APPELLATE CIVIL.

Before Mr. Justice Harrison and Mr. Justice Dalip Singh.

DAIM AND OTHERS (PLAINTIFFS) Appellants

versus

KHANU AND OTHERS (DEFENDANTS) Respondents.

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March 31.

Civil Appeal No. 1028 of 1922.

Indian Limitation Act, IX of 1908, Article 142—Suit for possession of land—Onus probandi—*whether proof of actual date of dispossession essential.*

In 1917 the parties, being two branches of the same family, agreed to partition its land on the basis of their then existing cultivating possession independent of the question of title, and on an application being made to the Revenue Authorities an order was passed that this should be done. The revenue records established continuous possession by the plaintiffs up to the date of the agreement of an area 211 kanals in excess of one-half, but the parties were shewn in the ownership column as holding equal shares, and notwithstanding the clear order to the contrary, partition was effected by making an entry shewing the parties as in possession of one-half each. On some subsequent date, the defendants took possession of the excess portion. The plaintiffs' suit for recovery of the same was instituted within twelve years from the date of the above entry. It was held by the trial Court that the plaintiffs must prove the actual date and circumstances of the dispossession and as he could not do so he must lose his land although he had instituted his suit within twelve years of his possession.

Held, that the suit was governed by Article 142 of the Limitation Act, under which it was sufficient for the plaintiffs to shew that within the preceding twelve years they had been in possession of the land in suit and had been dispossessed by the defendants ; and that proof of the particular date, etc., on which the dispossession took place, was not essential.

First appeal from the decree of Lala *Murari Lal, Khosla, Senior Subordinate Judge, Shahpur at*

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Sargodha, dated the 20th March 1922, dismissing the claim.

NANAK CHAND and OBEDULLA, for Appellants.

M. A. GHANI, SLEEM and J. L. KAPUR, for Respondents.

The judgment of the Court was delivered by—

HARRISON J.—The plaintiffs, descendants of one Haku, form one branch of a family, while the defendants, descendants of Gullu, form the other, the common ancestor being one Smail. *Mussammat* Begman, defendant No. 6, is the widow of Jahana of the plaintiffs' branch and she has been impleaded as a *pro forma* defendant only as a separate area of the family property has been given to her for her lifetime. The revenue records show that Smail owned one-half of a holding No. 64 and was joint in this holding with one Nabu and subsequently in the year 1892 his descendants effected a partition and received the larger portion of this holding. Haku, the ancestor of the plaintiff-branch is shown as having subsequently purchased a small plot of land. At the settlement of 1891-92 this plot was included in the joint holding of the family though no mutation order was passed and it is not known how the entry came to be made. The two branches of the family held definite areas throughout the period 1891 to 1918 as shown in the various *jamabandis*, the branch of Haku always holding considerably the larger share. In the column of ownership the entries continued as made in the year 1891-92 and showed both the property of Smail and the area purchased by Haku as jointly owned by the whole family. In 1917 the family presented a petition to the *Patwari* stating that they had partitioned the whole of the land held by them including a large

area of *shamilat*, which had been allotted in the year 1904, and that they wished to make a formal and regular partition by observing the existing possession of both branches and this independent of the question of title. On this the *patwari* sent a report to the Tahsildar, in which he showed the actual possession of the two branches as approximately equal. The Tahsildar recorded that the members of the family, who were present, asserted that the existing possession had continued for 11 years, that they wished that the existing possession be respected and continued; he therefore ordered partition to be effected in accordance with their wishes and in accordance with the actual existing possession. This could only mean actual cultivating possession more especially as the partition was to be irrespective of title. In spite of this perfectly clear order partition was effected by making an entry in the record showing the two branches as in possession of one-half each. The Plaintiffs have come to Court relying on the past history of the family, have stated that their cause of action arose on the date of the mutation entry, that the defendants have seized an area of 211 *kanals* since the date of that mutation order, and that they are entitled to this area and wish the *status quo* restored.

The suit has been dismissed and the plaintiffs appeal, and after taking us through all the revenue records and explaining the position, counsel has ultimately rested his case on the failure of the revenue authorities to carry out their own orders with the result that the defendants are now in possession of 211 *kanals* more than they held in the *jamabandi* of 1916-17. There can be no doubt that the orders as passed have not been carried into effect. Not only the *jamabandi* of 1916-17 but also the two previous

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jamabandis establish that the area now claimed by the plaintiffs was throughout held by them in excess of their strict half share as shown in the column of ownership. In the year of 1916-17 or thereabouts the area, which they had been holding jointly was apparently brought into hotchpot and the result of the division gave the same disproportion between the shares as is to be found throughout the entries and as is explained by the additional holding acquired by Haku.

Counsel for the respondents has urged that the plaintiffs should be confined to their pleadings and unless and until they can show the actual date and circumstances of the dispossession as alleged in their plaint, the present entry being in favour of the defendants, it must be assumed that all the previous entries are wrong; that it must be held that the plaintiffs have failed to show that throughout the whole of this period they have actually held knowingly or unknowingly the precise area purchased by their ancestor, and that they are therefore not entitled to the area, which they claim. If the pleadings are to be enforced strictly, it will be found at page 30 of the paper book that the defendants confessed judgment by stating that paragraph 8 of the plaint was correct. This is an obvious mistake and must be treated as such, but it hardly lies in the mouth of the defendants to insist on strict pleading when they themselves have been so careless. It appears to us that the plaintiffs having put their grievance before the Court and having roughly described their cause of action, though that cause of action did not arise from the making of the entry but from the conduct of the defendants which followed thereon, and we are of opinion that

relief should be given to them if they succeed in showing that they are entitled to it.

Without going into the question of the identity of the land throughout the 27 years or more the salient fact is established that the parties did agree to observe existing possession and that the revenue records bear strong internal evidence establishing that the excess held by the plaintiffs' branch is approximately the same throughout this period, and the amount now claimed has been correctly calculated. The fact that they were in possession of the excess area being established and the fact that they are now not in possession thereof gives them a cause of action. They made their agreement, orders were passed that it should be carried into effect, and, so far from the order being carried out, precisely the contrary was done and on some unknown date, the defendants entered upon the excess portion, which they now hold. We find that in accordance with the agreement the plaintiff-branch is entitled to receive this excess portion which it claims, namely, 211 *kanals* 15 *marlas* out of *khata khewat* No. 10, *khatauni* 45-64 as shown in the *jamabandi* papers for the year 1916-17.

The article which governs the case is 142, which gives rise to much misunderstanding although the wording is perfectly clear. In a suit governed by this article the plaintiff has to establish possession and dispossession within twelve years. He proves his possession say ten years ago and it is immaterial whether it was he himself or his tenant who actually occupied or cultivated the land. He proves that he is not in possession at the time of suit and that the defendant is. It follows therefore as the night the day that the defendant has dispossessed him at some time known or unknown and it equally follows that

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the dispossession took place less than ten years ago. All the necessary ingredients are established and the suit is good and sound. Now, what is the usual procedure. The plaintiff thinking it wise or necessary to give the exact date of his cause of action and not knowing what it is, selects a date more or less at random and says he was dispossessed some three years ago, or more or less as the case may be. The defendant denies this. The point is put in issue and the plaintiff fails to prove the date on which the dispossession took place. Although he owns the land, although he was in possession within twelve years and has been admittedly robbed by the defendant, the Court dismisses the suit and gives the plaintiff's property to the defendant. In doing so the Court appears to think, and counsel in arguing the matter often appear to approve of the position, that the Court is exercising some curious disciplinary powers, punishing the plaintiff for being untruthful or ignorant, and rewarding the defendant for exposing the deplorable conduct of the plaintiff—the prize taking the form of the plaintiff's land.

To take another instance a man goes away leaving his land in possession of a tenant and returns some years later to find a stranger in possession. He institutes a suit and is called upon to prove possession and dispossession within twelve years. Possession presents no difficulty; he proves that his tenant held the land under him less than twelve years ago. In order to prove dispossession he enquires from his tenant what has happened, that tenant being in collusive alliance with the stranger. An untrue story is told him in consequence, and in the fullness of time the inaccuracies are exposed in open Court. Filled with righteous indignation the Court dismisses the

suit because the unfortunate plaintiff is so unpopular or so ignorant that he has wrongly described the date of dispossession. This is happening every day. In *bana shikni* cases, where as a matter of fact neither side knows the exact date of dispossession and it is not a question of ignorance or untruthfulness or an inaccurate watch or a time expired calendar the same disciplinary action is taken. The plaintiff is forced to name a date. He does so at random and on its being shown that he cannot prove his guess he is punished by losing his land because the date of his cause of action is wrongly described. What has to be shown is possession and dispossession within twelve years and to do so it is sufficient to prove possession within twelve years, which can usually be done by the revenue records, if unrebutted, and, further, the absence of possession or rather the possession of the defendant on date of suit. It follows that dispossession has been proved. We accept the appeal and give the plaintiffs a decree with costs in both Courts.

N. F. E.

Appeal accepted.