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gift is such that it cannot be treated for the purposes of the distribution of the assets on inheritance as a bequest it follows according to our judgment that it is a gift not subject to the doctrine of *marz-ul-maut*. It may be added that a wife is a relation within the prohibited degrees and therefore a gift simple or *bil-ewaz* in her favour is irrevocable.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Wazir Hasan.

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September,
10.

MAHABIR SINGH AND ANOTHER (PLAINTIFFS-APPELLANTS)
v. CHITTA SINGH AND OTHERS (DEFENDANTS-RESPONDENTS).*

Limitation Act (IX of 1908), Article 142—Suit for possession by reason of discontinuance of possession—Title of plaintiff proved but his possession within 12 years not proved—Defendant's adverse possession for 12 years not proved—Plaintiff whether entitled to get decree for possession.

Held, that in cases falling under section 142 of the Indian Limitation Act the claimant must prove his possession within 12 years next preceding the date of the institution of the suit and in cases of that nature an enquiry into the question of adverse possession is irrelevant.

Where the plaintiff brought a suit for recovery of possession of a house by reason of the discontinuance of possession caused by the defendant and the finding of the court was in favour of the plaintiff on the question of title *held*, that the case fell under Article 142 of the Limitation Act and the plaintiff cannot get a decree unless he proves possession within 12 years regardless of the fact that the defendant had failed to prove that he had completed his title by adverse possession.

*Second Civil Appeal No. 93 of 1929, against the decree of Babu Mahabir Prasad, Additional Subordinate Judge of Lucknow, dated the 30th of November, 1928, upholding the decree of Saïid Yaqub Ali Ruzvi Munsif, dated the 21st of May, 1928, dismissing the plaintiffs' claim.

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Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi (1), *Mohammad Aman-ullah Khan v. Badan Singh* (2), and *Jaichand Bahadur v. Girwar Singh* (3), relied on.

Radhamoni Debi v. The Collector of Khulna (4), *Secretary of State for India v. Chelikani Rao* (5) and *Authuli Moothwar v. Peringati Kunharankuty* (6), distinguished.

Mr. Akhtar Husain holding brief of Mr. *Mohammad Khalil Siddiqi*, for the appellants.

Mr. Nazir-ud-din, for the respondents.

HASAN, J. :—This is the plaintiffs' appeal from the decree of the Additional Subordinate Judge of Lucknow dated the 30th of November, 1928, affirming the decree of the Munsif of Havali, dated the 21st of May, 1928.

In the suit, out of which this appeal arises, the subject-matter of dispute is a house situate in the village Nanmau, pargana Bijnaur, in the district of Lucknow.

On the pleadings in the case it is perfectly clear that the plaintiffs claimed recovery of possession of the house in question by reason of the discontinuance of possession caused by the acts of the defendants. The defence, with which I am now concerned, was that the plaintiff has not been in possession of the house within limitation and that the defendants had perfected their title to the same by adverse possession. On the question of title both the courts below are agreed that it is with the plaintiffs. Having regard to the defence set forth above the court of first instance framed the following two issues:—

- (1) Have the plaintiffs been in possession of the house within limitation?
- (2) Have the defendants perfected their title to the house by adverse possession?

Both the courts have answered the first mentioned issue in the negative and against the plaintiff. They have also answered the second issue in favour of the

(1) (1888) I.L.R., 16 Cal., 473;

(3) I.L.R., 41 All., 669.

(5) (1916) L.R., 43 I.A., 192.

(2) (1889) I.L.R., 17 Cal., 137.

(4) (1900) L.R., 27 I.A., 136;

(6) (1921) L.R., 48 I.A., 395.

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plaintiffs and against the defendants and on the finding arrived at on the first issue they have dismissed the suit.

The argument in second appeal is that the title having been found in favour of the plaintiffs and against the defendants the suit should have been decreed. I am of opinion that the decree of the courts below is correct and should be maintained. In the case of *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi* (1) their Lordships of the Privy Council held, to quote the head-note, that though the claimants "showed an anterior title but that was not enough without proof of their possession within twelve years to shift the burden of proof on to the defence to show that the defendants were entitled to retain possession." The burden of proof was on the claimants to prove their possession at some time within the twelve years next preceding the suit. That case specifically fell within the purview of Article 142 of Schedule I of Act XV of 1877. This view of the law was repeated in the case of *Mohammad Aman-ullah Khan v. Badan Singh* (2). It was held in this case that there had been dispossession or discontinuance of possession within the meaning of Article 142 and that whether any proprietary right had existed or not in the plaintiff's ancestors the twelve years' limitation ran from the date of dispossession or discontinuance. In delivering the judgment of the Privy Council in the case just now mentioned Sir ROBERT COUNCH said:—"No doubt the proprietary right would continue to exist until by the operation of the law of limitation it had been extinguished; but upon the question whether the law of limitation applies, it appears to be clear that it comes within the terms of Article 142, and if there has been any doubt in the minds of the courts in the Punjab as to what was the effect of the law of limitation in cases of this description, it seems to have "arisen from the introduction of some opinion

(1) (1888) I.L.R., 16 Cal., 473. (2) (1916) I.L.R., 17 Cal., 137.

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that there must be what is called adverse possession. It is unnecessary to enter upon that inquiry. Article 144, as to adverse possession only applies where there is no other article which specifically provides for the case." This decision is, therefore, a clear authority for the proposition that in cases falling under Article 142 of the Indian Limitation Act the claimant must prove his possession within twelve years next preceding the date of the institution of the suit and in cases of that nature an inquiry into the question of adverse possession is irrelevant.

On behalf of the appellants reliance was placed on the decisions of their Lordships of the Judicial Committee in the cases of *Radhamoni Debi v. The Collector of Khulna* (1) *Secretary of State for India v. Chelikani Rao* (2) and *Authuli Moothvar v. Peringati Kunharankuty* (3).

In the first mentioned case the plaintiff claimed title to certain chaks of land on two alternative grounds. (1) that the lands in suit constituted a village owned by him and (2) that she, the plaintiff, had had twelve years' adverse possession of the lands in dispute. Both the grounds of the claim were negatived by their Lordships of the Judicial Committee. They observed: The land, "generally speaking, is jungle; but there has been in some parts more or less of intermittant cultivation." This makes it perfectly clear that the case was not governed by Article 142 of Schedule I of the Indian Limitation Act but it was a case which fell on its merits under Article 144 of the same Schedule as the nature of the lands in suit was jungle land. In considering the result of the evidence as to possession their Lordships observed:—

"It is necessary to remember that the onus is on the appellant, and that what she has

(1) (1900) L.R., 27 I.A., 136.

(2) (1916) L.R., 43 I.A., 192.

(3) (1921) L.R., 48 I.A., 395.

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to make out is possession adverse to the competitor. That persons deriving from her any right they had have done acts of possession during the twelve years in controversy may be conceded. But the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. The appellant does not present a case of possession for the twelve years in dispute which has all or any of these qualities.' I am of opinion that this decision of their Lordships of the Judicial Committee is inapplicable to this case.

The second case cited on behalf of the appellants is also inapplicable. Their Lordships of the Judicial Committee held in that case that islands formed on the bed of the sea within the territorial limits of the Indian Empire belong to the Crown. These islands were being declared part of a reserved forest under the Madras Forest Act, 1882, and a notification to that effect was issued by the Government of Madras and persons claiming any rights in the lands were required to state the nature of the right claimed and to produce all documents in support thereof before the forest settlement officer. The respondents in the appeal before their Lordships of the Judicial Committee claimed to be owners of certain parcels of land included in the notified area. Their claims were rejected by the settlement officer and his decision was affirmed by the District Judge upon appeals under the Madras Forest Act, 1882. The claimants then appealed to the High Court and the High Court finally allowed the appeal and excluded the lands in dispute from the reserved forest area. The Secretary of State for India appealed and in the arguments on their behalf it was admitted that the Crown was never in possession and it was argued that consequently Article 142 of Schedule I of the Indian

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Limitation Act did not apply and that under Article 144 it was for the claimants to prove that their possession became adverse more than sixty years before the notification. In support of the distinction between the two articles the cases of *Maharajah Koowar Singh v. Nund Loll Singh* (1) and *Rao Karan Singh v. Bakar Ali Khan* (2) were cited.

On behalf of the claimants the original title of the Crown was not disputed but it was argued that in a suit for possession the plaintiff must prove that he has title which is not barred by the statute. The decision in *Maharajah Koor Singh v. Nund Loll Singh* (1) was relied upon and it was further argued that the above decision applied to suits whether they are within Article 142 or Article 144. In reply the Counsel for the Secretary of State for India in Council said—"In an action for ejectment in England the plaintiff had to allege and prove a dispossession. The principle with regard to limitation under the English statute does not apply in India except under Article 142. In the case of jungle lands it is often not in the power of the Crown to give evidence as to when a defendant's possession became adverse." The judgment of their Lordships of the Judicial Committee was delivered by Lord SHAW of Dunfermline. Having decided the question of title in favour of the Crown his Lordship observed :—

"In these circumstances the question before the Board would appear to be extremely simple. Under the Indian Limitation Act no adverse possession can be effectively pleaded against the Crown for a period of less than sixty years. The question simply is: Do the 'claimants establish such adverse possession? If they do not, the basis of their claim fails."

(1) (1860) 8 M.I.A., 199.

(2) (1882) L.R., 9 I.A., 99

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His Lordship then quoted the following passage from the judgment of the High Court:—

“In the case of lands which came into existence as land capable of occupation more than sixty years prior to the notification, the Crown must show by evidence that it had a subsisting title at some time within that period.”

His Lordship observed:—

“Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting possession. It is too late in the day to suggest the contrary of this proposition.”

Finally His Lordship said:—

“In their Lordships’ opinion objectors to afforestation thus preferring claims are in law in the same position as persons bringing a suit in an ordinary court of justice for a declaration of right. To such a situation in the one case, as in the other, their Lordships think that Article 144 of the Limitation Act XV of 1877 (Schedule II) applies, the period of twelve years thereunder being, however, extended to a period of sixty years by Article 149. In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the plaintiff. In their Lordships’ opinion the situation of a claimant under afforestation proceedings is the same upon this point.”

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It is therefore quite clear that Article 144 read with Article 149 was applied in that case and for this reason that decision is of no help to the appellants in the present case.

The third case was one in which the appellant before their Lordships of the Judicial Committee, that is the plaintiff, asserted that he was in possession of the property in suit which was a group of 24 hills in the North Malabar district of the province of Madras. The defendant in that case claimed title by adverse possession which was negatived by their Lordships of the Judicial Committee on the ground that the possession proved was not of such a nature as the law required for establishing prescriptive title. In discussing the evidence as to possession their Lordships said—"Much importance attaches to the nature of the property itself. It is forest land—apparently very little of it capable of, or at least up to the present subject to cultivation—and growing here and there stretches of timber. It is quite clear that a property of this nature is far removed as a subject of definite possession from lands under continuous and permanent cultivation, compactly situated and capable of being remembered with identification as the lands held and occupied in articulate plots or under leases." On the question of title their Lordships found that it was in the plaintiff and on the question of adverse possession they referred to their decisions in *Radhamoni Debi v. Collector of Khulna* (1); and *Secretary of State for India in Council v. Chelikani Rama Rao* (2) and said—"Standing a title in 'A' the alleged adverse possession of 'B' must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor." Their Lordships also found on merits that the plaintiff "has been exercising during the currency of his title various acts of possession, then the quality of

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(1) (1900) L.R., 27 I.A., 136.

(2) (1916) L.R., 43 I.A., 192.

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these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds.' This case also is therefore of no avail to the appellants.

The distinction between cases falling under Article 142 and cases where the defence to a suit for recovery of possession is twelve years' adverse possession under Article 144 is well emphasized, if I may respectfully say so, in a decision of a Bench of the High Court at Allahabad in the case of *Jai Chand Bahadur v. Girwar Singh* (1).

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Muhammad Raza.

MOHAMMAD NABEMULLAH AND OTHERS (PLAINTIFFS-APPELLANTS) v. RAMPAL AND OTHERS (DEFENDANTS-RESPONDENTS).*

1929
October, 1.

Limitation Act (IX of 1908) as amended by (Act X of 1922), section 14—U. P. Land Revenue Act (III of 1901), section 111—Partition proceedings in Revenue courts—Plaintiff directed to institute suit in Civil Court for determination of his title within three months—Suit instituted within time in a court having no jurisdiction by deliberately under-valuing it—Plaint returned and presented in proper court after expiry of three months—Plaintiff, if entitled to benefit of section 14 of the Limitation Act.

Held, that since Act X of 1922 amending the Limitation Act was passed the provisions of section 14 of the Limitation

*Second Civil Appeal No. 398 of 1928, against the decree of W. Y. Madeley, District Judge of Rae Bareilly, dated the 10th of October, 1928, confirming the decree of Pandit Damodar Rao Kellar, Subordinate Judge of Rae Bareilly, dated the 23rd of September, 1927.