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therefore, in case of there being several mortgage-bonds, the account must be taken of all of them in the same suit, and if the total amount, as in the present case, exceeds Rs. 500, the case does not fall under Chapter 2 of the Act. If it exceeds Rs. 5,000 the First Class Subordinate Judge alone has jurisdiction.

Order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Parsons.

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BAPU, (ORIGINAL DEFENDANT), APPELLANT, *v.* DHONDI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Suit to recover possession of mango trees—Adverse possession for twelve years by taking fruit—Easement—Section 26, *Article* 144, *Schedule II of the Limitation Act (XV of* 1877).

The plaintiff having brought a suit to recover possession of mango trees growing on his own land, and the lower Courts having found that the defendant had, during twelve years preceding the suit, adverse possession by taking fruits thereof,

Held, that the claim was for possession of an interest in immoveable property and was governed by the limitation of twelve years prescribed by article 144 of the Limitation Act XV of 1877.

THIS was a second appeal from the decision of A. S. Moriarty, Assistant Judge of Sátára.

Suit to recover possession of two mango trees.

The plaintiff sued to recover from the defendant possession of two mango trees which stood on his own land. He alleged that the trees had been in his possession until he was dispossessed by the defendant on the 11th July, 1888, and that the defendant brought a possessory suit against the plaintiff in the Court of the Mámlatdár and got a decree under which he dispossessed the plaintiff. The present suit was filed on the 5th October, 1888.

The defendant, Bápu, in his written statement contended that the trees belonged to him and were in his exclusive possession for upwards of twenty-five years, and that the plaintiff's claim was, therefore, barred by limitation.

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The Subordinate Judge found that the plaintiff had not proved his title to the trees, and that he had not been in possession of them within twelve years before the date of the institution of the suit.

The Subordinate Judge found that, notwithstanding the fact that the trees stood on the plaintiff's land, the defendant had become their owner by reason of his having enjoyed the fruits thereof for at least twelve years. He, therefore, rejected the plaintiff's claim.

The plaintiff appealed to the District Court, and the Assistant Judge reversed the decree of the Subordinate Judge and allowed the plaintiff's claim.

The Assistant Judge in his judgment observed :—

"The lower Court's decision appears to me to be founded on a misconception regarding the term 'possession,' and a consequent neglect of the distinction between 'limitation' and prescription.' The word 'possession' (*kabja*) is used by the Mámlatdár and the Subordinate Judge in two senses. They really mean by it (as the defendant's pleader himself admitted) 'the right to take the fruit from the trees'; in other words, the '*vahivat*', 'enjoyment' or 'user' of the trees, for the trees themselves are proved to stand on the plaintiff's ground. This is really an 'easement' (cf. Starling's Limitation Act of 1877, page 77), but in the Mámlatdár's order 'possession' (*kabja*) of the trees in the ordinary sense was given to the present defendant. Hence the plaintiff now suing to have the Mámlatdár's order set aside, asked for possession of the trees to be given back, &c. A suit for 'recovery of possession' would appear to bring the case under article 144, Limitation Act, and the Subordinate Judge accordingly took twelve years as the period of limitation.

"But the period of limitation for an easement is really twenty years (paragraph 2 of section 26, Limitation Act of 1877), and it is clear that the defendant has not had 'user' for this period, for he stated before the Mámlatdár (exhibit 4) that the trees had only been yielding fruit for fifteen years."

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The defendant appealed to the High Court.

Gangárám B. Rele for the appellant:—The lower Court misunderstood the nature of the respondent's claim. The respondent does not seek to establish his right to recover the fruit of the trees. He asks for possession of the trees. The claim is, therefore, governed by twelve years' limitation under article 144, Schedule II of the Limitation Act. When a person seeks to recover possession of trees, his claim is one for possession of an interest in immoveable property—*Mohanlál* v. *Amratlál*(1); *Oodoyessuree* v. *Hurokishore Dutt*(2); *Mohunt Dev Surun Poory* v. *Moonshee Mahomed Ismáil*(3); *Chiman Bába* v. *Bhagavan Lakshman*(4). The lower Court was, therefore, wrong in holding that the respondent claimed a right of easement and that his claim was governed by twenty years' limitation.

Vásudeo Rámchandra Joglekar for the respondent:—The Mámlatdár in the possessory suit confirmed the possession of the appellant,—that is, restored to him the right of recovering fruits of the trees. When a person is in possession of trees, his right of possession consists in recovering fruits. Moreover, the trees stand on our land; the appellant, therefore, cannot plead twelve years' limitation to our claim. The lower Court was right in holding that our claim was to an easement, and as such governed by twenty years' limitation.

JARDINE, J.:—The plaintiff in this suit claimed the possession of mango trees growing on his land. The Courts below have found that the defendant has during the twelve years preceding the suit had adverse user by taking the fruit. The Subordinate Judge rejected the claim, holding it to be barred by limitation of twelve years. The Assistant Judge, in appeal, held that under section 26, paragraph 2 of the Limitation Act, XV of 1877, the period of limitation was that of twenty years prescribed for claims to easements.

Limitation has to be applied to the claim as laid. The present is, in our opinion, a claim for possession of an interest in immove-

(1) I. L. R., 3 Bom., 174, at p. 176.
(2) 4 W. R., 107.
(3) 24 W. R., 300.
(4) P. J., 1879, p. 319.

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able property—*Oodoyessuree* v. *Hurokishore Dutt*[1]; *Mohunt Dev Surun Poory* v. *Moonshee Mahomed Ismáil*[2]—and the limitation is that of twelve years prescribed in article 144. The Assistant Judge appears to have thought that the suit must succeed, unless the defendant could prove acquisition of ownership by prescription, and this has led him to a wrong decision. The distinction between limitation and prescription in matters of pleading is shown in *Mohanlál* v. *Amratlál*[3].

For these reasons, we reverse the decree of the Assistant Judge and restore that of the Subordinate Judge. Costs of both appeals on the plaintiff.

PARSONS, J.:—I concur. Plaintiff sued to recover possession of two mango trees, which he alleged were his, standing on his own land, and in his possession till he was dispossessed by the defendant in July, 1888. Both the lower Courts found that there was no dispossession in 1888, but that the defendant had been in adverse possession of the trees for more than twelve years preceding the suit. The lower appellate Court, however, reversed the decree of the Court of first instance and awarded the plaintiff's claim, holding that a user for twenty years was required in order to give the defendant a title to take the fruit of the trees, and that, as so long a user was not proved, the defendant had no title to the trees. I think that there is an error in this decision. Plaintiff's suit, in the frame in which it was brought, falls clearly within the terms of article 142 of Schedule II of the Limitation Act, and, as according to the findings of both the lower Courts it was not brought within twelve years of the date of dispossession, it is time-barred. Even if article 144 be held to apply, still the suit would equally be time-barred, since the defendant has proved adverse possession for more than twelve years prior to suit.

Decree reversed.

(1) 4 W. R., 107. (2) 24 W. R., 300.
(3) I. L. R., 3 Bom., 174, at p. 176.