APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice B. S. Kisch.

1931 *September, 14.*

SURAJ BALI (DEFENDANT-APPELLANT) *v.* LALA MAHADEO PRASAD (PLAINTIFF-RESPONDENT)*

Indian Limitation Act (IX of 1908), Articles 142 and 144—Scope—Plaintiff not alleging dispossession—Suit based on title—Case, if governed by Article 142 or 144—Adverse possession, essentials of—Possession per se, if sufficient—Absence of direct proof of actual knowledge on the part of true owner—Notoriety of possession—Presumption of knowledge of adverse possession—Absence of evidence of unequivocal character for presumption of knowledge—Adverse possession, if established—Oudh Civil Rules, rule 289, clause (10)—Vakalatnama filed on the first date fixed for hearing and not before—Pleader's fee, how to be taxed.

Article 142 of the Limitation Act is restricted to suits for possession on dispossession or discontinuance of possession. In order to bring a suit within the purview of that article it must be shown that the suit was in terms as well as in substance based on an allegation of the plaintiff having been in possession and having subsequently lost it either by dispossession or by discontinuance of possession. Article 144 on the other hand is a residuary article applying to suits for possession not otherwise provided for. Suits based on the plaintiff's title in which there is no allegation of prior possession, and subsequent dispossession or discontinuance of possession must fall within this article. The question whether the article of limitation applicable to a particular suit is article 142 or 144 has to be determined by a reference to the pleadings. Where there is no allegation in the pleadings about the plaintiff having lost possession either by dispossession or by discontinuance of possession and the suit is based on title, the suit is governed by article 144 and not article 142 of the first Schedule of the Indian Limitation

*Second Civil Appeal No. 304 of 1930, against the decree of M. Mahmud Hasan, Additional District Judge, Lucknow, dated the 19th of July, 1930, reversing the decree of Mirza Muhammad Munim Bakht, Subordinate Judge, Malihabad at Lucknow, dated the 31st of August, 1929.

Act. *Sukhdeo* v. *Ram Dulari* (1), *Yaqub Khan* v. *Sheo Dularey* (2), and *Zahida Begam* v. *Mumtaz Ali Khan* (3), referred to.

Title by adverse possession cannot be acquired by mere possession *per se* for any length of time. In order to acquire such title, the possession must not only be open and exclusive but it must also be shown to have been adverse for the full statutory period. Notoriety of possession may in some cases justify a presumption that the true owner was aware of the character of the possession being adverse. But whether in the absence of direct proof of actual knowledge on the part of the true owner such a presumption should be raised against him or not must depend upon the special facts and circumstances of each case. Where there is hardly any evidence of an unequivocal character which can justify a presumption that the plaintiff must have known that the possession of the defendant has been in assertion of a hostile title, it cannot be held that the title by adverse possession has been perfected.

Where a *vakalatnama* is filed on the first date fixed for hearing of the case but not before that date, only half of the ordinary pleader's fee should be taxed under clause 10 of Rule 289 of the Oudh Civil Rules.

Messrs. *Mahesh Prasad* and *Muhammad Ayub*, for the appellant.

Messrs. *Hyder Husain* and *Ali Zaheer*, for the respondent.

SRIVASTAVA and KISCH, JJ. :—This is a defendant's appeal against the judgment and decree, dated the 19th of July, 1930, of the Additional Subordinate Judge of Lucknow setting aside the decision, dated the 31st of August, 1929, of the Subordinate Judge of the same place. It arises out of a suit for possession of a house with certain shops situate in bazar Daliganj in the city of Lucknow.

The plaintiff's case was that the property in suit had been purchased by his grandfather Ram Dayal on the 16th of October, 1865, that the plaintiff's father used to carry on a grain business in partnership with Bhawani Din, father of the defendant in the house and

(1) (1925) 29 O.C., 181. (2) (1930) 7 O.W.N., 504.
(3) (1931) 8 O.W.N., 921.

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shops in suit, that after the dissolution of the partnership which took place many years ago, Bhawani Din continued to carry on the grain business on his own account in the house and shops in question on payment of Rs. 3 per mensem as rent. It was also alleged that the rent had been fixed so low as Bhawani Din undertook to keep the house in repair. After the death of Bhawani Din, the defendant has continued in possession of the house and shops aforesaid on the same terms. In 1926 plaintiff instituted a suit against the defendant for recovery of the arrears of rent and the defendant in his written statement filed in that suit, on the 5th of January, 1927, denied that he was in possession as a tenant and questioned the proprietary title of the plaintiff. That suit was ultimately withdrawn with liberty to institute a fresh suit. The present suit was instituted on the 22nd of May, 1928, the denial made in the written statement, dated the 5th of January, 1927, being alleged as the cause of action for the suit.

The defendant contested the suit on various grounds. He questioned the plaintiff's title and denied the alleged tenancy. He also set up the bar of limitation and pleaded that he had acquired title to the property in suit by adverse possession.

The learned Subordinate Judge upheld the defences raised and dismissed the plaintiff's claim. On appeal the learned District Judge held that the property in suit had been purchased by the plaintiff's grandfather under a registered sale deed, exhibit 3, and that the plaintiff's title as owner of the property in suit had been satisfactorily established. On the question of limitation he held that the suit was governed by article 144 of the Indian Limitation Act and that the defendant had failed to make good his plea of adverse possession. He accordingly gave the plaintiff a decree for possession of the property in suit.

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The main question urged on behalf of the defendant-appellant is that the plaintiff's suit for possession was barred by time. It has been strenuously argued that the suit was governed by article 142 and not by article 144 of the Limitation Act. The distinction between the two articles has been repeatedly pointed out in decided cases—*Sukhdeo* v. *Ram Dulari* (1), *Yaqub Khan* v. *Sheo Dularey* (2) and *Zahida Begam* v. *Mumtaz Ali Khan* (3). Article 142 is restricted to suits for possession on dispossession or on discontinuance of possession. In order to bring a suit within the purview of that article it must be shown that the suit was in terms as well as in substance based on an allegation of the plaintiff having been in possession and having subsequently lost it either by dispossession or by discontinuance of possession. Article 144 on the other hand is a residuary article applying to suits for possession not otherwise provided for. Suits based on the plaintiff's title in which there is no allegation of prior possession and subsequent dispossession or discontinuance of possession must fall within this article. It is also equally well settled that the question whether the article of limitation applicable to a particular suit is article 142 or 144 has to be determined by a reference to the pleadings. We have already stated the allegations on which the plaintiff based his claim. These allegations were further amplified in the oral pleadings. Having carefully examined the pleadings we are unable to discover any allegation about the plaintiff having lost possession either by dispossession or by discontinuance of possession. As we have stated before the plaintiff bases his case on title acquired by his grandfather Ram Dayal under the sale deed, dated the 16th of October, 1865. He admitted that the defendant had been for a long time in possession as a tenant and based his

(1) (1925) 29 O.C., 131. (2) (1930) 7 O.W.N., 504.
(3) (1931) 8 O.W.N., 921.

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cause of action on the denial of his title by the defendant. We can therefore see no room for the application of article 142 to this case. Strong reliance was placed by the appellant's learned counsel on the decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Gur Sahai Kandu* v. *Chhedi* (1). The facts of that case are no doubt somewhat parallel to the facts of this case but it will appear from the observations made at page 133 that in that case the plaintiff stated that the defendants denied the plaintiff's title and alleged "that this amounted to the plaintiff's dispossession". There is no such allegation in this case and the case seems distinguishable on this ground. We accordingly agree with the opinion of the lower court that the suit is governed by article 144 and not article 142 of the 1st schedule of the Indian Limitation Act.

Another branch of the defendant's argument on the question of limitation was that they had succeeded in establishing their adverse possession for over twelve years. The learned District Judge rejected the evidence bearing on this point on the ground that there was no evidence to show that the defendants made any assertion of hostile title to the knowledge of the plaintiff or his father. In answer to this it was argued that the possession of the defendant being open, visible and notorious it was not necessary that the adverse character of the possession should be brought home to the plaintiff or his predecessor-in-title by direct evidence. It is not denied that mere possession for any length of time does not *per se* create any title by adverse possession. In order to acquire such title, the possession must not only be open and exclusive but it must also be shown to have been adverse for the full statutory period. Notoriety of possession may in some cases justify a presumption that the true owner was aware of the character of the possession being

(1) (1924) 27 O.C., 130.

adverse. But whether in the absence of direct proof of actual knowledge on the part of the true owner such a presumption should be raised against him or not must depend upon the special facts and circumstances of each case. The facts relied on in the present case are that Bhawani Din executed a sale deed of the property in suit and afterwards obtained a reconveyance from the vendee in his favour. He also executed some mortgages which were afterwards redeemed by him. The defendant and his father also executed some *sarkhats* of the shops in favour of certain tenants. These transactions are not of such a character that the plaintiff could be presumed to have knowledge of them. It is said that if the plaintiff had looked into the registration records he could have become aware of the sale deeds and the mortgage deeds. But there was no duty cast on him in law to do so.

Next it is said that the defendant had been paying water-tax and the house-tax in respect of the house and shops in suit. Every occupier of a house is liable for payment of these taxes. The payment of such taxes is not irreconcilable with the plaintiff's ownership of the property.

Thus there is hardly any evidence of an unequivocal character which could justify us in presuming that the plaintiff must have known that the possession of the defendants was in assertion of a hostile title. We are not therefore prepared to say that the learned District Judge was wrong in holding that the defendant had failed to establish that he had perfected his title by adverse possession.

It was also argued that the taxation of the defendant's pleader's fee in the lower court was wrong. The decree shows that only half the pleader's fee has been taxed. Rule 289, clause 10 of the Oudh Civil Rules provides that only one-half of the ordinary fee will be allowed on account of the legal practitioner

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of the respondent unless the legal practitioner has filed either his *vakalatnama* or a slip in the form appended to this paragraph after the filing of the appeal and before the first date fixed for hearing of the case. In this case the *vakalatnama* was filed on the first date fixed for hearing of the case but not before that date. The lower court was therefore right in taxing only half of the ordinary fee. It was contended that the pleader who filed his certificate of fee had also been appearing in the trial court and was therefore entitled to appear in the court of appeal without filing a fresh *vakalatnama*, and that the rule quoted above should not apply to such a case. The question does not arise because the legal practitioner concerned did actually file his *vakalatnama* in the court of appeal and did not act on the *vakalatnama* filed in the lower court. We must therefore overrule the contention.

Lastly it may be mentioned that the plaintiff's counsel contended that he had succeeded in establishing that the defendant had been in possession as a tenant and had been paying rent as such. The lower appellate court did not record any clear finding on this point. The evidence relied upon in support of this contention consists mainly of an entry in the account book exhibit 17 in respect of a sum of Rs. 214 credited for rent. The trial court did not accept this entry as correct. It also disbelieved the oral evidence bearing on the point. We can see no sufficient reason to disagree with the finding of the first court and must therefore hold that the alleged tenancy has not been proved.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.