaintiff, and those under whom he claimed for upwards of twelve years before suit.

Under these circumstances it was contended before the Privy Council that the plaintiff was bound to prove that he had been in possession within twelve years before suit, and this (as it would seem from the report) upon some general principle of law.

(1) L. R. 9 L. A. 99.

(2) I. L. R. 9 Calc. 744; S. C. 12 C. L. R. 257.

But their Lordship's held, that the suit was not brought (under article 143 of the Act of 1871) to recover possession as upon a dis-possession, and they therefore considered that the plaintiff was not bound to prove a possession within twelve years before suit; but that it lay on the defendant to prove an adverse possession for that period in order to establish his defence. I have said thus much in order to explain why in my opinion the Privy Council decision is not applicable here, and why that decision does not conflict in any way with the Full Bench judgment of this Court. But in point of fact, there is no evidence in the case, which would justify any Court in finding in the plaintiff's favor.

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The appeal must be dismissed with costs on scale 2.

CUNNINGHAM, J.—I concur in thinking that the ruling of the Judicial Committee in *Rao Karan Singh v. Bakar Ali Khan*, (1), cannot be regarded as modifying the law which has been repeatedly laid down in this Court on the subject of limitation in suits for possession of immovable property.

The plaintiff in that case sued for the amount secured on two mortgage bonds, and for sale of the mortgaged property. The defendant pleaded twelve years adverse possession, and all that appears to have decided was that the defendant was not, for the reasons set forth in the judgment, entitled to add to the period during which he had himself been in adverse possession, the period during which the Collector had been in possession on behalf of Government. I agree in dismissing the appeal with costs.

Appeal dismissed.

Attorney for the appellant: Baboo A. T. Dhur.

Attorney for the respondents: Baboo G. C. Chunder.

(1) L. R. 9. I. A. 99.