

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
Banerji.*

RAM LAKHAN RAI AND ANOTHER (DEFENDANTS) *v.* GAJADHAR RAI
AND OTHERS (PLAINTIFFS).*

*Act No. XV of 1877 (Indian Limitation Act), schedule ii, articles 137,
142, 144—Adverse possession—"Defendant"—Successive but independent
trespassers.*

Plaintiffs purchased certain property at an execution sale on the 20th November 1891, the property being at the time of purchase in the possession of trespassers, and formal possession was given to them on the 25th November 1892. In 1897 other persons, also trespassers, obtained possession of the property, against and not through the persons originally in possession. In 1908 the plaintiffs sued the second set of trespassers for possession. Held that article 144 of the second schedule to the Indian Limitation Act, 1877, applied and the suit was not time barred. *Ram Prosad Janna v. Lakhi Narain Pradhin* (1) followed.

THIS was an appeal under section 10 of the Letters Patent from a judgement of TUDBALL, J. The material facts appear from the judgement under appeal, which was as follows:—

"The facts of the case out of which this appeal arises are, so far as they are material for the disposal of the appeal, as follows:—Two brothers, Phenku and Sumeran, were separate owners each of a two annas share in a village. One Ram Sahai was the ancestor of the present plaintiffs. Phenku, Sumeran and Ram Sahai jointly brought a suit against certain defendants, which they lost in the year 1883, and costs were awarded to the defendant against them. Sometime between 1883 and 1887, both Phenku and Sumeran died. The former's estate was inherited by his sons. Sumeran left a daughter's son to succeed him. The latter, however, did not get possession of his estate, on the contrary the sons of Phenku, without any title, took possession of it, and in the year 1887 mortgaged it to one Subbe Rai. The defendants in the suit of 1883 executed their decree for costs as against Ram Sahai, the sons of Phenku and heirs of Sumeran. In 1891, the whole four annas (*i.e.*, the shares of both Phenku and Sumeran) was attached and sold and purchased by the present plaintiffs. The latter was put into formal possession on 25th November 1892. On an application for mutation of names, the Revenue Court ordered his name to be recorded, subject to the mortgage of Subbe Rai. The latter's mortgage was one with possession. In 1894, that is, after their rights had been attached and sold in execution of the decree for costs, the heirs of Sumeran brought a suit against the heirs of Phenku and the mortgagee Subbe Rai, to recover the two anna share of Sumeran, and after some litigation finally obtained a decree from this Court in their favour in 1897. In execution of that decree they obtained possession as against the heirs of Phenku and Subbe Rai. The present suit was brought by the plaintiffs against the heirs of Sumeran to recover

* Appeal No. 29 of 1910 under section 10 of the Letters Patent.

possession of this two anna share. It is brought some 16 years after the date on which formal possession was awarded to the plaintiffs as auction purchasers, but within twelve years of the date on which the heirs of Sumeran obtained possession as against the sons of Phenku and their mortgagee, but considerably more than 16 years after the date on which the sons of Phenku took possession of their share adversely to the heirs of Sumeran. Among other defences to the suit, the plea of limitation was raised. Both the lower courts have acceded to this plea, and holding that the plaintiffs have failed to prove possession within the period of twelve years (a possession which they actually alleged) have dismissed the suit. On appeal to this Court it is urged that the article applicable to the present suit, on the findings of fact by the lower court is article 144 of the second Schedule of the Limitation Act. On behalf of the respondents, it is urged that either article 137 or article 142 applies, and in either case the suit is barred by limitation. Article 137 relates to a suit by a purchaser at a sale in execution of a decree, when the judgment-debtor is out of possession at the date of the sale; and the period of limitation begins to run from the date when the judgment-debtor is first entitled to possession. The situation in the present case amounts to this, that while trespassers were in possession of the judgment-debtor's property that property was attached and sold in execution of the decree. If the auction-purchaser had then brought a suit to recover possession from the trespasser, it is quite clear that this article would apply. But the present suit is not directed against the trespasser. It is directed against the original judgment-debtor, who has subsequently to the sale ejected the trespasser and taken possession of the property himself. As against the present plaintiff, the judgment-debtor is equally a trespasser with the person who has been ejected by the judgment-debtor. Article 137, in my opinion, was not intended to apply to a suit such as is now before me, but to a suit directed against a third party other than the judgment-debtor. If this were not so, and the article applied to the circumstances of the present case, it would be tantamount to allowing the later of two trespassers to add to the period of his hostile possession, the period of possession of a former trespasser from whom he has not derived title in any way. In the case of *Ram Prasad Janna v. Lakhi Narain Pradhan* (1), the facts were very similar to those of the present case. A vendor who was at the time out of possession of certain immovable property, sold a portion of it, and after the date of sale the vendor recovered possession. The purchaser within twelve years after the vendor had recovered possession, but more than twelve years after the vendor had been originally dispossessed instituted a suit to obtain possession of the property covered by the sale deed. It was held that article 136 (the article applicable to cases of private sales) did not apply, but that the case fell within the purview of article 144. Similarly in the case reported in *J. L. R., 15 Bom., 26*, a Bench of the Bombay High Court held that articles 136 and 137 applied to suits brought by purchasers against third persons in possession of lands, in whose favour limitation runs against the purchaser, in the same way as it would against the owner with whose rights the purchaser is clothed. The only decision of this Court to which my attention has been called is that to be found in *J. L.*

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R., 2 All., 718. That decision, however, does not help me in the slightest, in the present case. It seems to me that the language in column 3 of schedule II against articles 136 and 137 is only intelligible in the view that I take. As regards article 142, it is urged that formal delivery of possession granted to the present plaintiffs on 25th November 1892, is possession within the meaning of that article, as has been held in this Court and also by the Calcutta High Court. Formal delivery of possession as against a judgement-debtor in possession would, no doubt, constitute such possession as is contemplated by this article, but as against a third person, it is of no value whatsoever. At the date when formal delivery of possession was given to the present plaintiff, the judgement-debtors, who were then owners of the property in dispute, were not in possession. The mortgagee, Subba Rai, a trespasser, was in possession, and as against him the plaintiff cannot be said to have obtained possession. The case of *Narain Das v. Lalta Prasad* (2) laid down that whatever might be the effect of the delivery of formal possession under section 319 of the Code of Civil Procedure as against the judgement-debtor himself, such formal delivery of possession will not take effect as actual possession as against a purchaser of the rights of the judgement-debtor who has previously obtained actual possession. In the present case there was no purchaser, but a trespasser who had obtained possession before the auction sale. In my opinion the formal delivery of possession of the 25th November, 1892 was not possession within the meaning of article 142. That article applies to a suit for possession of immovable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession. The only article which can therefore apply is article 144 as was applied by the Calcutta High Court in the case of *Ram Prasad Janna* mentioned above. In this view the period of limitation began to run when the possession of the defendants first became adverse to the plaintiffs. The adverse possession of the defendants clearly commenced when they recovered possession under their decree, against the heirs of Phenku and the mortgagee Subba Rai. They cannot add to that period the period during which the sons of Phenku held adversely to themselves. Their possessory title cannot be said to have been derived in any way whatever from the sons of Phenku, and therefore the two periods of adverse possession cannot be added together, so as to bar the present suit. It seems to me quite clear that it was not until the present defendants wrested the possession from the sons of Phenku, that any possession adverse to the present plaintiffs could have arisen in them. It is true that the present plaintiffs in the plaint say that they had been in possession within twelve years, but the facts have been found against them. On the facts found, article 144 clearly applies and the present suit is within time. I therefore admit the appeal and set aside the decree of the courts below. As the suit was dismissed on a preliminary point by the court of first instance, and there are other issues to be decided between the parties, I remand the case through the lower appellate court to the court of first instance for decision on the merits. Costs here and hitherto will abide the result."

Munshi Govind Prasad, for the appellants, submitted that the burden of proving that they had a subsisting title on the date of suit lay on the plaintiffs. They had obtained formal possession in 1892, but the suit for possession was brought more than twelve years after that date. The suit was governed by article 137, Act XV of 1877, schedule II, and was barred by limitation. He relied on *Sheoprasad v. Udai Singh* (1), *Mazhar Husain v. Behari Singh* (2) and *Parmanand v. Sahab Ali* (3).

Babu Sital Prasad Ghose, for the respondents, submitted that as the plaintiffs did not claim through the person who was in possession in 1892, they could not tack their possession on to that of the preceding trespasser. The defendants entered into possession in 1897 when the plaintiffs had a subsisting title, and the defendants had not since acquired a title by prescription. The suit having been brought within 12 years of 1897, was not barred.

STANLEY, C. J., and BANERJI, J.—The facts of this case are fully set forth in the judgement of the learned Judge of this Court from whose decision this appeal under the Letters Patent has been preferred, and it is unnecessary to recapitulate them. The plaintiffs acquired the property claimed by them under an auction purchase which took place on the 20th of November, 1891. Formal possession was delivered to their predecessors in title on the 25th of November 1892. At that time Sumeran, whose rights the plaintiffs' father, Ram Sahai, purchased at auction, was dead and his legal representatives were out of possession. A trespasser, namely, the mortgagee from the sons of Phénku Rai, was actually in possession. It was in 1897 that the present defendants appellants obtained actual possession of the property by virtue of a decree which they obtained in a suit to which the plaintiffs, or their predecessor in title, was no party. It is contended that the claim comes within the purview of article 137 of the second schedule to the Limitation Act of 1877. We agree with our learned colleague that that article only applies to a suit against a third party and not to a suit against the judgement-debtor or his representative. This is manifest

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(1) (1880) I. L. R., 2 All. 718.

(2) (1906) I. L. R., 28 All. 760.

(3) (1889) I. L. R., 11 All. 438.

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from the language of the third column of the schedule as pointed out by our learned brother. We are also of opinion that article 142 is inapplicable. The plaintiffs were never in actual possession and were not dispossessed. The only article therefore of the Limitation Act which can apply is article 144, and the period of limitation is 12 years from the date on which the defendant's possession became adverse to the plaintiffs. The word "defendant" by its very definition includes a person from or through whom the defendant derives his liability to be sued. Therefore the adverse possession of the defendant, referred to in the article, necessarily means the adverse possession of the defendant himself or of any person from or through whom he derives his possession. In the present case the defendant did not derive his possession from or through the sons of Phenku or their mortgagee. Therefore the defendants are not entitled to add to their own possession the period of the possession of the first set of trespassers. In the year 1897 when the defendants actually obtained possession, the plaintiffs had a subsisting title to the property, more than 12 years not having elapsed from the date of their auction purchase. It is from the date on which the defendants obtained delivery of possession in execution of the decree obtained by them that their possession can be regarded as adverse, and, as such possession commenced only in 1897, they have not been in possession for a period sufficiently long to extinguish the plaintiff's rights. The claim is therefore not time-barred, and the decision of the learned Judge of this Court is correct. We dismiss the appeal with costs.

Appeal dismissed.