APPELLATE CIVIL.

Before Chopra and Gosain, JJ.

CAPTAIN SODHI HARNAM SINGH,—*Defendants-Appellants.*

versus

KANSHI RAM AND OTHERS,—*Plaintiffs-Respondents.*

Regular First Appeal No. 3 of 1950.

1957

Nov. 11th

Indian Limitation Act (IX of 1908)—Articles 142 and 144—Respective scope and applicability of—Right to graze cattle—Nature of—Whether an interest in immovable property—Suit for the exercise of that right—Whether governed by Article 142 or 144.

Held, that the suit to which Article 142 of the Limitation Act applies must be one *for possession of immovable property* and the plaintiff must have been in possession of it. In order that a suit be one for possession, it is necessary that there must be a prayer, express or implied, for dispossession of the defendant from the property. Again, the suit must relate to immovable property and not merely to some interest therein. In that way, the scope of Article 144 is wider than that of 142. Article 144, provides the same period of limitation for "a suit for possession of immovable property or any interest therein not hereby otherwise specially provided for". While Article 142 is limited to suits for possession of immovable property, Article 144 includes, in addition, suits for possession of interest in immovable property. In order to find out as to what is the real character of a suit, which would determine the Article applicable, one has to look not merely to the form of the relief claimed but to all the facts and circumstances admitted or proved in the case. The question in each case is what in substance the plaintiff claims and what are the actual facts on which it is based.

Held, that the particular right to graze cattle contains the essential elements of property, and it is an incorporeal right capable of being possessed. A man is said to be in possession of a right when he can exercise it, and he recovers possession of an incorporeal

right when the obstruction which interfered with its exercise is removed. The right has also the distinctive feature of an interest in immovable property. A suit for the exercise of that right and for removal of any obstruction to the use of it shall have to be regarded as one for possession of an interest in immovable property. Since a suit of this nature is not otherwise specially provided for in the schedule, it must fall under the residuary Article 144 and would be governed by the rule of twelve years' limitation.

Regular First Appeal from the decree of the Court of Shri K. S. Gumbhir, Sub-Judge, 1st Class, Ferozepore, dated the 16th day of December, 1949, decreeing the suit for ejectment of the defendants from the land indispute in favour of Kanshi Ram, plaintiff No. 1 and Kanshi Ram, plaintiff No. 3 only in a representative capacity under Order 1, Rule 8, C. P. C. (V of 1908), representing the descendants of the original owners only and further ordering that the other plaintiffs would not be entitled to any relief and it was also directed that the defendants were to pay the costs of the litigation to the plaintiffs who had succeeded in the suit and so for the other plaintiffs to whom no relief was granted were directed to bear their own costs.

S. L. PURI and RAJINDAR SACHAR, for Appellants.

D. N. AGGARWAL and R. N. AGGARWAL, for Respondents.

JUDGMENT

CHOPRA, *J.*—The suit giving rise to this appeal is in respect of land measuring 451 *kanals* 3 *marlas* and used as pasture in village Sultankhanwala. The facts, which are no longer disputed, are these: Ancestors of plaintiffs respondents were the original owners of the entire land of Sultankhanwala. About 100 years ago they transferred their proprietary rights in the entire area to Sodhi Jagat Singh, ancestor of the defendants appellants, and they themselves became occupancy tenants of the land in their possession. It was further agreed that 500 *ghumaons* shall remain reserved as pasturage (*charagah*) for the exclusive use and benefit of the occupancy tenants. The agreement was

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recorded in the *wajib-ul-arz* and other settlement records. Sodhi Jagat Singh and his descendants uptil now continue to be entered as owners of the suit land in the proprietary column of the revenue records. In 1937, the occupancy tenants presented an application to the revenue authorities to enter "*charagah*" as its owner. This application of theirs was dismissed by Assistant Collector, Ferozepore, on 28th June, 1939, and the entries continued as before. The position, therefore, is that while the Sodhis are the owners of the land, the occupancy tenants alone have the right to use it as a pasture. The total area, however, continued diminishing as the Sodhis at different times brought portions of the land reserved for *charagah* under cultivation. In 1937 the area appears to have been reduced to 360 *ghumaons* and in 1939 to 230 *ghumaons*. On 15th May, 1940, some of the occupancy tenants brought a suit, in a representative capacity, (1) for a declaration that the land was reserved as pasture, (2) for ejectment of the Sodhis from 694 *kanals* and 14 *marlas* which they had brought under cultivation, and (3) for injunction restraining the defendants from interfering with the plaintiffs' rights to graze their cattle in the rest of the land. The defendants of the suit, *inter alia*, pleaded that only such part of the land transferred to their ancestors by the plaintiffs' ancestors was to be set apart as pasture as may be sufficient for the purpose, that a large area, besides 694 *kanals* and 14 *marlas*, had also been brought under plough by the defendants and with respect to it the plaintiffs ought to have prayed for consequential relief and, therefore, a suit merely for a declaration did not lie and that the suit for ejectment was barred by time. Sub-Judge Second Class, Ferozepore, in his judgment dated 17th June, 1941, arrived at the conclusion that the defendants were the owners of the land but, according to the agreement, the

particular area of 500 *ghumaons* was to be kept as *charagah*, that the plaintiffs alone, even to the exclusion of the owners, were entitled to graze their cattle in the land and that the suit, so far as the prayer for ejectment was concerned, was barred by time. It was also found that, with the exception of the field numbers enumerated in the judgment, which lay vacant, the remaining land had already been cultivated by the defendants and with respect to it a suit for declaration did not lie. A decree for declaration and injunction as regards the land lying vacant was passed in favour of the plaintiffs. The suit with respect to 694 *kanals* and 14 *marlas* and also with respect to the rest of the land was dismissed. The plaintiffs' appeal against this decree and cross objections of the defendants were dismissed by the District Judge. On plaintiffs' further appeal, the decree was confirmed by the High Court on 31st May, 1944.

The occupancy tenants, again in a representative capacity, instituted the present suit on 2nd May, 1947. On the grounds as before, they prayed for ejectment of the defendants appellants from land measuring 451 *kanals* 3 *marlas*, alleging that the defendants had brought it under plough some ten or eleven years ago. The suit was resisted on various grounds but with none of them, except that the suit was barred by time, we are now concerned. Counsel for the plaintiffs in a statement before framing of issues made it clear that the suit related to a part of the land with respect to which the previous suit was dismissed on the ground that a prayer for possession ought to have been made and, therefore, a declaratory suit did not lie. Sub-Judge First Class, Ferozepore, who was seized of the case, has held that the suit was governed by Article 144 of the Limitation Act and

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the defendants failed to prove their adverse possession for the statutory period. He consequently decreed the suit. The defendants have now come in appeal.

Lengthy arguments have been adduced by Mr. S. L. Puri, learned counsel for the appellants, with a view to show that it is Article 142 of the Limitation Act that applies and not Article 144. It is contended that Article 142 is not confined to suits for possession on the ground of possessory title but it applies to all cases of dispossession, whether the plaintiff is suing merely on the basis of his possessory title or on his proprietary title. Where in a suit for possession the plaintiff pleads possession and dispossession or discontinuance of possession, the suit is governed by Article 142 and it would be wrong to say that a person who proves title in a suit for ejectment has the right to the decree sought unless the defendant proves adverse possession for twelve years. The plaintiff is not entitled to succeed unless he shows, in addition to title, that he was in possession of the property within twelve years of the suit. Number of authorities have been cited in support of the contention. It is pointed out that in this case the plaintiffs claimed the suit property on the basis of their title and further alleged that the defendants had brought the land under cultivation some ten or eleven years before the institution of the suit. In the circumstances, it lay upon the plaintiffs to prove affirmatively that they were in possession of the land in dispute at any time within twelve years of the suit. According to the counsel, the trial Court was wrong in applying Article 144 to the facts of the case, and since the plaintiffs failed to prove their possession within twelve years the suit ought to have been dismissed as barred by time.

In my view, the contention and the entire argument is besides the point. Article 142 provides a limitation of 12 years for "a suit for possession of immovable property when the plaintiff in possession of the property has been dispossessed or has discontinued possession". The suit must be one *for possession of immovable property* and the plaintiff must have been *in possession* of it. In order that a suit be one for possession, it is necessary that there must be a prayer, express or implied, for dispossession of the defendant from the property. Again, the suit must relate to immovable property and not merely to some interest therein. In that way, the scope of Article 144 is wider than that of 142. Article 144 provides the same period of limitation for "a suit for possession of immovable property or any interest therein not hereby otherwise specially provided for". While Article 142 is limited to suits for possession of immovable property, Article 144 includes, in addition, suits for possession of interest in immovable property. In order to find out as to what is the real character of a suit, which would determine the Article applicable, one has to look not merely to the form of the relief claimed but to all the facts and circumstances admitted or proved in the case. The question in each case is what in substance the plaintiff claims and what are the actual facts on which it is based. Now, in the case in contest it is not disputed that title to the suit land vests in the defendants. They were found to be its owners in the earlier litigation between the parties and are entered as such in the revenue records. The plaintiffs do not claim the property on the basis of any proprietary right in the land itself. What they can, and do in fact, claim is the right to graze their cattle in the land. The right to use the land for grazing purposes exclusively vests in them, the defendants having no right to cultivate it or even to graze their cattle in it. The plaintiffs do not,

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and cannot, claim the land for any other purpose than that of grazing. Nor do they claim that they were ever in exclusive possession of the land, more than that they were using it for the particular purpose. The other modes of user remained, and are still to remain, with the defendants ; for instance, to cut the trees standing on the land. Thus, the defendants are not sought to be totally dispossessed of the land.

Evidently, what the plaintiffs claim is an interest in immovable property and not the property itself. The particular right to graze cattle, in my opinion, contains the essential elements of property, and it is an incorporeal right capable of being possessed. A man is said to be in possession of a right when he can exercise it, and he recovers possession of an incorporeal right when the obstruction which interfered with its exercise is removed. *Bhundal Panda, etc* v. *Pandolpos Patil etc.* (1) The right has also the distinctive feature of an interest in immovable property. A suit for the exercise of that right and for removal of any obstruction to the use of it shall have to be regarded as one for possession of an interest in immovable property. Since a suit of this nature is not otherwise specially provided for in the schedule, it must fall under the residuary Article 144 and would be governed by the rule of twelve years' limitation.

In *Sheoraj Singh* v. *Debi Bakhsh Singh and another* (2), the right of a landlord to demand and receive certain dues, e.g., *parjot*, *charai* and *charsai* from persons, who occupied or used land in the village in one way or another, was deemed to be an interest in immovable property within the meaning of Article 144. It was, therefore, held that if the defendant succeeded in showing that

(1) I.L.R. 12 Bom. 221
(2) A.I.R. 1918 Oudh. 181

he had exercised this right adversely to the plaintiff for a period of more than twelve years, the right of the plaintiff, if he ever had any, had become extinct and could not longer be enforced. In *Iyyadurai Gurukkal and others* v. *Ramasawmy Gurukkal and others* (1), a right to perform a kind of worship in a temple, as bathing the idol, etc., appears to have been regarded as property and capable of being acquired by prescription. The facts in a Division Bench decision of the Patna High Court *Kumardhubir Engineering Works Ltd.* v. *State of Bihar* (2), *were somewhat similar.* There, the suit, as framed, was for a declaration and for a permanent injunction that the plaintiffs had the right to rear and appropriate lac from one-half of the lac-bearing trees in the particular jungle plots. The contention that the right to rear and appropriate lac from lac-bearing trees was immovable property was turned down, and the right was regarded merely as an interest in immovable property. It was held that the suit, though in terms it was for declaration and permanent injunction, was in substance for possession of an interest in immovable property. Article 144 of the Limitation Act was, therefore, held to be applicable.

The present is a case analogous to those relating to the exclusive right of fishery. When the right of fishery is claimed without any exclusion of the owner or in common with others, the right may be regarded as an easement or a mere profit a *prendre.* But, the exclusive right to fishing falls within the definition of interest in immovable property under Article 144 and adverse possession of such a right for more than twelve years would, by operation of section 28 of the Limitation Act, extinguish the right of the lawful owner to that extent *Krishna Nandi* v. *Lokenath Mookerjee and*

(1) 18 I.C. 475
(2) A.I.R. 1952 Pat. 204

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others (1), The same view was adopted in *Secretary of State* v. *District Board of Tanjore* (2). It was held that an exclusive right of fishing in the sense that even the lawful owner is excluded from its enjoyment is a heritable and transferable interest in immovable property, which can be acquired by 12 years' adverse possession as against the lawful owner. In *Henry Hill and Co.* v. *Sheoraj Rai and others* (3), a distinction was drawn between a right to fishery which does not exclude the acquisition of similar rights by others or bar the enjoyment of such rights by the lawful owners, and an exclusive right to the fishing in a particular locality, as in the case of a several fishery. The former was regarded as a profit a *prendre*, in the nature of an easement, and the latter as an interest in immovable property which is both transferable and heritable and can be acquired by twelve years' possession.

In my view, the right claimed in the present case can more appropriately be regarded as an interest in immovable property, which is capable of being adversely possessed. That being the case, a suit for ejectment or a possessory action would be maintainable at any time within twelve years of the date when the defendant's possession became adverse. The finding of the learned trial Sub-Judge that Article 144 applies must, therefore, though on different grounds, be upheld.

I am in perfect agreement with the finding that the defendants had failed to prove by clear and unequivocal evidence that their possession of the property in question was continuous and that it lasted for the statutory period. Entries in the revenue records, which have been brought on the record, do not fully support this contention. They only go to show that at certain periods some of the

(1) A.I.R. 1932 Cal. 300
(2) A.I.R. 1930 Mad. 679
(3) A.I.R. 1923 Pat. 58

khasra numbers out of the *charagah* were under cultivation of the defendants, but at others the same fields were shown as *khali* or *banjar*. Mr. Puri has drawn our attention entries in *khasra gurdawaries* with respect to the field Nos. 526 and 556. The total area of these fields is 66 *kanals* 5 *marlas* and 216 *kanals* 14 *marlas* respectively. The whole of the first and an area of 164 *kanals* 15 *marlas* out of the second is in dispute. In *kharif* 1933, 64 *kanals* out of field No. 526 is shown as *khali nehri* and 2 *kanals* 5 *marlas as banjar qadim*. The entries with respect to it in Rabi 1934 are not quite legible and clearly understandable. In Kharif 1934, 34 *kanals* out of this field is entered as '*khali*' and 16 *kanals* as *Khali nehri*. An area of 40 *kanals* is again shown as *khali* in Rabi 1934. The position with respect to the second field is also the same. In *Kharif* 1934 and *Rabi* 1935 more than 200 *kanals* out of this field was entered as *banjar qadim* or *khali*. This brings the plaintiffs' suit with respect to this area within time. Moreover, there is no evidence that the same land out of these fields continuously and without a break remained under cultivation of the defendants.

Lastly, it is faintly suggested that the case was covered by Article 32 or the residuary Article 120 of the Limitation Act. The cause of action for the plaintiffs is the deprivation of their right to use the land for grazing purposes. The deprivation might have resulted from a perversion of the property by the defendants, but that alone does not make Article 32 applicable. Therefore, the plaintiffs are not restricted to the two years' limitation to bring their suit. The present being a suit for ejectment or a possessory action with respect to an interest in immovable property, it would be governed by the residuary Article of the twelve years' rule of limitation.

No other point has been urged. The appeal is dismissed with costs.

B.R.T.