(1865) 06 CAL CK 0002

Calcutta High Court

Case No: Special Appeal No. 2715 of 1863

R. Watson and Others		APPELLANT
	Vs	
The Government and Others		RESPONDENT

Date of Decision: June 13, 1865

Judgement

Norman, J.

This case having been re-argued before a Full Bench at the request of the respondent, and in pursuance of the permission given to that effect, I think that limitation will not apply to the claim of the patnidar to enhancement, if the lands in dispute were originally included in the decennially-settled estates of Bishenpore, and were not surrendered by the zamindar to the Government under the arrangement in 1802.

Pundit, J.

In this case it appears to be an admitted fact that the Permanent Settlement was made with the Raja of Bishenpore of his zamindari, together with certain ghatwali lands held by ghatwals, and that afterwards it was found expedient to detach the ghatwali lands from the estate, and to give some remission of revenue to the zamindar.

2. These lands were then and are still mostly jungle and hilly tracts, with very little cultivation, and so their exact boundaries and quantity it was not easy to know and determine at the time of this separation. The plaintiff is a patnidar under the zamindar, and the Government and the ghatwals oppose his claim and plead limitation, on the ground that the lands claimed by him have been held since the separation by the ghatwals as part of their ghatwali tenures. The ghatwals pay only a quit-rent for the lands they hold, and, when called upon by the Government to put in lists of the lands held by them, are said to have represented themselves as holding much less than they actually did and do hold. Now, with regard to the lands not under cultivation, no question of adverse possession can arise; but with regard to the lands said or proved to be under cultivation, it is not improper to apply the

Law of Limitation when the plaintiff has failed to prove that they were, as he had asserted, held by him under the right derived long ago from the zamindar. The arguments of his pleader regarding the onus probandi might have availed him if there had not been a separation, as ghatwals do not pay so much per biga to Government. It is impossible for Government to prove that it has actually and directly received rents for any particular portion of the lands in dispute. When, with regard to these cultivated lands, claimed by the plaintiff, the defendants plead limitation, I do not see why they should be required to prove that these lands have been held by the ghatwals, and also prove that the Government has received rents for these identical lands. The fact that Government received revenue from the zamindar does not alter the nature of the case or shift the onus. The plaintiff in this case, like any other plaintiff was bound to show that these cultivated lands were held by him within twelve years preceding his suit. On the contrary, he admits that, for more than twelve years from the time that he acquired the right under which he sues, he has never held them; and so with regard to this portion of the lands claimed by him, his claim appears to me barred by the Statute of Limitation.

3. I do not object to a remand regarding any portion of the lands claimed that may be admitted by both parties, or proved by evidence, to be uncultivated.

4. Although the ghatwals may perhaps succeed in proving some sort of possession even of these lands, yet as, from the very nature and quality of these lands, such possession cannot necessarily be considered as adverse; it is not at all advisable to apply any limitation to the claim of the plaintiff regarding such lands.

5. It would, however, be necessary to remand, in order to find out the two kinds of lands, if their respective quantity and identity are not admitted or already proved.

Loch, J.

6. With regard to the jungle lands, I see no objection to a further investigation being made as proposed by my colleagues, because it is very difficult to prove possession of such tracts, unless the proprietor has exercised acts of ownership by preserving and appropriating the jungle for his own use, or permitting others to appropriate certain portions, paying him for the same. The mere assertions of possession or demarcation in a map are not of themselves proof of possession. With regard to the cultivated lands, however, I do not see why the Law of Limitation cannot he pleaded by the defendants in this case as in any other where the complainant admits that he has been out of actual possession for more than twelve years.

7. The ghatwali lands of Bishenpore were originally comprised within the zamindari of that name. At the instance of Government, they were separated from that zamindari, and Government took possession of an area nominally aggregating 35,955 bighas, assessed at rupees 4,641. These lands had never been measured, and the area in possession of the ghatwals was known to be much larger than stated, and the first returns of the ghatwali lands received through the police officer

showed that the lands in the occupancy of the ghatwals, as ghatwali tenures, greatly exceeded the area mentioned in the instrument by which they were transferred to Government by the Raja of Bishenpore, to whom a remission of revenue from the jumma of Pergunna Bishenpore was allowed.

8. When the ghatwali lands were transferred to Government, they were entered as a separate mehal in the rent-roll of the district, and did in fact constitute a separate estate therein. The ghatwals hold these lands direct from Government in return for their services as police, paying also a small quit-rent. They stand very much in the position of talookdars under a zamindar, paying, however, in return for the lands they hold, not a full money-rent, hut a rent consisting partly of service and partly of money. It appears to me that the position of Government, as proprietor of the ghatwali mehal, is that of an independent zamindar deriving no title from the zamindar of Bishenpore, but as completely separate from him and his zamindari as if Government had acquired the lands by gift or purchase, or by any other independent mode. Now, if a talookdar paying a fixed jumma to his zamindar, encroach upon the property of a neighbouring zamindar, he pays no increase of rent to his own landlord for lands so acquired; and if the injured zamindar sleep over his rights, and do not seek to recover possession within the period allowed by law, the talookdar and his zamindar may effectually plead the Law of Limitation against him.

9. Why should the same rule not be applied to the case of these ghatwals? If a ghatwal trespass, the party injured is bound to take steps to remedy the injury in proper time. If he sleep over his rights, why should he not lose his remedy as in other cases? The conduct of the ghatwal may be reprehensible in appropriating the property of another, but it is no worse than that of the talookdar whom I have supposed under similar circumstances; and if the talookdar and his zamindar could plead limitation as against a party seeking to recover possession, why should not the ghatwal and Government, his zamindar, be able to take the same plea? It is true that Government is unable to show that it has received rents for the lands alleged to have been encroached upon, and thus exercised acts of ownership over them, but a zamindar, whoso dependant talookdar encroaches on the neighbouring zamindar''s lands, is equally unable to show this, and therefore this test is equally defective in his cases and yet in the latter case, if the injured party sleep over his rights, he loses his remedy.

10. In the present case, we find that plaintiff purchased the patni in 1839. He admits that, in regard to those cultivated lands, he has never received rents from the ghatwals, who hold them, rightly or wrongly, as part of their ghatwali tenure. In fact, he admits that he has exercised no right of ownership over them for more than twelve years. He alleges that his predecessor did collect rents from the ghatwals, which they ceased to pay on his purchase of the patni. Why did he sleep over his rights if they ever were in existence?

11. It may be said, however, that this is not a suit for possession. The form of the suit matters very little, except to show the ingenuity of the party bringing it. In substance it is to recover possession; but instead of bringing his action for possession and mesne profits as against wrong-doers, the plaintiff assumes that the lands are his, and the defendant ghatwals recusant occupants, and therefore he brings his action to assess these tenures. Had the suit been brought in its present form against an ordinary zamindar, the Law of Limitation could have been as effectually pleaded as if the suit had been to recover possession; and as plaintiff by his pleading shows that he has been out of possession for more than twelve years, his suit would have been held to be barred. In what respect is Government holding the ghatwali tenure in its own right as zamindar, in a different position from an ordinary zamindar? Government, it appears to me, as zamindar, has all the rights and privileges of an ordinary zamindar, and the laws applicable to suits brought against the latter are equally applicable to suits against the former. The present suit brought for assessment is simply an attempt to evade the Law of Limitation, and, if effectual now, may be used in all cases, I would, therefore, confirm so much of the order of the Judge as relates to the cultivated lands.

Trevor, J.

12. The question before us in this case is a simple one,--viz. whether the Statute of Limitation bars the claim on the plaintiff''s own statement of his case or not.

13. (After stating the facts.)--Had all the lands been under cultivation, and the zamindar in possession, or had Government pleaded that it had, by the receipt of rents, exercised the right of ownership continuously over the whole of it, this possession being adverse to the plaintiff, it would have been for the plaintiff to show that he had been in possession within twelve years prior to the date of suit, and, failing on this point, his suit must have been dismissed. But such is not the state of the present case. The Government pleader admits that the land in dispute is partly cultivated and partly jungle, and that he gets a quit-rent from the ghatwals for a large quantity of land; and that he is unable to say whether this is the portion of the land on which the quit-rent was fixed or not,--that is, he is unable positively to assert an adverse possession to the defendant. Now, as regards the uncultivated land, there seems to me to be no doubt that there was no possession accompanied by an exercise of the right of ownership in any one, either in the plaintiff or in Government. The ghatwals'' possession alone is not adverse to the plaintiff, they being under-tenants. It follows that, for this portion of the claim, the case must unquestionably be remitted for re-investigation as to whether the uncultivated land formed portion of the lands made over to the Government in 1802, or not. If it did, the plaintiff''s suit must be dismissed; whereas if it did not, he must obtain a decree.

14. Again, as to the cultivated land, as Government is unable to assert that these lands are those on which quit-rents of the ghatwals were fixed, and consequently those on which it has continuously exercised the right of ownership, the mere fact

of the ghatwals having taken possession of and cultivated them cannot, by limitation, bar the right of either zamindar. In this state of things, it seems to me that no application of the Statute of Limitation on the pleadings can be made; but this portion of the case, as well as that regarding the uncultivated lands, must be tried upon its merits, the real issue being, are the cultivated lands in dispute within the estate of plaintiff, or the ghatwali estate of Government, as settled in 1802? The plaintiff alleges that his predecessor in the patni always collected rents from these lands. If he is by evidence able to prove this, it will go far to establish his title to them, as on the part of Government it is not asserted that these particular lands have ever been subjected by it to assessment. On the view of the case expressed above, the whole case should, in my judgment, be remitted for inquiry on its merits in the mode above suggested.

15. In consequence of the death of Mr. Justice Levinge before judgment, the case came before the Chief Justice (Sir Barnes Peacock), by whom it was referred to another Full Bench, under the following order:--

Peacock, J.

16. But for the opinion of the two learned Judges (Mr. Justice Trevor and Mr. Justice Norman), I should have entertained no doubt or difficulty on the subject of this case. As to the cultivated lands, those learned Judges differ from Mr. Justice Loch and Mr. Justice Shumboonath Pundit. It appears to me that the decision of the 18th June 1860, which was passed by Mr. Justice Loch and Mr. Justice Bayley, in Collector of West Burdwan v. Watson S.D.A., 1860, 643, is perfectly correct; and following that decision, and the principle on which cases of this sort ought to be determined, it appears to me, if I can legally express an opinion upon the subject, that the decision of Mr. Justice Loch and Mr. Justice Shumboonath Pundit, as to the cultivated lands, is correct; but I unfortunately differ with those two learned Judges with regard to the uncultivated lands, because it appears to me that there may be a possession of uncultivated lands or jungle, just as much as of cultivated lands. Take the instance of tea gardens in Cachar or Assam. There is no doubt that persons have bought land from Government for tea gardens, who are in possession of the whole, notwithstanding large portions are jungle and wholly uncultivated. There may be great difficulty in proving the possession of uncultivated lands; and if there is any doubt as to who is in possession, the case would probably be determined in favor of the party who proves title; but if one party can prove that he has been in adverse possession of uncultivated lands for a sufficiently long time to bar the remedy of the person who has title, the case of the latter may be barred by limitation as to uncultivated land or jungle in the same manner and to the same extent as regards cultivated lands. Mr. Justice Loch says that it is very difficult to prove the possession of uncultivated lands, and Mr. Justice Shumboonath Pundit is of the same opinion. But although such a difficulty may exist, it does not follow that it is insurmountable. Therefore, if I could express an opinion as to whether the case should be remanded,

I should remand it, if at all, as to the uncultivated lands, to try first whether the ghatwals had or had not adverse possession of the uncultivated lands for a period exceeding twelve years before the commencement of the suit, and should hold that, if the possession by the ghatwals for twelve years before the institution of the suit should be established, the plaintiffs would he barred with regard to the uncultivated lands just as much as with regard to the cultivated lands. If neither party should be proved to have had actual possession, or to have exercised right such as would amount to possession, or from which possession might be inferred, the question of title would have to be gone into. This would be the case if the cause were remanded for re-trial as to the uncultivated lands, but I am not sure that it will not turn out that the lower Courts have found as a fact that the ghatwals were in possession of the uncultivated lands. This question, however, I cannot enter into as a fifth Judge, the four other Judges not differing as to the uncultivated lands.

17. If I were to give judgment as to the cultivated lands, and an application for a review of judgment were to be presented as to the uncultivated lands, as the pleader for Government has proposed, I could not express an opinion on that matter, because I should be no party to the judgment as to the uncultivated lands: as to those lands, the judgment would be that of the four Judges alone. But upon looking at section 23 of Act XXIII of 1861, I doubt whether I have power to express an opinion at all in the case. That section enacts as follows:-- "If, when the Court consist of only two Judges, there is a difference of opinion upon the evidence in cases in which it is competent to the Court to go into the evidence, and one Judge concur in opinion with the lower Court as to the facts, the case shall be determined accordingly; if in a Court so constituted" (that is, a Court composed of two Judges), "there is a difference of opinion upon a point of law, the Judges shall state the point upon which they differ, and the case shall be re-argued upon that question before one or more of the other Judges, and shall be determined according to the opinion of the majority of Judges of the Sudder Court by whom the appeal is heard." The Court by whom this appeal was heard was not a Court consisting of only two Judges. It was a Court consisting of five, who, if one of them had not unfortunately died, would have considered and passed their judgment on all the points brought forward. Mr. Justice Levinge might have expressed an opinion as to the uncultivated lands which I cannot. I therefore do not stand in the same position as he did. It is not a mere technical objection, because, when the Judges take time to consider and consult together, it is possible that the opinion and argument of one Judge might to some extent influence the opinion of another Judge. It might have been that Mr. Justice Levinge might have convinced Mr. Justice Loch and Mr. Justice Shumboonath Pundit that, although there might be great difficulty in proving possession of uncultivated lands, the case should not necessarily be remanded to try the question of title, until the question of possession had been first determined; or that the fact of possession of the uncultivated lands had been decided by the lower Courts, and was not open to be reversed on the special appeal. When the case came before me

to refer it to a fifth Judge, in consequence of the death of Mr. Justice Levinge, I thought that that would be the proper course. It did not occur to me then that I should not be in precisely the same position as that learned Judge, and to point out in consultation and express my views on those points of the case upon which there was no difference of opinion amongst the other four Judges. But upon further consideration, it appears to me that this is not a case within section 23 of Act XXIII of 1861, and that the case ought to be re-argued before five Judges, of whom I will form one. I think that the other four Judges ought to be the four who heard the case before.

18. Therefore, without expressing any decided opinion on the points upon which the learned Judges either differed or agreed, because my mind is open to be influenced upon further argument at the bar, or by the opinions and arguments of my learned brothers, I merely decide that this is not a case for a single Judge u/s 23 of Act XXIII of 1861, and that it must he re-heard before a Full Bench of five Judges. I will arrange and fix an early day for the re-hearing of the case before five Judges as above stated. I am very sorry that the mistake should have occurred, and that the learned counsel should have had the trouble to reargue the case fruitlessly.

19. The case was accordingly re-heard before such Full Bench, when the following judgments were delivered:--

Peacock, C.J.

20. There are two questions in this case: firstly, as to the cultivated lands, of which, it is admitted, the defendants were in possession; and, secondly, as to the uncultivated lands. It appears that the ghatwali lands were originally part of the zamindari of Bishenpore; and for some reasons (as to which it is not necessary now to inquire) a portion of the lands were given up by the zamindars to the Government, and the Government gave up a portion of the revenue assessed on the zamindari.

21. Upon a survey of the lands which are now in dispute, both the cultivated and uncultivated lands were included as belonging to the Government and in the possession of the ghatwals.

22. The owners of the patni of Bishenpore claim to set aside that survey, and to declare that they were entitled to the lands, both cultivated and uncultivated. They admit that, as to the uncultivated lands, they have never been in possession or in the receipt of any rents since the year 1839, when they became purchasers of the patni under a sale for arrears. But they say that, from that time, the defendants (the ghatwals) fraudulently or dishonestly refused to pay them rents as they did to their predecessors. The defendants say that they never paid any rent for the lands to the patnidar of Bishenpore; that that allegation is not true; that they hold now, and have held these lands since 1839, without paying any other than the quit-rent which they paid to Government. It is an important question (as regards not only the

Government, but as regards the ghatwals also) whether, in respect of lands which the defendants claim to have held as part of these ghatwali tenures, they are now to be called upon to pay, in addition to the quit-rent, a rent to the patnidar, on the ground that they are a portion of the lands of the patni of Bishenpore. If the plaintiff''s can make out that the ghatwals did pay rent to their predecessors, such payment as against the ghatwals would be evidence that the lands in respect of which the payment was made were part of the patni of Bishenpore. But the ghatwals could not legally transfer the right to the lands, if they really were part of the ghatwali estate, from the Government to the patnidar, by paying rent to the patnidar of Bishenpore, in addition to the quit-rent. Therefore, as regards the ghatwals, it is necessary to inquire whether they did or did not pay rent to the patnidar prior to 1839. If they did, such payment as regards the ghatwals would be evidence in favor of the owners of Bishenpore; but as against the Government, the mere fact of paying the owners of Bishenpore would not be sufficient. The first issue that ought to be tried as to the cultivated lands is whether the defendants (ghatwals), or those under whom they claim, paid rent for any and what part of the cultivated lands to the predecessors of the plaintiff; and next, whether the cultivated and uncultivated lands, or any and what part of them, formed part of the patni of Bishenpore. Then as to the uncultivated lands, it is said that the defendants were not in possession. But the survey shows that they are in possession, and that those lands are part of the ghatwali lands; and the action being brought to set aside the award made in that survey, there is a prima facie case in the defendants'' favor that they were in possession of those lands. Now, although it may be difficult in many instances to prove the actual possession of jungle lands, it is possible to do so.

23. The civil law requires different kinds of proof, according to the nature and quality of the things to be possessed. It is laid down as follows in Domat''s Civil Law:--

One may possess corporeal things, whether they he moveable or immoveable; but according; to the differences their nature, the marks of the possession of them are different. Thus, one may possess movables by keeping them under lock and key, or leaving them otherwise at one''s disposal. Thus, one possesses cattle either by shutting them up or giving them to be kept. Thus, one possesses a house by dwelling in it, or having the keys thereof, or trusting it to a tenant, or by building in it. Thus, one possesses lands by cultivating them, reaping the fruits, going or coming through them, or disposing thereof at pleasure.

24. The marks of possession, therefore, with regard to property depend on the nature of the property. It is not necessary, in order to prove possession, to prove an actual bodily continuous possession.

25. Domat says:-- "Although possession implies the detention of what we possess, yet this detention ought not to Page 847, para. 2132, be so understood as if it were necessary to have always, either in our hand or in our sight, things of which we have

the possession. But after possession has been once acquired, it is preserved without an actual possession."

26. The exercise of such acts of ownership over jungle lands as would ordinarily he exercised over property of that nature would he evidence of possession. For instance, if it were proved that the ghatwals were in the habit of cutting or preserving the wood, gathering wax or wild honey, collecting sticks, lac, &c., may all be evidence of acts of ownership or possession, and those who have to deal with the facts of the case must determine whether the acts were referable to the right of property or possession, or acts of mere right or casement independent of possession, As, therefore, there may be possession of uncultivated land, as well as of cultivated land, the question must be tried whether the defendants were in possession of the uncultivated lands from the year 1839, or for a period exceeding twelve years next before the commencement of this suit; and if they had possession of the uncultivated lands, or of any portion of them, whether they ever paid rent for them to the plaintiff or his predecessors.

27. I think these are the only issues which it will be necessary to try for the purpose of coming to a correct conclusion as to the final decision of this case. But as these questions of fact may be difficult to be dealt with upon the evidence, I think it will be well to direct the Judge to take the case on to his own file, so that, in case of necessity, it may come up to this Court as a regular appeal, and be heard and determined as well on the questions of fact as on the questions of law.

28. The issues are as follow:--

1. Whether the defendants (ghatwals), or those under whom they claim, paid rent for any and what part of the cultivated lands to the plaintiff or his predecessors of the patni estate.

2. Whether the cultivated or uncultivated lands claimed, or any and what part of them, formed part of the patni estate of the plaintiff.

3. Whether the defendants (ghatwals) were in possession of the uncultivated lands, or of any and what part of them, from the year 1839, or for a period exceeding twelve years before the commencement of this suit.

4. Whether they paid rent for the same, or for any and what part of them, to the plaintiff, or the owner of the patni estate.

29. I should add that a tenant cannot prescribe against his landlord according to the English law or the civil law, nor, as I understand, according to the law as laid down in the Sudder Decisions.

Trevor, J.

30. When this case was last before the Court, I put in a written judgment, and I see no reason to alter the opinion therein expressed. It appears to me that the case

should be referred to the lower Court for inquiry on only one point,--viz., with whom is the title to the lands in dispute--is it with the plaintiff or the defendant?

31. The only party who could plead an adverse possession to the plaintiff is the Government. But it has never set up an adverse possession, and the mere fact of the ghatwals having been in possession, as tenants, cannot entitle them to do so. Such being the case, in my opinion the only point for enquiry is, as I have above stated, with whom is the title--with the plaintiff or the defendant? and I would send the case back for that purpose only.

Loch, J.

32. I still adhere to my former opinion. I think the suit is barred by limitation. The plea set up by the defendants, and taken together by the zamindar and the ghatwal, is a valid plea; and as the plaintiff admits that, as regards the cultivated lands, he has exercised no light of ownership for more than twelve years, he cannot bring his action to recover.

33. With regard to the uncultivated lands, however, there is not the same admission made, and therefore I think the case may go back again for the question of possession to be re-tried, as proposed by the learned Chief Justice. If plaintiff''s possession within twelve years be proved, it will go far to prove his title.

Norman, J.

34. I adhere to the opinion I originally expressed in this case. With reference to the arguments which have since taken place, it is necessary to add that, when the case was before the Court on the last hearing, Baboo Krishna Kishor Ghose admitted that the Government had not received rent specifically for those lands from the ghatwals, defendants, who were in possession. For the purpose of the plea of limitation, it must be assumed that these lands were within the limits of the decennially-settled estate of Bishenpore. I think that, when a person holds lands within a zamindari, but not under a zamindari title, in order to sustain the plea of limitation against the zamindar suing to assess, he must show a possession adverse to that of the zamindar. If he is a mere ryot, his possession is not adverse. Again, as a mere squatter, he cannot plead limitation. If the plea of limitation could be pleaded successfully, it would be on the ground that, from a twelve-year''s possession, it could be inferred that a rent-free tenure has been created within the zamindari. But such a grant, if actually made, would be invalid, and, as it appears to me, contrary to section 10, Regulation XIX of 1793. That, I believe, is the true ground of the decisions in cases like Sheikh Shafaetoollah v. Joy Kishen Mookerjee 7 Sel. Rep., 499, that the general Law of Limitation is inapplicable to the case of a person who proceeds to assess rent against another, holding under an alleged invalid rent-free tenure. In that case, and in Degumber Mitter''s case S.D.A. Rep., 1856, 617, it is said that the cause of action was a perpetually recurring one. I think that principle applies to the persons who are now found occupying lands within the

zamindari of Bishenpore. They themselves could not plead limitation in a suit to assess and declare the land to be mal lands. I think it makes no difference that they are holding adjacent lands under the Government. They say that the lands are within a zamindari belonging to the Government. Are they, or are they not?--that is a simple issue. It may be, as a general rule, that encroachments are to belong to the estate of the landlord under whom the encroaching tenant holds. But that is a presumption capable of being rebutted. It is by no means clear that there is such a presumption in favor of the landlord as against a stranger. Lord Campbell in Doe dem Baddeley v. Massey 17 Q.B., 376 says:-- "The principle of law must be that the lessee is estopped from denying that the whole premises are those which were demised to him. It would be strange to lay down that the tenant steals for the benefit of his landlord. If it was so taken, the landlord is thereby entitled as against the tenant who took, but not as against a third person." The zamindar of Bishenpore being liable to the payment of Government revenue in respect of these lands, it is exactly the same as if a contract existed with the Government. It appears to me that the Government cannot be in the position of being entitled to claim the Government revenue, and at the same time to plead adverse possession as against the zamindar in respect of these lands. I am therefore prepared to say that the Government cannot set up an adverse possession. It is clear that the Government never did, in fact, assert any adverse title by taking rent for, or specifically asserting a claim to, those lands as against the zamindar. Had the Government actually asserted an adverse title to the lands as being part of the ghatwali lands more than twelve years ago, the question would have been different. As to the first issue proposed by the learned Chief Justice (namely, whether the ghatwals, or those under whom they claim, paid rent for the cultivated lands to the plaintiffs or their predecessor), I see no objection to it; and if that issue is fixed in favor of the plaintiffs, and it is shown that the ghatwals ever paid to the now plaintiffs or their predecessors, they cannot convert what was once a tenancy into an adverse possession. Nor have I any objection to the second issue whether the cultivated and uncultivated lands ever formed part of the plaintiffs'' patni estates. The third and fourth issues, whether the defendants were in possession of the uncultivated lands for more than twelve years before suit, and whether they ever paid for the same to the patnidar, are material, because, if found against the defendants, they dispose of the case, even if the views I have enunciated are adopted by the majority of the Court.

Pundit, J.

35. The ghatwals hold a separate estate, so long as it is not proved that they were the ryots of the plaintiff or of his predecessor, and they have a right to plead adverse possession and limitation against the plaintiff. That the ghatwals were originally allowed to hold, as ghatwals, lands in quantity less than they are now holding, would not alter the position of things, or affect the rights of the defendants. When the ghatwals pay only quit-rent in a lump sum for the ghatwali estate, Government may, without any prejudice to the rights of the ghatwals, say that it

cannot declare that, for any particular parcel, we get or do not get the quit-rents. Whether the lands in dispute are parts of the original ghatwali tenure, or represent the encroachments of the ghatwals upon the zamindari lands, it does not alter the state of things. Government can hold adversely to the plaintiff through the ghatwals, if they have held the lands in dispute as ghatwals. As regards the cultivated lands, plaintiff admits that he has not received any rents for them since his purchase, and so, to prove anything on this point favorable to the plaintiff, the onus is upon him. As to the uncultivated portion, if the defendants like to plead the adverse possession of a property which may be legally held by plaintiff, without the exercise of any ordinary proprietary rights, the defendants must prove that their alleged possession of these lands is such as can legally and reasonably be called adverse to the plaintiff. I have no objection to an order of remand directing that for lands cultivated more than twelve years ago, if the plaintiff likes, he may prove that his predecessors had received rent from the defendants now in possession or their predecessors; and if he can prove that, then those who held once as tenants cannot be allowed to hold for themselves or others adverse to their former landlord. It may also be directed that, with regard to lands brought into cultivation within twelve years, there would not be any question of limitation. As to the uncultivated lands, if the defendants can prove that they have held possession of these in such a manner as to make their holding actually adverse to the plaintiff, then limitation will apply to the claim for this portion. If for both, or any portion of them, limitation does not apply, then for the same reason the title of the plaintiff is to be inquired into. The case is to go to the Zilla Judge, and not the Principal Sudder Ameen, that the decision arrived at by the lower Court may be appealable to this Court as a regular appeal.