

(1924) 02 CAL CK 0024

Calcutta High Court

Case No: None

Suresh Chandra
Mukherjee

APPELLANT

Vs

Shiti Kanta Banerjee

RESPONDENT

Date of Decision: Feb. 22, 1924

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 98
- Limitation Act, 1963 - Article 142

Citation: (1924) ILR (Cal) 669

Hon'ble Judges: Page, J; Newbould, J; B.B. Ghose, J

Bench: Full Bench

Judgement

Newbould, J.

The plaintiff brought the suit out of which this appeal arises for declaration of his title and also recovery of possession of about 1,000 bighas of land. He succeeded in obtaining a decree for a part only of the land claimed and appealed to this Court. His appeal was heard by a Divisional Bench of this Court consisting of Woodroffe and Cuming JJ. There was a difference of opinion, Woodroffe J. holding that the appeal should be dismissed while Cuming J. was in favour of allowing the appeal in part. They held that as there was a difference of opinion and there was no majority varying or reversing the decree appealed from, the appeal should be dismissed. Against this decision the plaintiff has preferred an appeal u/s 15 of the Letters Patent. A preliminary objection has been taken that no appeal lies. This objection we overruled at the commencement of the hearing of the appeal. Though we accept the contention of the learned Vakil for the respondents that the decision of the Judicial Committee in *Bhaidas Shibdas v. Bai Gulab* I.L.R(1921) 45 Bom. 718 shows that the procedure laid down in Section 98 of the CPC was wrongly applied in the present case, that is immaterial. Had the provisions of Clause 36 of the Letters Patent been followed the result would have been the same since the opinion of

Woodroffe J. who is the senior Judge would prevail. Under Clause 15 of the Letters Patent this appeal is clearly competent.

2. The present suit is due to events primarily caused by the movement of the river Ganges at a part where under the name of Bhagirathi it flowed between the Nadia district on its north and the Burdwan district on its south. At the time of the Revenue Survey by Government of 1855 there were churs on both sides of the river. On the north side was chur Baliadanga which was temporarily settled with the defendant's predecessors in two estates bearing touzi Nos. 824 and 2460 of the Nadia Collectorate. On the south side was a chur adjoining mouza Kavirajpur which is a part of the estate bearing touzi No. 10 of the Burdwan Collectorate and in this village the plaintiff has putni right to certain plots. The river moved gradually in a southerly direction causing accretions to chur Baliadanga and diluviating first the chur adjoining Kavirajpur and subsequently also part of the Kavirajpur mouza. This alluvion and diluvion continued until the accretions to chur Baliadanga became reformations in situ of Kavirajpur land. While this was going on Government made three surveys and settlements of the land which accreted to chur Baliadanga in the years 1880, 1890 and 1903. Even in 1880, some land of Kavirajpur was settled with the defendants as proprietors of estates Nos. 824 and 2460 and in 1890 still more land of that mouza was settled with the defendants. During the survey and settlement of 1903 the mistake was discovered and the land found to be reformation in situ of mouza Kavirajpur was excluded from the settlement. The temporarily-settled estates Nos. 824 and 2460 were originally undivided four annas and twelve annas shares of chur Baliadanga. In 1893 a partition suit was brought which after protracted litigation ended in a division of the land after survey by a Commissioner in 1899. The plaintiff instituted the suit, out of which the appeal arises, on the 25th February 1916. He originally claimed approximately 1,000 bighas of land. In the trial Court he gave up his claim to a large tract on the east and at the hearing of the first appeal to this Court he no longer claimed the land which had been settled with defendants after the 1903 survey. He originally based his title both on his putni right and adverse possession. The finding that he has no title other than his putni right has not been disputed. He is content to rely on the finding of the trial Court that he has established his putni title to 15 specific chaks and the abasista chak or unnumbered residue. The learned Subordinate Judge gave the plaintiff a decree for the land within these chaks that was south of the lines of the south boundary of the chur shown in the settlement map of 1903 and the partition map of 1899. He held that the plaintiff's title to land north of this line had been barred by limitation.

3. The case made in the plaint was that diluvion took place in 1890 and reformation in 1902. It was further alleged that the land first began to be fit for cultivation in October 1906 and the defendant No. 1 then proposed to take a settlement from the plaintiff. As there was undue delay, the plaintiff in 1913 attempted to have the lands surveyed and was prevented by defendant No. 1. This case has admittedly failed The

correctness of the various maps as showing the reformation is not questioned and the map of 1880 shows that reformation in situ had commenced before that year. The plaintiff's case now is that he was in possession of the chaks to which he has proved title until they were diluviated and his possession must be presumed to have continued and that he is entitled to succeed unless the defendants can prove that they have destroyed his title by adverse possession. This contention raises the issue as to the party on whom the burden of proof lies in the present case. On this issue I find myself in entire agreement with the finding of Woodroffe J. The reasoning in his judgment appears to me clear and logical and in accordance with the principle laid down in previous decisions of this Court and the Judicial Committee of the Privy Council. He points out that the plaintiff sued for possession on the allegation of dispossession. Article 142 of the first Schedule of the Indian Limitation Act, 1908, is therefore applicable and he is bound to prove possession within twelve years before suit. Admittedly he has not had any actual possession since the lands became submerged and it is also admitted that the defendants have been in possession since 1906, ten years before the institution of the suit. In order to prove possession within twelve years the plaintiff may rely on the presumption that possession of the lawful owner continues as long as the land is incapable of actual possession. But in a case like the present where Article 142 applies the plaintiff, if he relies on this presumption must prove that the land was incapable of actual possession within twelve years before suit. For the appellant, it was strongly contested before us that it lay on the defendants to prove their adverse possession for twelve years before the suit. It was urged that the presumption of possession in favour of the real owner would continue until it is shown that the presumption does not apply by reason of the defendant having been in adverse possession. It was also urged that the presumption would continue as long as the land continued incapable of ordinary possession, and it is for the defendants to show when this change took place. These contentions ignore the difficulty in the appellant's way arising from the fact that he has so framed his suit that the initial burden lies on him to prove dispossession within twelve years. Relying, as he does, on a presumption to discharge this burden he must prove the facts necessary to establish this presumption, that is to say, not only that he was the legal owner but also that the land was incapable of possession in the ordinary way. Of the cases cited, the Full Bench decision of this Court in *Mohammad Ali Khan v. Khaja Abdul Gunny* ILR (1883) Cal 744 is the most favourable to the appellants. The rule laid down at page 752, if read apart from the context, seems to support his contentions. It is as follows: "The true rule appears to be this: that where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did continue till within twelve years before suit it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown." But the rule is qualified by the preceding remarks on p. 751 which require the plaintiff to show such acts of ownership as are natural under the existing condition of the land before he can

claim the benefit of the presumption that his possession continued. It is not necessary to discuss all the decisions that have been cited on behalf of the appellant. Several of them, as for instance, *Basanta Kumar Roy v. Secretary of State* I.L.R(1917) Cal 858; L.R. 44 IndAp 104 can be distinguished on the broad ground that they were cases where Article 144 and not Article 142 was applicable. The headnote of the Indian Report wrongly states that the High Court decided that case on limitation alone holding that the suit was barred by Article 142. The English Report of the same case quotes the High Court judgment, which clearly states that the case "must be governed by Article 144". Other cases that were cited follow the decision in *Mohammad Ali Khan v. Khaja Abdul Gunny* ILR (1883) Cal 744 and give no greater support to the appellant's contention than that Full Bench decision. I would therefore hold that in the present case it lay on the plaintiff to prove that the lands were incapable of user within twelve years prior to the suit. For the appellant it was further urged as an alternative plea that if it is necessary for him to prove that the land was incapable of user, he has proved this at any rate as regards the land south of the survey line of 1890. In order to prove this he relies on the defendant's evidence, oral and documentary. The case made out by the plaintiff's witnesses was entirely abandoned at the hearing of the appeal and their evidence was not even read to us. The first piece of evidence on which reliance is placed is that of Gurudas Biswas, defence witness No. 2. He was the gomasta of the second defendant in respect of the chur lands from 1306-08 B.S. In cross-examination he stated, "I found the sandy tract of the chur in the same condition during the period of my service. There was no alteration in its area during that period." It is contended that this proves that no extra land became culturable after the survey of 1890. But if his examination-in-chief be also read, it is clear that what he meant was that during this period, as the river receded there remained a fringe about 1 1/2 or 2 rashis wide of unculturable sandy land and that though the nature and area of this fringe remained unchanged, its position altered as the chur extended towards the south. The only other oral evidence to which reference is made in this connection is that of defence witness No. 7, Rajani Kanta Dey. He was a Collectorate amin and took part in the settlement surveys of 1890 and 1903. His evidence-in-chief is strongly in favour of the defendants since he says that he saw the chur after 1903 and found the major portion of the chur under cultivation. It is contended that this evidence refers to the land which was settled with the defendants in 1901 and not to the land now in dispute. But this cannot be, since he was speaking of the land down to the water's edge and the map of the 1903 survey shows the water edge far south of the land settled with the defendants as part of their estates Nos. 824 and 2460. A similar argument to that based on the evidence of defence witness No. 2 is based on this witness's statement: "About 50 to 60 bighas lands must have accreted to the chur between 1890 and 1903. In 1903, I found the area of the sandy portion of the chur to be 60 to 80 bighas." But this does not mean that the only accretion during these years was sandy land. Our attention has also been drawn to a statement in the Settlement Report of the 8th March 1904, Ex. P. "The estate consists of a low tract of

chur land liable to annual inundation." It is urged that as these remarks refer to the land settled with the defendants, the disputed land to the south would be still more liable to inundation. But the expression "liable to annual inundation" does not mean that the land was actually inundated every year. The same paragraph of the report shows that though aus paddy could not be grown in normal years, kalai and musuri were extensively grown, and this supports the defendant's case that the land was capable of possession. Another argument is based on the map and report of the Commissioner who executed the partition decree in 1899. It is contended that as the south line of the Commissioner's map and of the settlement map of 1903 are almost identical, there could have been little alteration in the chur during the interval between the two surveys. It appears from the Commissioner's report that in 1899 there was practically no culturable land south of the land settled in 1890. But the Commissioner's map does not show the true position of the river in 1899. At the wish of the parties to the partition suit, the defendants in this suit, he included land which was still part of the bed of the river in his map and divided it between them. It follows, therefore, that there was a considerable accretion of culturable land, to the south of the chur between 1890 and 1903. The defendant's evidence does not show that any land north of the line, which has been given as the south boundary in the decree, was unfit for cultivation within 12 years of the institution of the suit.

4. These findings are sufficient for the disposal of the appeal. But even if I had held that the burden of proof lay on the defendant to prove twelve years' adverse possession, I should decide in their favour. That the defendants did exercise acts of possession on the land as it reformed and became capable of possession, there can be no doubt. Further these acts of possession were all done in the assertion of the claim of the defendants to the land by virtue of the settlements made by Government. This case is distinguishable from Basanta Kumar Roy's case I.L.R (1917) Cal 858; L.R. 44 IndAp 104 cited above, since there are "circumstances to link together various portions of ground so as to make the possession of a part as it emerged amount constructively to possession of the whole."

5. We all agree that the appeal fails and it is accordingly dismissed with costs.

Ghose, J.

6. It is unnecessary for me to recapitulate the facts of this case as they have been sufficiently stated in the judgment of my learned brother Newbould which I had the advantage of reading. I agree that there is no substance in the preliminary objection taken on behalf of the respondents that the appeal is not maintainable.

7. The only question argued on behalf of the appellant is one of limitation. The allegation in the plaint is that the plaintiff was in possession of the land in suit before diluvion, which commenced to reform in 1902 and that he has been dispossessed by the defendants in 1906. That appears to be the proper meaning of the plaint and this was sought to be established by the evidence led by the plaintiff.

The story, however, that the land began to reform in 1902 is untrue, as it is beyond dispute that it reformed long prior to that date; and this has not been contested by the appellant. The suit then being for possession on the allegation of dispossession falls within Article 142 of the Limitation Act, as has been held by both the learned Judges of this Court who heard the appeal in the first instance. This is also not seriously disputed by the appellant. The burden of proof in such a case is without doubt on the plaintiff to show that he had been dispossessed within 12 years of the date of suit. The plaintiff-appellant admits that he has been dispossessed for about 10 years, the suit having been brought in 1916. The difference between the admitted possession of the respondents and the period of limitation is within the narrow limit of about two years, during which the appellant must establish his possession in order to succeed in the suit. In the case of *Nitrasur Singh v. Nund Lall* (1860) 8 I.A. 199, 220 Turner L.J. in delivering the judgment of the Privy Council said: "The appellant is seeking to disturb the possession, admitted to have existed for about 11 years, of defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him... on a dispossession within 12 years next before the commencement of the suit... No proof of anterior title such as would be involved in the decision of the boundary question in his favour can relieve him from this burden or shift it upon his adversaries by compelling them to prove the time and manner of dispossession." The law is the same under the present Limitation Act, where the dispossession from which limitation is declared to run should have taken place within 12 years of the suit. The nature and quality of the possession of the respondents in this case during the period after the admitted dispossession of the appellant need not require any discussion. The appellant may establish his possession within the disputed period of two years, by showing that his possession was either actual or constructive. There is no evidence of actual possession or the exercise of any act of possession, however trivial, by the appellant during that period, for the title being in him such acts might have preserved his title. Constructive possession may be shown by the fact that the land being under water was incapable of possession or although it was capable of being possessed, no one had actually taken possession during the period in question. The appellant cannot by proving possession at any period anterior to twelve years before suit shift the onus on the respondents to prove their possession.

8. Much stress was laid by the appellant on the observations of Wilson J. who delivered the judgment of the majority of the Full Bench in *Mohammad Ali Khan v. Khaja Abdul Gunny* ILR (1883) Cal 744, 752, and it was contended that as the land in this case did probably continue to have been in such a condition as not to be fit for the usual modes of enjoyment within twelve years before suit, it should be presumed that his possession continued until the contrary is shown. It is urged that it is incumbent on the respondents to show that they had dispossessed the appellant during the two intervening years. The meaning of the observations relied

on will be clear when read with the preceding remarks in the judgment of that case. What the learned Judge laid down was that so long as the state of the land remained unchanged, the possession of the rightful owner should be presumed to continue unless he is shown to have been dispossessed. Dealing with the case of diluvion by a river, Wilson J. says (at p. 751), In such a case, if the plaintiff shows his possession down to the time of diluvion, his possession is presumed to continue as long as the lands continue to be submerged". It has been established in this case that the condition of the land had changed a considerable number of years prior to the period in dispute, and there is no reason why the ordinary rule that the plaintiff should prove his possession within the period of limitation should be departed from. The appellant has not succeeded in proving that the land was incapable of possession on account of its remaining submerged or that no one else was in possession during the disputed period although the land had emerged from the water.

9. It is next submitted that the settlement report of 1904 shows that the land was liable to annual inundation and plaintiff's possession should be held to have constructively revived during such inundation and the suit is therefore not barred. The appellant strongly relies on the case of *Basanta Roy v. Secretary of State* ILR (1917) Cal 858; L.R. 44 IndAp 104, as bearing a close resemblance to this case. There are, however, distinctions between that case and the present one in important particulars. Their Lordships of the Judicial Committee observe, in following the case of *Secretary of State v. Krishna Mani Gupta* ILR (1902) Cal 518; L.R. 29 I.A. 104: "No rational distinction can be drawn between that case and the present one where the reflooding was seasonal and occurred for several months in each year. It was held that when the land was resubmerged the possession of the Government determined, and that, while it remained submerged no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner" (44 I.A. at p. 113). In that case the plaintiff did not come to Court on the allegation that he had been dispossessed. It was held that the suit was one to which Article 144 of the Limitation Act was applicable and it was therefore for the defendant to show that plaintiff's title had been extinguished by reason of the adverse possession of the defendant. In the present case it is for the plaintiff to establish a subsisting title. There is no evidence that the land was inundated during the two years in question and that there was a cessation of the dispossession by the defendants by reason of the submergence of the land. The principle on which the cases of *Krishna Mani Gupta* ILR (1902) Cal 518; L.R. 29 IndAp 104 and *Basanta Roy* I.L.R (1917) Cal 858; L.R. 44 IndAp 104 were decided, was that the possession of the defendant was in fact determined by the submergence of the land, when it became derelict and, as was observed in the former case, on the dispossession of the defendant (Government) by the vis major of the floods the constructive possession of the land was (if anywhere) in the true owners (see p. 115 of 29 I.A.). In the present case there is no suggestion that the inundation had the effect of dispossessing the

defendants or rendering the land derelict, and in my judgment that principle does not, therefore, apply in the present case. The case of *Kuthali Moothavar v. Peringat* ILR (1921) Mad. 883; L.R. 48 IndAp 395 was also a case falling within Article 144 of the Limitation Act and moreover the plaintiff there had proved the exercise of various acts of possession during the currency of his title and is therefore different from the present case.

10. It is next urged that the respondents only cultivated small areas during the period of their possession and their possession of a part did not amount to possession of the whole. But assuming the fact to be so, in this case there is the connecting link of claim of title and close connection and interdependence between the part and the whole, as the respondents were in possession by virtue of settlements obtained from Government of the entire land, which was surveyed at intervals and depicted in maps, and on the whole of which revenue was assessed. Then again the respondents partitioned the entire land among themselves in 1899 when it was again surveyed and masonry pillars erected in order to demarcate the portion of each co-sharer. The circumstances contemplated as operating in favour of a wrongdoer in the case of *Mohini Mohan v. Promoda* I.L.R (1896) Cal 256, 259 which has been approved by the Privy Council in *Basanta Roy's* case ILR (1917) Cal 858; L.R. 44 IndAp 104,114 are established in this case. This argument of the appellant also fails.

11. Lastly, it is urged that plaintiff should at any rate be given a decree for that portion of the land which lies south of the settlement boundary line of 1890, as it was found by the partition Commissioner in 1899 to be sandy and almost in the bed of the river and could not therefore be the subject of effective possession by the defendants. It does not however appear that the portion was in the same condition in 1904. *Rajani Kanta De*, amin of the Collectorate who is an independent witness, says: "In 1903 I found the major portion of the chur under cultivation. About 2 to 2 1/2 rasis wide lands from the water edge was sandy. Above that all lands were culturable." The sandy portion in 1903 would appear to be the portion for which the appellant was given a decree by the trial Court. In any case the respondents having erected pillars on this portion during the partition proceedings and included it within the rest of the land, the possession of this portion cannot be distinguished from this rest. Thus all the contentions of the appellant fail.

12. In this view, it is unnecessary to discuss the question as to what would have been the effect of the possession by the respondents if the case fell within Article 144 of the Limitation Act. It is sufficient to say that under the circumstances of the present case, the possession of the respondents cannot be held to be surreptitious or occasional acts of trespass and that it had not the qualities of adequacy, continuity and exclusiveness. I agree that the appeal should be dismissed with costs.

13. I agree that this appeal should be dismissed. In my opinion, it is not incumbent upon the Court in this appeal to consider upon whom lies the burden of proving the dispossession of the appellant because "as their Lordships find the evidence sufficient to establish a clear conclusion of fact it cannot matter now by which party it was given" [per Lord Sumner in *Basanta Kumar Roy v. Secretary of State for India* ILR (1917) Cal 858 ; L.R. 44 IndAp 104]. The only inference which, in my judgment, can reasonably be drawn from the facts proved at the trial, and set out in the judgment of my brother Newbould, is that the appellant was dispossessed of the lands in dispute more than twelve years prior to the institution of the present proceedings. If that be so, this appeal must fail, because it was undoubtedly incumbent upon the appellant, having regard to the form of his claim, and the provisions of Article 142 of Schedule I of the Limitation Act, 1908, to establish the fact that he was dispossessed within 12 years prior to the date upon which he launched this suit.

14. I desire, however, to state that I am unable to concur in the view which has found favour with Woodroffe and Newbould JJ. as to where the burden of proof lies in circumstances such as those obtaining in this case. While they accept the appellant's contention that inasmuch as both the title to and the possession of the lands in dispute were vested in the appellant before the river Bhagirathi changed its course and the lands became submerged, the said lands are deemed to have remained in the constructive possession of the appellant so long as they continued to be inundated, these learned Judges are of opinion, that "it lay upon the plaintiff to prove that the lands were incapable of user within 12 years prior to the suit" (per Newbould J.) and that the plaintiff "must show that his constructive possession continued on account of diluvion, and on account of the land being incapable of possession within 12 years of the suit" (per Woodroffe J.) With great respect, I am unable to agree that the burden which lay upon the appellant was of this nature. In my opinion, the true rule was laid down by the Judicial Committee of the Privy Council as follows: "The Limitation Act of 1877 does not define the terms "dispossession," but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: Constructively it continues until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. There can be no discontinuance by absence of use and enjoyment when the land is not capable of use and enjoyment (per Cotton L.J. in *Leigh v. Jack* (1879) L.R. 5 Ex. D. 264, 274. It seems to follow that there can be no continuance of adverse possession when the land is not capable of use and enjoyment, so long as such adverse possession must rest on de facto use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession and revives as it ceases". Mr. Justice Wilson intended, I think, to lay down the same rule when he observed: "The true rule appears to us to be this: That

where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did continue till within twelve years before suit, it may properly be presumed that it did so continue and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in Section 114 of the Evidence Act". *Mohammad Ali Khan v. Khaja Abdul Gunny* ILR (1883) Cal 744 The rule of constructive possession does not create a new title to or interest in the lands; it merely operates to maintain the continuance of an existing right or interest. Further acts of possession after the waters have subsided are not required to prove possession by the true owner, for in law such possession is deemed to have been throughout continuous and unbroken. The occasion and the necessity for further acts of possession by the true owner arises when, and only when, his right to possess the lands is challenged. So long as his possession is neither threatened nor disturbed what need is there of further witness?

15. I find myself in agreement with the following observations of Melvill J. on this subject. "The burden of proof being upon the plaintiff, what is he required to prove? Simply, that the cause of action accrued within the period of limitation made applicable to the suit. This is by no means equivalent to saying that a plaintiff in an action of ejectment must prove that he has been in possession within 12 years. He may not have been in possession within twelve years, and yet the cause of action may have accrued within that period. If a man buy a piece of open ground, he is not bound to enclose it or to build upon it, or formally to take possession of it; nor, if he do formally take possession of it, is he bound by subsequent acts to proclaim the continuance of his possession. So long as the land remains unoccupied, his rights are not interfered with, and he is not called upon to assert them. He has no cause of action, and there is no person whom he could sue. His cause of action accrues when another person takes possession of the land". *Pandurang Govind v. Bal Krishna Hari* (1869) 6 Bom. H.C. 125. See also the observations of Knight Bruce L.J. in *Holmes v. Powell* (1856) 8 D G.M. & G. 572. Now, while the doctrine of constructive possession, in my opinion, is equally applicable to cases where the plaintiff seeks to obtain possession of land in the possession of another, and to cases where the plaintiff claims to recover possession of lands of which he alleges that he has been dispossessed, a plaintiff who frames his suit to recover possession of lands of which he has been dispossessed, must needs prove that he has been in possession, and that he has been dispossessed within 12 years prior to commencing proceedings to recover possession of the lands. He must further prove unless it is admitted the time when, and the mode in which such dispossession was effected. Having regard to the evidence adduced at the hearing, so far am I from being satisfied that the plaintiff in this case has proved that he has been dispossessed of the lands in dispute within 12 years prior to the institution of the suit that, in my judgment, the true conclusion to be drawn from the evidence is that the respondents have been in possession of the

lands in a manner adverse to the plaintiff's title for more than 12 years before the present proceedings were commenced. In my opinion, no question of law is involved in this appeal, which depends solely upon the determination of an issue of fact. For these reasons it appears to me to be a matter of indifference whether Article 142 or Article 144 of the Limitation Act is applicable in the circumstances of this case, or upon whom the burden of proof lies, for in any event the appeal fails and should be dismissed.