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evidence, slight though it may be, to support the finding of the lower appellate Court that Dip Chand's one-sixth was not sold in 1861. Pandit *Sundar Lal* raised a further contention, namely, that this suit was barred by section 13 of the Code of Civil Procedure. It appears that Sita Ram and his brother Nathu brought a suit against the purchasers of 1861 to recover the whole of the property which they had taken possession of after the sale, their case being that Duli's liability arose out of an immoral contract from a Hindu point of view. That suit was dismissed. It appears to us that that dismissal does not operate as *res judicata* in this suit. In that suit Sita Ram and Nathu appear to have been suing on their own behalf. It does not appear that either of those plaintiffs represented Dip Chand, although Sita Ram was in fact Dip Chand's father. The accident that Sita Ram for the purpose of defending this appeal has been brought upon the record as the legal representative of Dip Chand has, so far as we can see, no bearing on this question. It was Dip Chand who obtained the decree from the lower appellate Court and Sita Ram is merely here to defend that decree, supporting the decree and the rights of the person whom he represents. There is a slight error, we are informed, in the decree below. The decree will stand for delivery of possession of one-sixth of the property of which the auction-purchasers who are now before us, or represented, got possession under the auction of 1861 and for proportionate mesne profits calculated on the basis of the profits ascertained below. To that extent the decree below will, if necessary, be varied, in other respects the appeal will be dismissed with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.

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JAFAR HUSAIN AND ANOTHER (DEFENDANTS) *v.* MASHUQ ALI (PLAINTIFF).*

Suit for recovery of possession of immoveable property—Limitation—Adverse possession—Burden of proof—Act XV of 1877 *(Limitation Act), s.* 28.

Where a suit for the recovery of possession of immoveable property is resisted by a plea of adverse possession for more than twelve years, the question of limitation

* First Appeal No. 40 of 1891 from an order of Babu Mirtonjoy Mukerjee, Subordinate Judge of Benares, dated the 28th March 1889.

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becomes a question of title, and it lies upon the plaintiff in the first instance to give satisfactory *primâ facie* evidence of his possession within twelve years of the suit. *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1) and *Parmanand Misr* v. *Sahib Ali* (2) referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Munshi *Jwala Prasad* and Munshi *Kashi Prasad*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

EDGE, C.J., and BLAIR, J.—This was a suit for possession brought by a husband of a deceased Muhammadan lady against her brother and her brother's son. The plaintiff alleged that he was dispossessed in 1887. The defendants alleged that the plaintiff and the lady through whom he claims had never been in possession, and that the defendants had held adverse possession for more than twelve years. The first Court dismissed the suit as barred by limitation. The District Judge on appeal set aside this decree of the first Court, and, finding that twelve years' adverse possession was not established, made an order of remand under s. 562 of the Code of Civil Procedure. From that order of remand the appeal has been brought. The District Judge did not try the issue as to whether the plaintiff had been in possession within twelve years before suit; he assumed that in a case of this kind the onus of proof was upon the defendant, and he in fact found no facts on which we could infer that he thought the plaintiff had made out a *primâ facie* case of possession within twelve years.

We are satisfied that where a plaintiff comes into Court alleging that he has been dispossessed within limitation, and when the defence is adverse possession, the question of limitation becomes a question of title. The plaintiff must at least give some *primâ facie* evidence to satisfy the Court in the first instance that he was in possession within twelve years before the defendant can be called upon to make out his defence of twelve years' adverse possession. Apparently that is the result of the decision of their Lordships of the Privy Council

(1) I. L. R., 16 Calc., 473. (2) I. L. R., 11 All., 438.

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in the case of *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1). The authorities which show that s. 28 of the Indian Limitation Act of 1877 makes limitation a matter of title to be proved by the plaintiff in suits for the possession of property are collected in the case of *Parmanand Misr* v. *Sahib Ali* (2). In the present case the District Judge had not tried, or apparently considered, the question as to whether plaintiff had proved, *primâ facie* or otherwise, title within twelve years before suit. On that point he seems to have expressed no opinion on the plaintiff's evidence at all. Before going into the question as to whether the defendants had or had not a title by adverse possession, the District Judge ought to have satisfied himself and expressed an opinion that there was *primâ facie* proof that the plaintiff had a subsisting title at the commencement of the suit. We set aside the order of remand and remand the case under s. 562 of the Code of Civil Procedure to the Court of the District Judge for him to try the issues which arise in the case and to dispose of the appeal according to law. It may be that the District Judge may find the question of limitation either way. We express no opinion on the facts on either side as to the question of limitation. Costs here and hitherto will abide the result.

Cause remanded.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

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March 10.

ALI AHMAD (PLAINTIFF) *v.* RAHMAT-ULLAH (DEFENDANT). *

Construction of document—Mortgage—Sale—Bai-bil-wafa, nature of—Act IV of 1882 *(Transfer of Property Act) s.* 58*—Pre-emption.*

The transaction known to Muhammadan law as a *bai-bil-wafa* is a mortgage within the meaning of s. 58 of Act IV of 1882, and not a sale.

The plaintiff in a suit for pre-emption had, prior to the sale of the property claimed, executed a deed in respect of his share in the village in virtue of which he claimed the right to pre-empt, the material portion of which deed was as follows:—"Thirdly, if I, the vendor, or the heirs of me, the vendor, Ali Jan, *alias* Ali Ahmad, should pay off the entire consideration money mentioned above on the Puranmashi

* Second Appeal No. 1125 of 1889 from a decree of Rai Lalta Prasad, Subordinate Judge of Ghâzipur, dated the 9th July 1889, reversing a decree of Maulvi Sayyid Zain-ul-abdin, Munsif of Korantadih, dated the 18th January 1889.

(1) I. L. R., 16 Calc., 473. (2) I. L. R., 11 All., 438.