ALLAHABAD HIGH COURT

Bindhyachal Chand

Vs.

Ram Gharib Chand

(Sulaiman CJ, Mukerji and King JJ.)

03.05.1934

ORDER

Sulaiman CJ,

1. This Letters Patent appeal raises a question of limitation.

2. The plaintiff belongs to the same family as the defendants other than defendants 1 to 3. The plaintiff claimed possession over certain sir lands on the allegation that ha was A Co-sharer of these lands with the defendants other than defendants 1 to 3, but in defiance of his rights the defendant, Paras Ram, executed a deed of gift in favor of defendants 1 to 3 on 5th May 1919. The plaintiff alleged that the deed of gift was contested in the Revenue Court and also in the civil Court and thereafter on the plaintiff's failure, defendants 1 to 3 dispossessed the plaintiff of the lands in 1922. The plaintiff claimed joint possession over a half share in the lands in suit.

3. The suit was dismissed by the Court of first instance on the finding that the plaintiff had failed to establish his title. The bore was an appeal and the lower appellate COM!; found at one time that the plaintiff and the defendants other than defendants 1 to 3 were co-sharers and it remanded the suit for a finding as to whether the plaintiff had been in possession of the property in suit within 12 years of it. There was an appeal against the order of remand to this Court and the appeal was dismissed. On remand the learned Additional Munsif who heard the suit again decreed the suit for joint possession and decreed. a Certain amount of money as damages. There was again an appeal to the District Judge and the learned additional Subordinate Judge who heard the append dismissed the suit, being of opinion that the plaintiff had failed to prove his possession within 12 years of the suit.

4. On second appeal a learned Single Judge of this Court held that Article 144, Limitation Act, applied, that it having been found that the plaintiff and the defendants other than the done es were co sharors it was for the defendants to prove that they had been in adverse possession for more than 12 years. The learned Judge relied on certain recent decisions of this Court and principally on the case of *Kanhaiya Lal v. Girwar*[1] In this Letters Patent appeal it is contended by the defendants that, the article which was properly applicable was Article 142, Limitation Act, inasmuch as the plaintiff expressly pleaded in para. 5 of the plaint that he had been dispossessed prior to the suit. It appears to us that the lower

appellate Court applied Article J 42, Limitation Act, and thereupon proceeded to find whether the plaintiff had proved his possession within 12 years of the suit. If Art, 144 be held applicable, an issue would have to be remitted in order to find whether the defendants had been in adverse possession of the lands in wait for more than 12 years. Therefore even if Article 144 applied the appeal cannot be properly disposed of without a Clear finding on the issue or mentioned. The main question however is whether Article 144, Limitation Act, or Article 142 of the same Act, Schedule 1, applies. On this point there seems to be some difference of opinion. In two cases it has been definitely held that where parties were once Co-sharers Article 142 could never apply and that Article 144 would be always applicable. The opinion was further expressed that Article 142 applied only to what are known, as possessory suits, that is to say, suits based on possessory title. We have some difficulty in accepting the correctness of this decision and we therefore think that the case should go before a larger Bench for finally deciding the point so far as this Court is concerned. We accordingly direct that the case be laid before the learned Chief Justice for forming a Full Bench to decide the following question namely:

> Where a plaintiff who was A Co sharer with some of the defendants who transferred a part of the property to third parties, admits in the plaint that he was dispossessed by the transferees some time prior to the institution of the suit, whether Article 142, Lim. Act, applies or Article 144?

5. If the Full Bench decides that Article 144 applies we shall have to remit an issue of fact as already indicated above.

Order

Sulaiman, C.J.

6. The question referred to the Full Bench in this case is:

> Where a plaintiff who was A Co sharer with, some of the defendants who transferred a part; of the property to third parties, admits in the plaint that he was dispossessed by the transferees some time prior to the institution of the suit, whether Article 142, Lim. Act, or Article 144 applies?

7. The facts as stated by the Bench which has referred this case to us are that the plaintiff belongs to the same family as the defendants other than defendants 1 to 3. The plaintiff' claimed possession over certain sir plots on the allegation that he was a Co sharer of these lands with the other defendants, but that they had wrongfully gifted the plots including the plaintiff's share to defendants 1 to 3 in 1919, and on the strength of the deed of gift defendants 1 to 3 had dispossessed the plaintiff from the lands in 1922. the plaintiff claimed joint possession over half share in these plots. The defendants denied that the plaintiff had ever been in possession of these plots and set up their own exclusive title. The first Court held that the plaintiff had failed to establish his title and dismissed the suit on that ground only. On appeal the lower appellate Court came to the conclusion that the plaintiff had legal title and remanded the case for the determination of the question whether the plaintiff had been in possession of the property in suit within twelve years. The Munsif found in favor of the plaintiff and decreed the claim. The lower

appellate Court after the remand ultimately held that the plaintiff had failed to prove his possession within 12 years of the suit and accordingly dismissed the suit. On appeal to the High Court, a learned Judge of this Court came to the conclusion that in view of the decision in certain cases, the plaintiff's suit could not be dismissed unless the defendants succeeded in establishing their adverse possession for over 12 years. When the matter came up in appeal before the Letters Patent Bench, the Bench felt disinclined to accept the observations made in some cases and referred the question for answer to the Full Bench. For the purpose of this reference it must be assumed that the plaintiff in his plaint admitted that he was dispossessed by defendants 1 to 3 in 1922, but that the plaintiff and the donors originally were Co-sharers in these sir plots.

8. The main question is, whether it is Article 142 or Article 144 which would apply to such a Case. Now Article 144 is a residuary article applicable to suits for possession of immovable property not otherwise especially provided for in the Act. Where there is no other special article applicable, the omnibus Article 144 would apply, and then the twelve years would begin to run from the date when the possession of the defendants became adverse to the plaintiff. If however there is a special article which applies, Article 144 would be completely excluded and would not be applicable. Article 142 is an article applicable to suits for possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued his possession. Such a suit must be brought within 12 years of the date of the dispossession or discontinuance. The article is very general in its scope, and the only conditions necessary are that the suit should be for possession of immovable property and that the plaintiff, while in possession of the property must have been dispossessed or must have discontinued his possession. Obviously the word "plaintiff" in this article includes his predecessor-in-title as well. There are no words in this article which would confine its applicability (;o suits based on possessory title only, or confine it to plaintiffs who claim the property wholly and are not Co sharers or Co owners with the defendants. Beading Articles 142 and 144 it would appear that the legislature has drawn a distinction between a mere dispossession or discontinuance of possession of the plaintiff and the defendant's adverse possession ; otherwise there would be no occasion for having two separate articles. The burden of proving the date of the dispossession or discontinuance of possession under Article 142 must be on the plaintiff, who, in order to succeed, must show that the dispossession or discontinuance of possession was not prior to twelve years before the suit was filed.

9. With the exception of the case of *Kanhaiya Lal v. Girwar*[2] there appears to be no other authority for the view that Article 142 is inapplicable to a suit brought on the basis of title. In that case no doubt the learned Judges expressed the opinion that this article is restricted to suits in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title. In my opinion there is no justification for limiting the scope of this article a such suits only. As a matter of fact, in several cases which went up to their Lordships of the Privy Council, and in which Article 142 was applied, the suits were actually for possession on the basis of title and not on possessory title. In this connection I may mention the cases of *Mohima Chundur v. Mohesh Chunder*[3] and *Muhammad Amanulla Khan v. Badan Singh*[4] in both of which cases the suits were brought on the basis of title by plaintiffs who were not in possession, and their Lordships

[2]1929 All. 753 [4](1890) 17 Cal. 137
[3](1889) 16 Cal. 473

applied Article 142 and dismissed the claim on the
ground that the plaintiffs had failed to establish their possession within twelve years, i.e., that they had been dispossessed within8 12 years. These cases were not brought to the notice of the Bench which decided *Kanhaiya Lal v. Girwar*[5] We have examined the paper book in that case, and it appears that the plaintiff's had not clearly admitted his dispossession by the defendant; rather he had asserted that he was still in possession. The lower appellate Court had merely found that the evidence as regards possession produced by both parties was worthless. The view expressed in *Kanhaiya Lal v. Girwar*[6] was in one sense followed by another Bench in *Kallan v. Mohammad Nabi Khan*[7] The learned Judges reinforced the view by relying on certain observations made in several cases quoted in the judgment. It may however be pointed out that the learned Judges themselves emphasized the fact on p. 109 (of 1933 A. L. J.) that in the plaint the plaintiff did not allege that the plaintiff while in possession was dispossessed. It was a suit brought by a person claiming to be the owner of a house against the defendant along him to be his tenant. There was no allocation that the defendant had at any time dispossessed the plaintiff. On the fluids as alleged in the plaint Article 142 would, not have been applicable.

10. Many of the cases referred to in that judgment as well as a few other cases were reviewed by my learned brother King, J., in *Kunji v. Niyaz Husain*[8] in whose judgment I concurred, though I dictated a short separate order. It is therefore not necessary to refer to all those cases over again. But I should like to discuss briefly the sense especially relied upon in Kalian's case because in nay opinion those cases are no authority for the proposition that whore the plaintiff admits dispossession and brings a suit for possession of immovable property, Article 142 is not applicable and the burden lies on the defendant to establish his adverse possession. In *Sec. of State v. Chellikani Rama Rao*[9]the question of limitation arose in connection with the claim of the objectors who claimed title under the Madras Forest Act. They were admitted in possession at the time, and their claim could not be regarded as one brought by persons for recovery of possession on the ground of dispossession. Their 'Lordships of the Privy Council accordingly held that the only question bother they had established their case n!" acquisition of title by adverse posacimion for over twelve years within the moaning of Article, 144. That case obviously is no authority for the proposition suit where the suit is for possession on the ground of dispossession Article 144 nevertheless applies.

11. In *Kamakhya Narayan Singh v. Ram Raksha Singh*[10] certain villages
had been leased by the plaintiff's predecessor to the defendants' predecessors in mukarrari istemrari; after the death of the original lessee his assignees remained in possession and ceased to pay rent to the original lessor or his successors in spite of notices served on them. The suit was accordingly brought for ejectment by the representatives of the original lessor. The High Court came to the conclusion that the defendants had made a definite assertion of adverse right more than twelve years prior to the suit and that they claimed to hold as permanent mukarraridars, and the suit was therefore barred by Article 144, Limitation Act. Their Lordships of the Privy Council held that the plaintiff failed to

[5]1929 All. 753 [7]1933 All.775 [9]1916 P.C. 21
[6]1929 All.753 [8]1934 All.362 [10]1928 P.C. 146

prove that the relationship of landlord and tenant, on which he relied, was in existence within twelve years prior to the institution of his suit, and that therefore the plaintiff's suit for possession

was barred by the Limitation Act, and this appeal should be dismissed.

12. Their Lordships did not say that they applied Article 144 to the case. The case was apparently governed by Article 139, Limitation Act, and that article was perhaps so applied. In any case, there is justification for holding that their[11] the plaintiff had sued to establish his title to certain lands containing numerous hills. Mr. De Gruyther, the learned Counsel for the plaintiff, had pointed out in his argument that the plaintiff-appellant did not admit that he was out of possession. The case was disposed of on the basis whether the title was with the plaintiff or with the defendant. It was not a Case where the plaintiff had brought a suit on the ground of dispossession. Their Lordships came to the conclusion that the case was not one of doubtful title but of clear title, and the title being with the plaintiff, it could not be destroyed unless the defendants established adverse possession with all the qualities of adequacy, continuity and exclusiveness. In that casa it was found as a fact that the plaintiff had been "exercising during the currency of his title various acts of possession," which wore abundantly sufficient to destroy that adequacy and interrupt that exclusive-ness and continuity which would be demanded of any person challenging by possession the title which the plaintiff holds. The two reported cases of this Court, which also were relied upon, are those of *Mohammad Ishaq v. Zindi Begam*[12] and *Jai Chand Bahadur v. Girwar Singh*[13] In neither of these cases the plaintiff was suing for possession on the ground that he had been dispossessed. In the former case the plaintiff had alleged that the premises had been let out to the defendant on rent; in the latter case the plaintiff was a zamindar who was seeking to eject the defendant treating him as a mere licensee who had set up adverse possession against the zamindar. The plaintiff being the zamindar of an agricultural village, the presumption of title as well as of possession was in his favour. It is therefore quite clear that none of these cases furnish any authority for the proposition either that Article 142 cannot apply to a suit based alone on title (which proposition is contrary to that laid down by their Lordships of the Privy Council in the two oases mentioned earlier) or for the proposition that in all suits or possession of property as soon KM title is either admitted or proved, the burden of proving adverse possession either lies on or shifts to the defendants.

13. It seems to me that the essential difference between 'Art. 142 and Article 144 is that when a 'plaintiff is suing for possession on the basis of dispossession, the burden lies on him to show that the date of his dispossession or discontinuance of possession, which gave him the cause of action for the suit, was within twelve years of the suit; while if the suit is not for possession based on the ground of dispossession, both is a suit for possession of immovable property not especially provided for in any other article of the Act, then on proof of title the plaintiff's suit cannot be dismissed until the defendant further establishes his adverse possession for more than twelve years. There is obviously some distinction between the mere dispossession or discontinuance of possession of the plaintiff and the adverse possession of the defendant. Ordinarily an owner of property is presumed to be in possession of it, and such presumption is in his favor where there is Lordships applied Article 144 to that case. In *Kuthali Moothawar v. Kunhaarankutty* [11]1922 P.C.181 [13]1919 All.403
[12](1931) 134 I.C. 461

nothing to the contrary. It would therefore follow that an owner of property starts with the presumption in his favor that he is in possession of his property. But where the plaintiff admits that he has been dispossessed by the defendant or, at any rate, it is found in the ease that he has been dispossessed and is not in possession at the time when he brings the suit, then he cannot

start with the presumption in his favor that the possession of the property was with him. He would have no right of action unless he claims within the period of limitation prescribed therefore. He has to bring his suit within twelve years of the date on which he was dispossessed or when he discontinued his possession. the burden of showing that this date was within twelve years of the suit is on the plaintiff', and he cannot claim to have discharged it within any proof and evidence merely on the ground of any presumption arising from the fact of his ownership.

14. But although the burden of proving dispossession or discontinuance of possession within twelve years lies on the plaintiff, he may discharge his burden by leading direct or circumstantial evidence to show that he was either in actual or in constructive possession sometime before the period during which he was admittedly out of possession and within twelve years of the suit. Ho may either show that the possession of the defendant was permissive as that, of a licensee, lessee, or at any rate, even that of a Co owner, or he may show that he was actually in the enjoyment of the property and exercising other acts of ownership. It would in every case be a question of fact whether the plaintiff had proved his possession, actual or constructive, within the period of twelve years. If the Court after considering all the evidence and circumstances were to record a finding that the plaintiff had failed to prove his possession, constructive or actual, within twelve years, then the suit must fail, even though the Court does not record a definite finding that the defendant bad established his adverse possession for more than twelve years. No doubt in many cases the distinction is very fine, and the line of demarcation between dispossession and adverse possession is thin. But the question in each case is one of burden of proof, and it is incumbent on the plaintiff, when he admit his dispossession, to establish his possession within twelve years.

15. Where the parties are strangers and they claim title to the whole property in dispute, no difficulty ordinarily arises. The failed that the plaintiff has been dispossossnd by the defendant would show that echo defendant was exercising adverse possession as against the plaintiff during the period of his dispossession. The position becomes difficult when the parties are Co-owners, Ordinarily the possession o one co-owner, who is entitled to joint possession of the whole property, is referable to his title, and he cannot ask the Court to presume that his possession was illegal or adverse to the other co-owner. It follows that if one Co-owner is in actual possession of the joint property, and the other co-owner is either absent or is not in actual possession, the latter would still be in constructive possession of his property through his Co-owner. There would be prim a face no case, where the possession of one Co-owner was illegal and was necessarily adverse to that of the other Co-ownor. The presumption would be that they are both in joint possession. But it cannot be denied that one Co-owner can dispossess another Co-owner and can exercise adverse possession over a joint property. If, therefore the plaintiff, Co-owner admits that he has been dispossessed and that, at any rate, for a short period prior to the suit, the possession of his Co-ownor was adverse to him, then he cannot fall back on a mere presumption of joint possession in his favor and succeed without showing any other circumstances whatsoever. But if the Co-owner, who has been dispossessed were to satisfy the Court that he was actually dispossessed on some ditto within twelve years he discharges his burden ; or even if he proves that prior to that period the parties were on good terms with each other without any denial of title and without any quarrel, the Court may record a finding that the possaion of the plaintiff prior to the period of actual possession was constructive. In such an event the finding would be that the plaintiff has succeeded in establishing that he was in constructive possession of the property within 12 years of the suit.

16. Personally speaking, I do not think that the plaintiff can by cleverly drafting his plaint evade the burden of proof which Article 142 casts upon one who is suing for possession on the ground of dispossession.

17. When a plaintiff falsely alleges that he is in possession and wants a relief, to which the owner in possession is entitled, e. g., for partition, injunction, joint possession, etc., and it is found that he was in fact not in possession but had been dispossessed, technically speaking, the suit would fall under Section 42, Specific Belief Act and would be dismissed on the ground that he had omitted to ask for a Consequential relief and had failed to prove his case. But a Court may allow him to change his ground and give him a decree for possession, treating his claim as one for recovery of possession on the basis of dispossession, provided he succeeds in showing that his dispossession took place within 12 years.

18. In such a Case the claim would still be regarded as a Claim either on the basis of dispossession or discontinuance of possession and the same principles would govern such a suit.

19. A number of cases have been cited before us by the learned Counsel for the respondent, which lay down that as between Co owners there cannot be adverse possession, until the Co-owner in possession establishes that he had been openly and notoriously in exclusive possession of the property by denying the title of the other Co-owner so as to amount to an ouster. It is not actually necessary that the denial of title should be brought to the knowledge 6f the other Co-owner specifically. But such a knowledge may be inferred from circumstances showing that the adverse possession was exercised openly and notoriously. Those cases are not in point, because they were not cases where the plaintiff had admitted his dispossession but were cases in which the only question was whether adverse possession had been completed. Their Lordships of the Privy Council and the learned Judges in India merely laid down what constituted adverse possession and what qualities were necessary in order to complete it. In none of these cases Article 142 could be considered. I should however like to refer to the Pull Bench case of *Rustam Khan v. Janki*[14] In that case the suit was brought by the plaintiff for recovery of his share in the estate left by the common ancestor of the plaintiff and the defendant who had died in 1908 leaving a number of legal heirs. In February 1921, one of the heirs who was in possession of the property, executed a deed of gift in favor of her daughter and daughter's son. The suit was brought well within 12 years of this date, but more than 12 years after 1908. The Courts below held that the suit was within time and the defendant's adverse (possession under Article 144 had not been established. A learned

[14]1928 All. 467

Judge of this Court came to the conclusion that the claim being for recovery of a share in the assets of a deceased ancestor it was governed by Art 123, Lim. Act, and time began to run from the date of the death of the deceased. The Letters Patent appeal was referred to a Full Bench and the only point which was for the consideration of the Pull Bench was whether Article 123, Lim. Act, applied to the case or not, for if id did the claim was barred by time and, if it did not, the claim was not barred by time, or whether Article 144, as applied by the Courts below, or Article 142 was applicable. There was no discussion of Article 142 in the judgment of any of the learned Judges constituting the Bench for the obvious reason that the main question was whether Article 123 did or did not apply. There the plaintiff had not been in actual possession of his share, and in one sense he had not been actually dispossessed by his Co heirs. His title had been denied by the execution of a deed of gift a few years before the suit. Bearing these facts in mind, all the learned

Judges came to the unanimous opinion that Article 123 was not applicable. In the course of my judgment I certainly said:

> That such a suit is not covered by Article 123 at all and must fall under the general Article 144, Lim, Act, from the date when the defendant's possession became adverse.

20. But it must be borne in mind that in the plaint in that case the plaintiff had not definitely admitted that he had been dispossessed, and the fact that the gift had been made was tantamount to the setting up of adverse possession by his coheir. The language used by me was obviously used with reference to the facts of that case, and when the plaintiff had not been in possession and could therefore not have been dispossessed, nor admitted that he had been dispossessed, it was considered that no other article but Article 144 would be applicable. In any ease, the point that we have to consider in the present case did not at all arise then for consideration, as the sole suggestion was whether Article 123 could be applied. The case was really one of denial of title and adverse possession set up by the defendant rather than dispossession as admitted by the plaintiff. In cases falling strictly under Article 142, in "which the only question is one of discontinuance of possession of the plaintiff and not of adverse possession of the defendant, the question of limitation in one sense becomes the question of title, because by virtue of Section 28, Lim, Act, if the claim is barred by time, the title must be deemed to be extinguished.

21. In the present case I should like to point out that the dispute relates exclusively to the sir rights in the plots in suit which means the plaintiff's claim to recover possession of such sir rights. If the village is joint and the parties are Co-sharers in the village, the dismissal of the plaintiff's claim for the sir rights, so long as the general partition of the village does not take place, would not affect any rights which he may have to get credit for these lands when such partition is effected. I would accordingly answer the question referred to the Full Bench by saying that where a plaintiff, who was Eco sharer with soave of the defendants who transferred a part of the property to third parties, admits in the plaint that he was dispossessed by the transferees some time prior to the institution of the suit, Article 142, Lim. Act, and not Article 144 applies.

Mukerji, J.

22. The question before this Full Bench is:

> Where a plaintiff who was a Co-sharer with some of the defendants who transferred a part of the property to third parties, admits in the plaint that he was dispossessed by the transferees some time prior to the institution of the suit, whether Article 142, Lim. Act, applies or Article 144?

23. The two articles, 142 and 144, Schedule 1, Lim. Act, have been responsible for various conflicting decisions in India. So far as I have been able to find, there is no case decided by their Lordships of the Privy Council in which the two articles have been discussed with a view to laying down, in what cases Article 142 would apply and in what cases Article 144? I propose to take the articles as they stand in the Act and to examine their use on general principles. The authorities on the subject are various and many important cases have been reviewed by the learned Chief Justice and it will serve no useful purpose to go over those grounds again.

24. The scheme of the Limitation Act is to provide for a special rule of limitation in as many cases as possible and then to provide) a role for case a which are not governed by the specially provided for rules. In the case of suits for possession, the provisions start with Article 124 and with come exceptions go up to Article 143, providing special rules. They are followed by the general rule, viz., Article 144. It would follow naturally that if there be an article especially applicable to a suit, then the residuary Article 144 cannot apply. Column 1, Schedule I, Lim. Act, is headed as description of suit, the second column provisos for the period of limitation and the third column provides the date from which the limitation is to be counted. The description of suit would naturally moan the allegations on which the plaintiff ha" brought his suit and on which he seeks relief. Primarily therefore the Ari Clo to be applicable is to be chosen with regard to the facts stated in the plaint. There may be cases in which the plaintiff's suit would be quite within time if the Megatons nada in the plaint were correct, hat on n trial it may be found that Uin allegations are not correct. In the circumstances, the Court, after finding the facts, will have to find what Article of Schedule 1, Lim. Act, would apply to those facts, and having got the right Article to find out whether the suit is within time or not. Just to illustrate what mean, I will give a simple example ;

25. A plaintiff states in the plaint that he is the owner of the property and he was dispossessed by the defendant two years prior to the suit. The defendant pleads that the plaintiff is not the owner of the property and the defendant has been in adverse possession for more than 30 years. The Court finds that the plaintiff was not dispossessed two years prior to the suit but 1 years prior to it. The Court further finds that the plaintiff is the owner of the property. On these findings, the Court will apply Article 142, although the plaintiff's allegation that he was dispossessed two years prior to the suit is found to be untrue. In the plaint filed in the suit out of which this reference has arisen, the plaintiff stated that he and one Paras Earn won the owners in equal shares of certain sir lands and that defendants 1 to 3, who were donee's of Paras Earn, dispossessed him in 1932. On the face of these allegations the suit is abundantly within time, because the suit is "for possession of immovable property when the plaintiff while in possession of the property has' been dispossessed." On a trial of the suit, it was found by the Court below that the-plaintiff was never in possession of the property within 12 years of the institution of the suit. In view of this finding the only possible course open to the Court would be to bold that the suit was barred by time.

26. The argument however raised before the Courts was that the learned Subordinate Judge (Mr. Junaid) found that the parties were owners of the lands inasmuch as they were Co-sharers in the patti in which the lands are situated and therefore the possession of Paras Earn was possession of the plaintiff and therefore the title of the plaintiff having been proved, Article 144, Lim. Act, should apply and the suit should be treated as being within time. This is the view which has been accepted by the learned Single Judge of this Court against whose judgment the Letters Patent appeal was filed out of which (Letters Patent appeal) this reference has arisen. I have already stated that in the general scheme of the Limitation Act, Article 144 will have to be applied as the last report, that is to say, when any other Article to be found in Schedule 1 is found., to be inapplicable. If on the allegations made in the plaint the suit falls within Article 142, I see no justification for taking it out of that Article and for applying Article 144 on grounds which are not to be found mentioned in Article 142 itself. The statement of law that Article 142 can apply only where the basis of the suit is a possessory title and where a regular title is established, that

Article has no application, is, in my opinion, not supported by the language of Article 142. It goes without saying that a person can get only ' what belongs to him. In other words, in order to succeed in a Court of Justice, he must prove his title to the property claimed. There are no doubt some exceptions to this general rule. For example; an exception will be found in Section 9, Specific Belief Act, where a person is entitled to recover possession on the mere strength of his previous possession provided his dispossession took place within two months prior to the institution of the suit. A special rule of limitation has provided for such a suit. See Article 3. Again, as another exception, it has been laid down that where a defendant who has no title in himself dispossesses a man in possession who also has no title to it but is in peaceful possession, the person in peaceful possession is entitled to succeed on his "possessory title," as it is called, although the dispossession may have taken place more than two months prior to the institution of the suit. But in this case the fact that the plaintiff was in possession has been regarded as being his "title" which would enable him to succeed. The general rule therefore is that a person must prove, in a Court of Justice in which he seeks relief, that he is entitled to relief by way of possession on the basis of title to the property. Therefore as Article 142 does not specifically refer to what has been described as a suit on possessory title, it must be applied in every case where the plaintiff alleges his own dispossession by the defendant prior to the suit as also where he does not make any such allegation, but it is found, as a fact, that he was dispossessed by the defendant prior to the institution of the suit.

27. Now let us examine whether the mere fact that the plaintiff has a share in the property in suit, the plaintiff being a Co-sharer in the joint patti, will make any difference in the application of Article 142. In the present suit, all that the plaintiff claims is that he has a title to hold the lands as his sir. On the finding of fact arrived at by Mr. Junaid, plaintiffs title as a Co-sharer of the patti has been established. In this view, I can describe the plaintiff's claim as a Claim for something which is less than a pure proprietary interest. In other words, the property claimed is less than the full proprietary interest in the lands in suit. If however Article 142 be applicable where full proprietary interest is claimed, I do not see why it should not be applicable where anything less than full proprietary interest is claimed. It is open to a Co-owner to oust another Co-owner, subject to the latter seeking relief in a Court of justice. But if the ousted Co-owner does not seek relief within the period laid down by the law, he must lose his property. The mere fact therefore that the parties to a suit for possession are Co-owners will be no justification for not applying Article 142 to the case. As regards the statement of law that ordinarily the possession of one of several Co owners is possession on behalf of all the Co-owners cannot be denied. In a Case where a plaintiff was in possession of joint property by reason of the fact that it was in physical possession of one of several Co-sharers of his, as a matter of peaceful and adequate enjoyment of property, the date from which the Co-owner has been in possession will not determine the date when the "dispossession" of the other Co sharers began. For there is no dispossession at all. In such a Case, if by any subsequent event, any Co-owner, who was not in physical possession is dispossessed, the date of the actual dispossession would be the date from which limitation would begin to run. By way of illustration, let us take this case: Two brothers A and B inherited their father's property in equal shares. The younger brother A. is loft at home and the elder brother B goes out to make a living. to a distant place. B returns after 14 years and wants to live in the paternal house with his younger brother A. If he is allowed to live for a month and is then turned out by A, B may bring a. suit for recovery of possession. On the facts stated, I would hold that B's dispossession took place when he was actually turned out of the house and not when he went away to a distant place to earn his living. I need hardly point oat that it is always a question of

fact and not of law whether in particular circumstances it is open to a Court to find the possession of one party as the possession not only of himself but also of another party. The law can be applied only where the facts have been ascertained definitely and the Court has come to a particular conclusion.

28. From what I have said above, it will be clear that I am definitely of opinion that in a Case like the one we have to consider Article 142 only should be applicable. Let us now proceed to consider Article 144. As I have said, it is the residuary Article and is applicable only when a suit does-not fall within any of the numerous Articles. Where a plaintiff was never in possession but has acquired a title which entitles him to possession and he brings his suit, no article coming prior to Article 144 will be found applicable to his suit. As an example we may take the case in *Rustam Khan v. Janki*[15] In this a Mohammedan possessed of property died in 1908. There were several legal heirs and the plaintiff in the suit was found not to have been in physical possession of any of the properties. It was also found that his title as s Co-owner had never been denied, but one of the heirs executed a deed of transfer and thereupon the plaintiff claimed his share in the property. It was held that Article 144, Limitation Act, applied and the suit was within time. In the judgments that were delivered in the case, there was no occasion to discuss the question whether Article 142 applied or Article 141. The Full Bench was constituted for an entirely different purpose. I will taken the case only by way of an illustration. In the illustration furnished by Bustiim Khan's case there was no previous possession of the plaintiff and therefore there was no dispossession whatsoever, and Article 142 could not apply. There was no other suitable article applicable and therefore the residuary article had to be applied.

29. Article 142 refers to dispossession or discontinuation of possession. This must moan that there was a previous possession on the part of the plaintiff. A mere denial of title of the plaintiff on the part of a defendant who is a Co-sharer of the plaintiff, and whose possession may be regarded as plaintiff's possession will not amount to plaintiff's

[15] 1928 All. 467

dispossession and the plaintiffs proper remedy will be by a suit for a declaration of title. Where the defendant's possession could be treated in law as plaintiff's possession, but the defendant subsequently transfers possession to a party whose possession cannot be any longer treated in law as the possession of the plaintiff, the plaintiff will have to regard himself as dispossessed and will have to bring his suit within twelve years of the transfer. What I have said presupposes that the transfer is brought to the notice of the plaintiff and that the transfer is under circumstances which does not imply in law a Continuance of the possession of the plaintiff. In two cases in this Court the broad statement of law has been laid down that Article 144 applies to all suits for possession based on title. As a matter of fact, if we read the other articles, which relate to suits for possession, we cannot say in the case of any one of them, they contemplate suits not based on title. For example, let us take Article 124 which relates to a suit for possession of a hereditary office. The plaintiff must be entitled to the office before he can sue. Then let us take Article 134 which relates to a suit to recover possession of immovable property conveyed or bequeathed in trust. Now, it cannot be said that the plaintiff can succeed without proving his right to recover the property. The proposition then that Article 144 applies to all eases where the plaintiff has proved his title is in my opinion too wide.

30. In view of the fact that the rulings on which reliance has been placed in the two cases of this Court, where this view has been specifically laid down, have been reviewed by the learned Chief

Justice, I do not propose to examine for myself those cases. I will however make some remarks on the case in *Kallan v. Mohammad Nabi Khan*[16] This was a suit brought by the plaintiff on the allegation that he was the owner, by purchase, of a Certain house ; that his vendor had let it out to the defendant, and that the plaintiff had issued a notice terminating the lease, but the defendant refused to vacate the house. It was found that the allegation of tenancy was false. The defendant's case was that the title did not lie with the plaintiff or his vendor. The suit however was allowed to proceed on title and succeeded on the ground that it was for the defendant to prove 12 years' adverse possession. On the facts of the case stated above, and as pointed out in the judgment of the case itself, 'there was no allegation of previous possession or dispossession. It was on that account that Article 144 applied. With all respect, in my opinion; the proper method of approaching the case should have been this : When it was found that the relationship of landlord and tenant did not exist between the parties, the plaintiff's suit should have been either dismissed or ho should have been called upon to amend the plaint and to make a specific allegation as to when and how the defendant obtained possession of the property. The case then should have been allowed to proceed on the new pleadings.

31. If the allegation of tenancy had been proved, the defendant would have been bound to vacate the property on the terms of the lease, because he could not deny the title of the person from whom he had taken the property. But if this allegation was found to be incorrect, the plaintiff had to make some fresh allegations, and the amended case could then be considered for purposes of application of the rule of limitation. If this procedure be not adopted, the result would be that a person who has been dispossessed more than 12 years prior to the institution of the suit would escape the effect of Article 142, would be saved from the trouble of proving that he was in possession within 12 years of the suit and would have the benefit of the burden of proof being thrown on the defendant to show when his possession became adverse. It is not desirable that premium should be put on

[16]1933 All. 775

false allegations. If in the ease of *Kallan v. Mohammad Nabi Khan*[17] the plaintiff had been called upon to state when and how the defendant took possession, he would have been obliged to state the true facts and the truth might have brought the case within the purview of Article 142. With all respects therefore Article 144 should not have been applied on the mere ground that the suit of the plaintiff was based on title and the defendant was bound to prove when his possession became adverse to the plaintiff. For the reasons given above, my answer to the question before the Pull Bench is that Article 142 applies and not Article 144.

King, J.

32. I agree that Article 142 is applicable. The plaintiffs' case was that they had a half share in the sir rights and khudkhast rights in the plots in suit. According to the plaintiffs, the plots in suit were held by them and by their relative Paras Earn as Co-owners. But Paras Earn, being the senior member of the family, was in actual occupation and cultivation of the plots. In 1919 he made a gift of his proprietary rights in the village, purporting to include the plots in suit, to defendants 1 and 3S and the latter upon the strength of the deed of gift in their favor took exclusive possession of the plots in the year 1922, thereby dispossessing the plaintiffs. The defence was a denial of the plaintiffs' title as co-owners and a denial that the (plaintiffs had been in possession of the plots within 12 years before the date of the institution of the suit. The suit was certainly for possession of immovable property. The plaintiffs claimed title and alleged that

while they were in possession as oo-owners they had been dispossessed by the contesting defendants, and the date of their dispossession was in the year 1922. On these pleadings it seems clear that the language of Article 142 is applicable and that the period of limitation for the suit must be governed by that article. There are numerous authorities also in support of this view and the only rulings which seem distinctly to point to a Contrary conclusion are two rulings by Benches of this Court. The case of *Kanhaiya Lal v. Girwar*[18] laid down that Article 142 is restricted to eases in which the relief for possession sought by the plaintiff is based on what may be styled as ' possessory " title. The learned Judges further took the view that when a plaintiff sues for possession of immovable property both on the ground of his title and on the ground that his possession has been disturbed by the defendant, then if he proves his title, the burden of establishing title by adverse possession for more than 12 years lies upon the defendant, and if he succeeds in proving that fact, the suit must fail ; otherwise, the plaintiff is entitled to a decree.

33. I see no justification for restricting the scope of Article 142 to cases in which the relief for possession is based only on "possessory" title and not on proprietary title. There seems to be nothing in the language of Article 142 which would restrict it to suits based on possessory title only. Moreover there are numerous rulings of the Privy Council to the contrary. I need refer only to two rulings, for the sake of example, namely *MohimaChundur v. Mohesh Chunder*[19] and *Muhammad Amanulla Khan v. Badan Singh*[20] These were both cases in which the plaintiff claimed possession on the basis of proprietary title and on the allegation that he had been dispossessed by the defendants. In both these cases, their Lordships of the Privy Council held that limitation was governed by Article 142. These rulings therefore are clear

[17]1933 All. 775 [19](1889) 16 Cal. 473
[18]1929 All. 753 [20](1890) 17 Cal. 137

authority against the view taken in *Kanhaiya Lal v. Girwar*[21] The latter case has been followed by a Bench of this Court in *Kallan v. Mohammad Nabi Khan*[22] This case has been discussed by my learned brothers and I think it is unnecessary for me to cover the same ground again. I agree with them that these two decisions of this Court do not lay down the correct law. I have discussed most of the rulings which have been cited before us in a previous case, viz. *Kunji v. Niyaz Husain*[23] It seems superfluous for me to discuss the same rulings again and I need only express my adherence to the views expressed in the previous case.

34. In the present suit the lower appellate Court has held that the plaintiffs have proved their title as Co-owners of the plots in suit. For the purpose of deciding this appeal, the question will arise whether in view of this finding of title in favor of the plaintiffs, it is necessary for the plaintiffs to prove any overt act of possession within the period of 12 years prior to the data of the suit, or whether it is necessary for the defendants to prove ouster of the plaintiffs as their Co-owners for a period of 12 years before the suit. This question however has not been referred to the Full Bench and I express no opinion upon it. If it in hold that the plaintiffs, by proving title owners, have thereby raised a presumption of their possession up to the date of their admitted dispossession, and that the burden of proof has therefore shifted upon the defendants to prove the ouster of the plaintiffs for a period of 12 years, then no doubt the defendants are practically in the position of having to prove ad verse possession for a period of 12 years. But this does not mean that limitation is governed by Article 144 and not by Article 145. It must further be clearly understood that the decision of this appeal will allots only the cultivate rights, or the sir and khud kasht rights of the plaintiff's in. the plots in suit and will not affect any other rights which they may have as a Co-sharer in the mahal.

.

[21]1929 All.753

[22]1933 All. 775

[23]1934 All.362