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the rule with which we are concerned in this case, was bad because it was inequitable. It does not appear to have been argued that the rule was inconsistent with the provisions of section 72 of the Act. I am, therefore, unable to accept that case as any guide in deciding the question which has been argued in the present case.

It follows, therefore, that the commencement of the liability of the Company for goods delivered to be carried under section 72 is in no way dependent upon the fact of a receipt having been granted, and must be determined on the evidence in the case quite independently of rule 2 under section 47, sub-section (1), clause (*f*).

For these reasons I concur in the order proposed by my learned brother.

Rule made absolute.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

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RASULKHAN HAMADKHAN AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

GULAB CHHITU AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), schedule I, Article 14—Possession of land as owner for fifty years—User of land as graveyard and also as timber depôt—Order by Government for discontinuing the user as timber depôt—Order ultra vires*—Land Revenue Code (Bombay Act V of 1879), sections 65, 66.*†

* First appeals Nos. 267 and 270 of 1912.

† The sections run as follows :—

65. An occupant of land appropriated for purposes of agriculture is entitled by himself, his servants, tenants, agents or other legal representatives, to erect

The plaintiffs were in possession of the land in dispute as owners ever since 1860 and used a portion of it as a graveyard, and on another portion of it they built a shed which was used as a timber shop. In 1871, Government assessed the land and entered it in the Revenue Registers as "Government waste land." The plaintiffs paid no assessment on the land. In 1908, the District Deputy Collector passed an order directing the Mamlatdar to "cause the building and the wood to be removed forthwith from the said land." This order was finally confirmed by the Commissioner on the 24th April 1909.

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farm-buildings, construct wells or tanks, or make any other improvements thereon for the better cultivation of the land, or its more convenient occupation for the purposes aforesaid.

But, if any occupant wishes to appropriate his holding or any part thereof to any other purpose, the Collector's permission shall in the first place be applied for by the registered occupant.

The Collector on receipt of such application shall at once furnish the applicant with a written acknowledgment of its receipt, and after inquiry may either grant or refuse the same; but, if the applicant receive no answer within three months from the date of the said acknowledgment, the Collector's permission may be deemed to have been granted.

Unless the Collector shall in particular instances otherwise direct, no such application shall be recognized except it be made by the registered occupant.

When any such land is thus appropriated to any purpose unconnected with agriculture, it shall be lawful for the Collector, subject to the general orders of Government, to require the payment of a fine in addition to any new assessment which may be leviable under the provisions of section 48.

66. If any such land be so appropriated without the permission of the Collector being first obtained, or before the expiry of three months from the date of the aforesaid acknowledgment, the occupant and any tenant, or other person holding under or through him, shall be liable to be summarily evicted by the Collector from the land so appropriated, and from the entire field or survey-number of which it may form a part, and the registered occupant shall also be liable to pay, in addition to the new assessment which may be leviable under the provisions of section 48 for the period during which the said land has been so appropriated, such fine as the Collector may, subject to the general orders of Government, direct.

Any co-occupant or any tenant of any occupant or any other person holding under or through an occupant, who shall, without the registered occupant's consent, appropriate any such land to any such purpose, and thereby render the said registered occupant liable to the penalties aforesaid, shall be responsible to the said registered occupant in damages.

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The plaintiffs filed the present suits on the 2nd February 1910, to obtain a declaration that they were absolute owners of the land, to have set aside the order of 1909, and to get a permanent injunction restraining Government from disturbing the plaintiffs in their possession of the land. The lower Court dismissed the suits holding that the plaintiffs were not absolute owners but occupants only, and that the suits were barred under Article 14 of the first schedule to the Limitation Act, 1908. The plaintiffs having appealed :—

Held, that as the land in dispute was not used for the purpose of agriculture, neither section 65 nor section 66 of the Land Revenue Code (Bombay Act V of 1879) applied to the case, and the orders passed by the Revenue Authorities to evict the plaintiffs were *ultra vires*.

Held, further, that the suits were not barred by Article 14 of the Limitation Act (IX of 1908), inasmuch as it was not necessary for the plaintiffs to have the order set aside.

APPEALS from the decision of E. H. Waterfield, Acting District Judge of Broach.

Suits for declaration and injunction.

The plaintiffs in these suits owned a piece of land, of which they were in possession ever since the year 1860. A portion of the land was used by them as a private cemetery (*kabarastan*). On another portion of the land they built a shed which was used as a timber shop.

It appeared that in 1871 Government assessed the land at Rs. 3-8-0; and entered it in the Revenue Register as "Government waste land." The plaintiffs were never asked to pay any assessment for the land.

In 1903, one of the plaintiffs appeared before the Talati of Ankleshvar in the course of revenue inquiry and stated as follows :—

I, Gulab Chhitu, residing at Ankleshvar, being questioned this day, state that the land of Survey No. 538, measuring acre 0-32, is set apart for a graveyard. I am managing this graveyard. This land is leased to one Jamnadas, a resident of the said town. I do not remember his father's name. The rent has been fixed at Rs. 17. I have built a hut on it and the other one has been built by the said Jamnadas. The said Jamnadas uses the hut built by me. The amount of Rs. 17, the rent of the land, is to be utilized for the purposes of the Pir's grave (*dargha*) which stands on this land. In order to keep the Pir's grave in a good state of repairs, the land is leased out. The hut is a *kachha* hut. I am ready to pull it down, if Government have any objection.

The inquiry resulted in a letter from the District Deputy Collector to the Mamlatdar of Ankleshvar on the 12th February 1907, which ran as follows :—

It will appear on looking into our office E. No. 634, dated 19th March 1898, and Meherban Collector's letter No. E.-1274, dated 19—20th April 1898, copies whereof are attached hereto in the correspondence of (the year) 1898, that the said Survey number has been fixed as being for (the purposes of) cemetery and only for that reason the Commissioner has sanctioned that the same should be continued (to be held) unassessed as (for purpose of) cemetery, although the present owner thereof has no (such) right. It will, moreover, appear from the very same papers that it has been refused to treat these numbers as "Inam" and to apply the summary settlement thereto : *vide* Meherban Collector Saheb's English letter, paragraph 4. Likewise, it will appear from seeing the last sentence of the said paragraph that the land, having been fixed as being for (purposes of) a cemetery, the owners thereof have no right left to them to use the same in any other way whatever.

If, in this manner, a house be built on the cemetery land, and a wood depôt be opened there or would be stored there, that cannot be allowed on any account whatever. Therefore, you will please cause the building and the wood to be removed forthwith from the said land. Further, you will be good enough to send the statement in respect of the income which has become receivable from the time the correspondence commenced.

In part (?) 'Chh' of your endorsement No. 755, dated 17th October 1905, in the above matter, you have expressed an opinion that the land should be entered against the name (? of the party). However, looking to the papers accompanying (marked) E. that too is not possible, and even if the name be entered, still the building cannot be allowed to stand without fine, etc., being taken.

The plaintiffs appealed unsuccessfully to the Collector against the order. It was confirmed by the Commissioner on the 24th April 1909.

In the meanwhile, on the 28th September 1908, the following notice was served upon the plaintiffs :—

Notice under section 202 of the Land Revenue Code to Gulab Chhitu and Ahmedkhan Mahmedkhan directing to remove huts, heaps of wood, etc., from Survey No. 538 measuring gunthas 32 assessed at Rs. 3-8-0 as the land has been assigned to graveyard and, consequently, they have no right to use it for purposes other than graveyard. If they will make default in carrying out the order within thirty days, actions will be taken under section 202, Land Revenue Code.

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On the 2nd February 1910, the plaintiffs filed the present suits against the Secretary of State for India in Council praying that "they should be declared absolute owners of the land, that the defendant's order should be set aside with an injunction not to disturb them in their rights of ownership."

The defendant contended *inter alia* that the suits were time-barred; that the land was never a building site, but was used as a burial ground managed by plaintiffs' ancestors, and that the orders of the Revenue Officers were quite legal and justified by the provisions of the Land Revenue Code.

The District Judge held that the orders passed by the Revenue Authorities were not illegal; that the plaintiffs were not absolute owners of the land but occupants only, and that the suits were barred under Article 14 of the Limitation Act.

The plaintiffs appealed to the High Court.

G. N. Thakor for the appellants.

S. S. Patkar, Government Pleader, for the respondent.

HEATON, J.:—In this matter the following facts are either admitted or established beyond any real controversy.

There is a certain plot of land which is used, and for many years has been used, as a graveyard, but also for storing wood. On the findings of the first Court which to this extent are not challenged in appeal, the occupants or persons who are in charge of the land whether with reference to its use as a graveyard or as a timber store are the plaintiffs. This occupation had continued for at least fifty years before this suit was brought.

Eventually the Government Officers decided that the plaintiffs should be evicted unless they ceased to use the land for the purpose of a wood store. I am describing the case in general, but I think in sufficiently

accurate, terms. Plaintiffs have brought this suit substantially to protect themselves against the proposed eviction by Government Officers unless they cease to use the land as a wood store. The Acting District Judge who heard this case substantially found the facts as I have described them, but he came to the conclusion that the order of eviction was perfectly legal and justified under the provisions of the Land Revenue Code. It is here at the outset where I differ from the District Judge. To begin with, as a general principle, Government have no power to evict persons in such occupation of land except as provided by the law, and it is not suggested that they have any power to evict these plaintiffs unless that power is to be found in the provisions of the Land Revenue Code. It is not denied that the plaintiffs are lawfully in occupation of this land provided that they put the land to a proper use, that is to say, they are not in occupation as trespassers or persons without any right. It is said, and it may be perfectly true, that they are in occupation as persons entitled to be in charge of the graveyard which exists on the land. But assuming this to be so, and knowing as we do, that they have used the land as a wood store, is there any provision in the Land Revenue Code which entitles the Government Officers to evict them? I can find none. It is not shown in this case that the land has been assigned for the purpose of a graveyard as provided in section 38 of the Land Revenue Code. We know merely that the land is and has been a graveyard for a very great many years. How, under what arrangement, or by whose authority, it came to be a graveyard we do not know, and in our ignorance it would be profitless to conjecture.

Then this land, so far as the evidence shows, has neither been assessed nor held for the purpose of agriculture. True, it was assessed, but so far as I can

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judge on the evidence it was assessed for some purpose not directly connected with agriculture, because when it was assessed, it had been for many years and was still a graveyard. No assessment was ever levied from the occupants and it nowhere appears from the Government records that the land was ever regarded as land to be used for the purpose of agriculture. In fact it never has been used for the purpose of agriculture, so far as the evidence informs us. It is not therefore land to which sections 65 and 66 of the Land Revenue Code apply. I can find no provision which entitles the Government to evict these persons as from their proceedings it seems they propose to do. On the merits, therefore, I feel no doubt whatever that the plaintiffs are entitled to protection against this intended eviction.

The only other points which I need notice are first that we are not in any way in this case concerned with the question as to whether Government have the power or whether they ought to levy any assessment on this land. Secondly, it has been argued that the suit is time-barred. It has been so argued because, it is said, Article 14 of the Schedule to the Limitation Act covers the case. That Article relates to a suit to set aside an act or order of an officer of Government. It is true that the suit is one in terms to set aside the order of an officer of Government but it is a suit to set aside an order which bears a date less than one year from the time when the suit was filed and, therefore, the suit is not on its face time-barred. What really underlies this argument is not a question of limitation so much as a very different question. It is argued that there was an earlier order and that limitation runs from the date of that order. That can only be if the order were one which, if not set aside, would lawfully operate as a bar to the plaintiffs' rights. So far as I can see, none of the

orders in the case operates as a bar to the plaintiffs' rights. Neither the earliest of them, that of the District Deputy Collector, nor the latest, that of the Commissioner. It is true that the orders are adverse to the interests of the plaintiffs and if practically given effect to, would lead to the eviction of the plaintiffs. No doubt these orders give the plaintiffs a right of action because they are at any rate to the extent of a threat, an invasion of their rights, but they are not a tangible invasion. They do not of themselves affect the plaintiffs, it would only be the enforcement of the orders which would do this. Therefore I think there is no bar of limitation in the case.

The order which I would propose is that the decree of the lower Court be set aside, that a declaration be made that the plaintiffs are in lawful occupation of the land in suit and are entitled to remain in such occupation undisturbed and I think the plaintiffs should have their costs in both the Courts.

SHAH, J.:—These appeals arise out of two suits brought by the respective plaintiffs against the Secretary of State for India in Council for a declaration that they were the owners of the property in suit and that they had been in possession and enjoyment adversely to the defendant for over sixty years, for the cancellation of a certain order of the Commissioner, Northern Division, and for a permanent injunction against the defendant to prevent any obstruction being caused to them in the enjoyment of the property. The lower Court dismissed the suits on the ground that the claim was time-barred, though it held that the plaintiffs were the occupants of the land in suit. The plaintiffs have appealed to this Court and have urged two points in support of the appeals, *viz.*, (1) that the evidence establishes the fact that they have been in possession of the property in suit in their own right, and (2) that their claim is not time-barred.

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With reference to the first point a few facts which are beyond dispute may be stated. The plaintiffs have been in possession of the land at least from the year 1860 and have been using the property partly as a graveyard and partly for the purpose of stacking timber. There is nothing to show as to how the plaintiffs obtained this land, nor is there anything to show that the defendant had originally assigned this land to them before the year 1860. In 1871 when a survey settlement was effected, the land was assessed. It is not clear on what footing it was assessed. It was entered in the Revenue register as waste land and the amount of assessment was shown in that register. No assessment was ever demanded from the plaintiffs up to the date of the present litigation. In 1898 there was some correspondence with regard to the land in suit as well as other lands and in the letter of the Collector to the Commissioner, dated the 20th of April 1898, the view which the Revenue Authorities took of their position with reference to this land is stated. It is not suggested, however, that the plaintiffs had anything to do with this correspondence or that any attempt was made to question the propriety of their possession or of the use which they were making of the land. In 1907 the order, which is referred to by the lower Court as the order which the plaintiffs must seek to set aside, was made by the District Deputy Collector. That was, however, only a letter addressed by that officer to the Mámlatdár of Ankleshvar, and there is nothing to show as to when, if at all, it was communicated to the plaintiffs. In that order it was stated as follows :—" If, in this manner, a house be built on the cemetery land, and a wood depôt be opened there or wood be stored there, that cannot be allowed on any account whatever. Therefore you will please cause the building and the wood to be removed forthwith from the said land." An

appeal was preferred against this order to the Collector, who declined to interfere. A further appeal was preferred to the Commissioner who made an order in April 1909 declining to interfere with the order of eviction. The notice which was actually served on the plaintiffs has been put in on behalf of the respondent now in this appeal. That notice orders the plaintiffs to remove the wood and clear the ground, directs them to use the land only for the purposes of a Kabarsthan, and states that on failure of their doing so, steps would be taken against them under section 202 of the Land Revenue Code.

The present suits have been brought on the 2nd of February 1910, *i. e.*, within a year from the Commissioner's order, but more than a year after the order of 1907, Exhibit 49, or the notice of September 1908.

The plaintiffs have adduced evidence to show that at least since the year 1860 they have been using the land in suit in their own right and dealing with it as their own property. They have mortgaged and leased the property from time to time. There are superstructures over the land and it has been used as a timber shop. The evidence also shows that a part of the land is used as a private Kabarasthan by the plaintiffs. It is not necessary to discuss the oral evidence which establishes these facts. The evidence as to the possession and the use of the property is clear and practically unchallenged. The lower Court also has substantially accepted that evidence as proving these facts. It is clear, therefore, that the plaintiffs have been in possession of this land for over fifty years. There is nothing to show that the defendant had assigned this land to them before that time. Under these circumstances it seems to me that though there is no direct evidence that the plaintiffs are the owners of the land, under section 110 of the Indian Evidence Act the burden

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of proving that they are not the owners would be on the defendant who affirms that they are not the owners.

Coming now to the defendant's evidence it seems to me that beyond the entries in the Revenue registers, there is nothing to show that the Government assigned this land to the plaintiffs. It is not shown under what circumstances this land came to be assessed in 1877, but it is significant that in spite of the plaintiffs using the land as their own, no attempt was made even after 1877 up to the year 1907 either to prevent them from using the land otherwise than as a Kabarasthan, and they were never asked to pay any assessment. I am unable to infer from these revenue records that this land was assigned to the plaintiffs by the defendant. There is only one other piece of evidence upon which the learned Government Pleader has relied for the purpose of showing that the plaintiffs are not the owners. That is the statement which was made by one of the plaintiffs on the 18th of September 1903 before the Talâti of Ankleshvar. There is no doubt that in this statement the deponent expresses his readiness to pull down the Kacha hut built on the land if Government have any objection to it. It seems to me, however, that no steps were taken after this statement, as I have already stated, up to the year 1907, and when steps were taken in 1907 or in 1908, the plaintiffs asserted their present claim. It does not appear clearly how the statement came to be made before the Talâti, but apparently it was in connection with some Revenue enquiry which ultimately resulted in the order of 1907. The plaintiff who has made this statement says that he made it in ignorance of law. On giving the best consideration to the statement it seems to me that it would not be right to treat this as an admission of the defendant's right by the plaintiffs. As soon as a definite

order was made in 1907 that the plaintiffs should remove the huts, which they had built on the land, they asserted their right as owners of the land. Under these circumstances I am unable to treat this statement as in any way advancing the defendant's case. In my opinion, therefore, the result of the evidence is that the plaintiffs' possession for over fifty years is established and that the defendant has failed to show that the plaintiffs are not the owners.

It is necessary to mention here that the Government have never attempted to levy the assessment from the plaintiffs. So far as the present dispute is concerned, it has arisen in consequence of the Revenue Authorities having asserted their right to evict the plaintiffs if they did not remove the huts and if they failed to confine the use of the land to the purposes of a Kabarasthan. It is not, therefore, necessary to consider whether even if the plaintiffs be the owners of this land the Government have the right to levy any assessment from them in respect of the land. In fact there are no materials in the case upon which this point could be decided, and it is clear that the Government have not so far called upon the plaintiffs to pay the assessment. In coming to the conclusion, therefore, that in virtue of the plaintiffs having proved their possession of the land in their own right and the defendant having failed to show that they are not the owners, we say nothing as to the right of the Government to assess this land and to levy the assessment from the plaintiffs. The lower Court has dealt with the question of assessment, but it does not seem to me to be either proper or necessary to decide that question in this case. I desire to make it clear that the declaration which may be made in favour of the plaintiffs in this litigation will be without prejudice to the right of the defendant, if any, to levy assessment in respect of this land.

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I now come to the question of limitation. The lower Court has held that under Article 14 of the Indian Limitation Act the suits are time-barred because they are brought more than a year after the order (Exhibit 49). It seems to me that the view taken by the lower Court on this point is wrong. In the first place in these suits it does not appear to me to be at all necessary for the plaintiffs to have any order set aside. Their claim is substantially one for confirmation of their possession and for an injunction restraining the defendant from evicting them. The order in question is not of such a character as would by itself have any effect if neither party took any action on it. Besides strictly speaking it is merely a communication by the District Deputy Collector to the Mamlatdar. In pursuance of this order no doubt subsequently a notice was issued, and it was urged, on behalf of the respondent, that at least from the date of that notice the suits ought to have been brought within a year. I do not think that that notice is any more an order within the meaning of Article 14 than the order which is supposed to have been contained in Exhibit 49. Further, on the merits, having regard to the view which I take of the plaintiffs' possession and of their right to this property, it is clear that the order in question is outside the powers of the Revenue Authorities. It was urged by the learned Government Pleader on behalf of the respondent that the order in question was justified by the provisions of sections 65 and 66 of the Land Revenue Code. It was contended that the plaintiffs having used the land for non-agricultural purposes, the Revenue Authorities had the power to evict the plaintiffs under section 66 of the Act: but in my opinion these provisions of the Land Revenue Code have no application to the present case as the plaintiffs are not occupants of the land within the meaning of the Code,

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and their rights are not proved to be limited to the agricultural use of the land. It is not possible, therefore, to attribute the order or the notice to any section of the Land Revenue Code under which the Revenue Authorities can be said to have the power to evict the present plaintiffs from the land in dispute. It follows, therefore, that the order and the notice are *ultra vires* of the Revenue Authorities. On these grounds it seems to me that it is not incumbent on the plaintiffs to have any order passed by the District Deputy Collector or the Collector or the Revenue Commissioner set aside.

I do not think that any injunction is necessary under the circumstances. It will be sufficient to declare that the plaintiffs are entitled to be confirmed in their possession of the land. I, therefore, concur in the order proposed by my learned colleague.

Decree set aside.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

VASUDEO RAGHUNATH OKA (ORIGINAL PLAINTIFF), APPELLANT, v. JANARDHAN SADASHIV APTE (ORIGINAL DEFENDANT), RESPONDENT.*

1915. *March* 22.

Transfer of Property Act (IV of 1882), section 53—Fraudulent transfer—Transfer voidable at the option of the person defrauded—Purchaser at Court sale not a subsequent transferee—Person having interest in the property means person having interest at the date of the transfer.

The plaintiff purchased certain lands in 1906. In execution of a money-decree against the vendor, the lands were sold at a Court auction and purchased by the defendant in 1909, with full notice of the sale of 1906. The defendant having been put into possession of the lands, the plaintiff sued to recover possession relying on the sale of 1906. The defendant contended that the sale

* Second Appeal No. 683 of 1913.