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MA SHIN
v.
MAUNG HAN AND OTHERS.

BROWN, J.

It has been suggested by the learned advocate that when Ma Shin was examined as a witness in the earlier case her statements were not entirely consistent with the case she now puts forward; but I am not now concerned with the merits of her present case.

The sole question for decision at present is whether the suit is barred as *res judicata*, and on that point I must hold that the appellant is entitled to succeed.

I, therefore, set aside the judgments and decrees of the lower Courts and direct that the suit be re-opened and tried on its merits by the trial Court.

The appellant will be entitled o a refund of the court-fees paid by her in this Court and in the District Court. The balance of her costs in the District Court and in this Court will be paid by the respondents.

APPELLATE CIVIL.

Before Mr. Justice Brown.

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Jan. 11.

U MAUNG GYI
v.
MAUNG ON BWIN AND ANOTHER.*

Burden of proof—Dispossession, adverse possession—Limitation Act (IX of 1908), *Sch. I, Arts.* 142, 144*—Averment by plaintiff of permissive use—Defendant's occupation over twelve years—Burden of proof on plaintiff to show dispossession within twelve years on failure to prove permissive use.*

Ordinarily in a suit under Art. 142 of the Limitation Act, the burden of proof would lie on the plaintiff, and in a suit under Art. 144 it would lie on the defendant. Where a plaintiff avers that he was at one time the owner of immoveable property and that the defendant obtained possession from him, his suit falls under Art. 142, and on his failing to prove the permissive

* Special Civil Second Appeal No. 529 of 1928 against the judgment of the District Court of Amherst in Civil Appeal No. 139A of 1928.

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nature of the occupation, plaintiff cannot succeed without at first showing that he had been in possession within twelve years of bringing the suit.

Mohima Chunder v. *Mohesh Chunder*, 16 Cal. 473 (P.C.)—*referred to.*

Eunoose for the appellant.

Kirkwood for the respondents.

BROWN, J.—The plaintiff-appellant sued the defendant-respondents for possession of a certain piece of land. The plaintiff's case was that the land originally belonged to him and that about ten years ago he allowed the defendants to occupy the land temporarily. The defendants denied the plaintiff's title and denied that they came into possession with his leave or license. They said that they entered on the land 21 years ago and that they had been in peaceful and uninterrupted possession ever since. It has been found as a fact that the plaintiff did acquire title to the land in the year 1894 by the purchase at a Court auction sale, but that the defendants had been in possession for 15 years or more before the suit was brought, and that the plaintiff has failed to show that they entered into possession with his permission. On these facts the District Court held that the burden of proving that the defendants' possession was permissive and not adverse rested on the plaintiff and that as the plaintiff had failed to discharge that burden the suit must fail. The plaintiff has appealed on the ground that the burden has been wrongly placed.

It is urged that the suit is under Article 144 of the Limitation Act and that under that Article the burden is on the defendants to prove that their possession was adverse. Both the lower Courts have discussed a number of authorities on the question of burden of proof in such cases. Ordinarily in a suit under Article 142 the burden of proof would lie on

the plaintiff and in a suit under Article 144 it would lie on the defendants. It is contended on behalf of the appellant that this is not a suit under Article 142 because the plaintiff was never in possession. It seems to me however that this contention is contradicted by the plaintiff's evidence.

The plaintiff quite clearly says that the defendants requested him to allow them to occupy the land and that he gave them permission. That seems to me tantamount to a statement that it was the plaintiff who put the defendants in possession and that the plaintiff was at that time at least in constructive possession of the land. In fact according to the plaint his possession continued through the defendants until recently when they set up an adverse claim on their own behalf.

In the case of *Mohima Chunder Mozoomdar and others* v. *Mohesh Chunder Neoghi and others* (1), their Lordships of the Privy Council observe: "This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession, and *a fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strengh of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit, namely, for the two or three years prior to the year 1875 or 1874, and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed." If, in the

(1) (1888) 16 Cal. 473.

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present case, the plaintiff had proved the permissive occupation by the defendants, the burden would then clearly have rested on the defendants to show that they had acquired title by twelve years' adverse possession. But it has been found as a fact that the plaintiff has failed to prove this permissive occupation. All that has been proved is that the plaintiff was at one time the owner, but that for the last 15 or 20 years the defendants have been in possession, and it seems to me that the plaintiff's claim is that the defendants obtained possession from him. That being so, the suit was a suit under Article 142, and on his failing to prove the permissive nature of the occupation the plaintiff could not succeed without at first showing that he had been in possession within twelve years of bringing the suit.

For these reasons I am of opinion that this case was rightly decided by the District Court and I dismiss this appeal with costs.

APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

1929

Jan. 1.

C.T.A.M. CHETTYAR FIRM

v.

KO YIN GYI AND ANOTHER.*

Inherent powers of the Court to prevent injustice—Powers of the Court to amend decree in favour of party against whom it was never intended to operate—Civil Procedure Code (Act V of 1908), ss. 151, 152—Merger of lower Court's decree into that of High Court—Proper Court to grant relief—Power of Court to amend decree under O. 41, r. 33 of the Code in favour of absent parties—Power to refund court-fees on review application, when to be exercised.

A District Court's decree accidentally included the appellants' names and of other defendants as liable for mesne profits of a certain land and for costs.

* Civil First Appeal No. 234 of 1925 against the decree of the District Court of Tharrawaddy in Civil Regular No. 24 of 1920, and Civil Miscellaneous Application No. 44 of 1928 for a review.