

## APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice  
E. M. Nanavutty

RAM SHANKAR AND ANOTHER (PLAINTIFFS-APPELLANTS) v.  
SHEO DUTT AND ANOTHER (DEFENDANTS-RESPONDENTS)\*

1934  
November,  
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*Limitation Act (IX of 1908), Articles 142 and 144—Suit for possession based on dispossession—Article 142, Limitation Act, when applies—Burden of proof—Oudh Courts Act (Local Act IV of 1925), section 12(2)—Civil Procedure Code (Act V of 1908), Order XLII, rule 1—“Appeals from appellate decree” in Order XLII, rule 1, meaning of—Cross-objections in an appeal under section 12(2)—Permission under section 12(2), whether necessary for cross-objections.*

Where a case is one for possession based on dispossession it falls within the terms of Article 142 of the Indian Limitation Act and the burden lies upon the plaintiff to establish his possession within limitation.

In an appeal under section 12(2) of the Oudh Courts Act a party has no right to prefer cross-objections as a matter of right, without making an application and getting the requisite permission under that section.

The words “appeals from appellate decrees” as used in Order XLII, rule 1 of the Code of Civil Procedure have reference only to second appeals filed under section 100 of the Code of Civil Procedure and not to appeals under section 12(2) of the Oudh Courts Act.

Mr. *Kashi Prasad Srivastava*, for the appellants.

Mr. *Siraj Husain*, for the respondents.

SRIVASTAVA and NANAVUTTY, JJ.:—This is an appeal under section 12(2) of the Oudh Courts Act against the judgment and decree of a single Judge of this Court passed in Second Civil Appeal No. 19 of 1932.

The suit which gave rise to that appeal was instituted by the plaintiffs for possession of certain plots of land. The plaintiffs are admittedly co-sharers of Patti Mata Din in which the said plots are situate. Their case

\*Appeal under section 12(2), Oudh Courts Act, No. 2 of 1933, against the order of the Hon'ble Mr. Justice J. J. W. Allsop, Judge of the Chief Court of Oudh at Lucknow, dated the 13th of September, 1933, modifying the decree of Pandit Krishna Nand Pandey, Additional Subordinate Judge of Unao, dated the 15th of October, 1931.

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was that the defendants had put up certain structures which constituted dispossession of the plaintiff from the said plots. They therefore asked for a decree for demolition of the structures also. The present appeal is confined to two *chabootras* "ABCD" and "EFGH". One of the questions which arose for decision before Allsop J. was whether the suit was governed by Article 144 or by Article 142 of the Indian Limitation Act. The learned Judge did not consider it necessary to decide this question because he was of opinion that the defendants had satisfactorily established their adverse possession in respect of the said *chabootras* for over twelve years. The learned counsel for the plaintiffs-appellants has impugned this decision on the ground that no plea of adverse possession had been raised in the pleadings. It is also contended that there was no legal evidence in support of the finding about adverse possession. The learned counsel for the defendants-respondents has not seriously attempted to support the finding of the learned Judge about adverse possession which has been given in his favour. He has however maintained that the suit was governed by Article 142 of the Indian Limitation Act, and that the plaintiffs' claim in respect of the *chabootras* has rightly failed because the plaintiffs have failed to make out their possession within limitation.

We have examined the plaint and the statement of the plaintiffs made in the trial Court. The plaintiffs' case clearly was that they were the owners and in possession of the land in suit, that the defendants in 1926, about  $2\frac{1}{2}$  years before the institution of the suit, had unlawfully constructed the *chabootras* in question, and that this act of the defendants constituted plaintiffs' dispossession from the land in dispute. They accordingly claimed a decree for possession. Plaintiff No. 1 made a statement on oath as P. W. 1 to the same effect. Thus we are satisfied that the plaintiffs' case was one for

possession based on dispossession and clearly fell within the terms of Article 142 of the Indian Limitation Act. In this view of the case the burden lay upon the plaintiffs to establish their possession within limitation.

The Court of first appeal, after discussing the evidence, found that the plaintiffs' allegation about the *chabootras* having been constructed 2½ years before the filing of the suit was not correct, and that the said *chabootras* had been in existence for over twelve years. This finding was accepted by Allsop J. also. No ground has been made out for our interference with this finding in this appeal under section 12(2) of the Oudh Courts Act.

We must, therefore, uphold the order of Allsop J. dismissing the plaintiffs' claim for the *chabootras* on the ground of its being barred by Article 142 of the Indian Limitation Act.

The defendants-respondents have also filed cross-objections in respect of a tin shed constructed by them over the door of their house No. 92. The defendants never made any application for permission under section 12(2) of the Oudh Courts Act in respect of the grounds raised in their cross-objections. We are very doubtful of the right of the defendants to prefer cross-objections as a matter of right, without making any application and getting the requisite permission under section 12(2) of the Oudh Courts Act. Reliance has been placed on Order XLII, rule 1 of the Code of Civil Procedure, which lays down that the rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees. It has been argued, that the decree of Allsop J. in second appeal was an appellate decree, within the meaning of this rule, and therefore the defendants are entitled as of right to file cross-objections under Order XLII, rule 1 of the Code of Civil Procedure. We are of opinion that this argument is fallacious. Sections 100 to 103 of the Code of Civil Procedure, which deal with second

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appeals are preceded by the heading "Appeals from appellate decrees". We are inclined to think that the words "Appeals from appellate decree", as used in Order XLI, rule 1 of the Code of Civil Procedure have reference only to second appeals filed under section 100 of the Code of Civil Procedure. It would be anomalous that while an appellant is not under section 12(2) of the Oudh Courts Act entitled to appeal as of right, and cannot do so without obtaining a declaration from the single Judge concerned that the case is a fit one for appeal, the respondent should be allowed to file cross-objections as a matter of course without the necessity of obtaining any such declaration. The cross-objections must therefore fail on this ground. However, as we have heard the learned counsel on the merits of the cross-objections, we might as well add that in our opinion they have no substance. Allsop J. had disallowed the defendants' cross-objections in respect of the tin shed in question on the ground that the case set up by the defendants in respect of it had never been set up before and was a new case. The learned counsel is unable to refer us to anything on the record to refute this. We are not therefore prepared to say that the learned Judge was wrong in disallowing the cross-objections.

The result therefore is that the appeal and the cross-objections both fail and are dismissed with costs.

*Appeal dismissed.*