

## Monmotha Nath Mitter and Others Vs Anath Bundhu Pal and Another

**Court:** Calcutta High Court

**Date of Decision:** Aug. 19, 1919

**Acts Referred:** Bengal Tenancy Act, 1885 " Section 161

**Citation:** 61 Ind. Cas. 469

**Hon'ble Judges:** N.R. Chatterjea, J; Greaves, J

**Bench:** Division Bench

### Judgement

1. These cases were remanded to the Court below for distinct finding upon the following points with respect to the lands of Schedules ka and

kharist, "whether any of the namas in Mouzah Baliari mentioned in the chalan of 1275 (Exhibit P 26) OR any of the jamas in Mouzah Bankipore

mentioned in the chalan of 1276 (Exhibit P 27) can be identified with the jamas mentioned in the khatian or other papers prior to the Permanent

Settlement. Whether the land of such jama can be traced and identified, Second, whether the rent or rate of rent of any such jama has remained

unchanged from the time of the Permanent Settlement. Third, whether, upon the facts proved and the circumstances of the case, any presumption

arises with respect to any such jama that the rent or rate of rent has remained unchanged from the Permanent Settlement, and, if so, whether such

presumption has been rebutted.

2. The learned Subordinate Judge has carefully considered the jamas mentioned in the chalans, Exhibits P--26 and P--27, one by one, and has

come to the following conclusion: "The facts above discussed show that the small jamas of the chalans, Exhibit P--26 and P--27, cannot be

identified with the lands and jamas described in Exhibits VI and V--2, the khatians of 1190 or any other papers existing before the Permanent

Settlement. In the case of a few of the jamas, the areas of lands held by the tenants in 1275 did agree with the areas held by them respectively in

1190, i.e., before the Permanent Settlement. But that fact alone is not enough to enable us to trace the disputed lands of Schedules ka and kha and

identify them with the lands of the jamas existing before the Permanent Settlement. The defendants did not rely upon any other documents to prove

their contention. The result is, the first question raised in respect of the lands of ka and kha Schedule should be answered in the negative.

3. With regard to the second point, the learned Subordinate Judge has found that in not a single case the defendants succeeded in satisfactorily

showing that the rent or rate of rent remained unchanged from the time of the Permanent Settlement. He has also found that no presumption arises

with respect to any; jama that the rent or rate of rent has remained unchanged from the time of the Permanent Settlement, and that, in the case of

some of the "jamas mentioned in Exhibit P--27, the presumption, if any has been rebutted by the plaintiffs.

4. The learned Pleader for the appellants has not attempted to show that the findings are wrong.

5. He admitted that the evidence adduced by the defendants is not sufficiently satisfactory to identify the small jamas with the consolidated jamas

mentioned in Exhibits P--26 and P--27, or that the rents have all along been uniform from the time of the Permanent Settlement, or that there is

uniform payment of rent BO as to raise any presumption u/s 50 of the Bengal Tenancy Act, We accept the findings arrived at by the Court below,

as well as the reasons upon which they are based, and which are given in detail in its judgment,

6. The learned Pleader for the appellants, however, has raised two points in connection with the lands of Schedules ka and kha. The first is, that

Ramjan and his predecessors having been in possession for such a length of time such possession constituted an incumbrance, and that the

possession of the defendant himself, since his purchase, for over 12 years as a trespasser was an incumbrance which it was necessary for the

plaintiffs to annul under the provisions of Section 167 of the Bengal Tenancy Act.

7. With regard to the possession of Ramjan, we do not see how such possession can be held to be an incumbrance, Ramjan held possession as a

tenant, and, however long such possession might have been held, it could not have been adverse. The only question was, whether the tenancies

were permanent or not, and no question of adverse possession could arise with regard to the lands of Schedules ka and kha, so long as they were

in the possession of Ramjan and his heirs and before the sale to the defendants.

8. With regard to the possession of the defendant himself since his purchase, the question was dealt with in our remand order, in deciding the 7th

issue. It was pointed out that, although the defendants obtained possession of the lands in July 1899 (his purchase was on the 9th March 1900),

and the suit was brought on the August 1911, i., e., after mere than 12 years, the plaintiffs purchased the patni at the rent sale on the 15th August

1906 which was within 12 years of the suit, and that the adverse possession (if any) of the defendant was arrested by the sale of the patni on the

15th August 1900 which was only 7 years from the time when defendant obtained possession, and his title had not been perfected before the patni

was sold. We accordingly held that the suit was not barred by limitation and, for the same reasons, we hold that the possession of the defendant

himself did not constitute an incumbrance,

9. The next point taken is, that the defendant was recognised as tenant by the dar patnidars. Mr. Sirkar for the plaintiffs objects to this question

being gone into, as it was not raised before remand, the only recognition pleaded being that alleged to have been made by the plaintiffs after their

purchase. So far as the marfatdari rent receipts granted to the defendants by the dar--patnidars are concerned, they were dealt with by us in our

remand order, and we held as follows: ""The effect of the use of the word marfatdar" may vary according to the circumstances of each case on a

consideration of all the facts of the case, but having regard to the fact that rent receipts were asked for in the name of the purchaser, and the

landlord expressly refused to grant receipts in his name and gave receipts in the name of the old tenant (the purchaser being described merely as

marfatdar) negatives any idea of recognition of the purchaser as the tenant."" That disposes of the contention.

10. We now come to the lands of Schedule ga and gha, With respect to these lands, the Court below was asked to come to findings upon the

questions, first, whether the defendant and his predecessors--in title had been in possession for 12 years of the lands in Schedules ga and gha prior

to the date of the sale at which the plaintiffs purchased the patni, and was such possession adverse? Second, whether such possession, if any,

commenced from before or after the creation (a) of the patni, (b) of the dar-patni and (c) of the ijara p The Court below has recorded its findings

with respect to the plots separately.

11. Two main questions have to be considered in connection with these lands. The first is, whether Zemindar was out of possession of the lands

from before the creation of the patni, and was the possession of the defendant adverse; and the second is whether the adverse possession of the

defendant, even if it commenced after the creation of the patni, constituted an incumbrance which the plaintiffs were bound to annul under the

provisions of Section 167 of the Bengal Tenancy Act before they can succeed.

12. Before dealing with these questions it should be mentioned that there is no doubt that there were lakherai, debutter and brahmottar lands in the

village at the time of the Permanent Settlement. The chittas of 1190, Exhibit V, printed at pages 397 to 422 (Book No. II), deal with debutter and

brahmottar lands. Some of these lands were purchased by the Naskara. For instance, the chitta of 1190 (Book No. II, page 417) mentions 5

bighas 13 cottas of brahmottar land in the name of (worm eaten) Ram Sidhanta and Kirparam Sidhanta, and the kobala dated the 16th Ashar

1209(Btfok No. II, page 295) shows that 5 bighas 13 cottas of brahmottar lands were sold by Kriparam Sarma to Habib Naskar. The chitta

(Book No. II, page 415) mentions 1 bigha 19 cottas as brahmottar and the kobala Exhibit O 57 dated the 22nd Kartik 1283 (Book No. II, page

314) recites that 18 cottis 41/2 chatahs out of one plot of brahmottar land in the name of Ram Ram Bapuli 1 bigha 19 cottas were purchased by

one Dosh Mahmud Molla, and which, together with some other land, were sold by Tomijudin Nacker to Ramjan Naskar. The chitta mentions

several plots of brahmottir lands (without sanad) in the name of Jagannath Tarkapanchanon of Tribeni, one of them being 1 bighi 8 cottas (Book

No. II page 411) and the kobala dated the 19th Magh 1207 (Book No. II, page 311) shows that Jagannath, in exchange for 1 bigha 2 cottas first

class lands given to him by Samsuddin Nacker, gave the latter 1 bigha 8 cottas of second class brahmottar lands. The chitta mentions 4 bighas 19

cottas of lands belonging to Bishalakshmi Thakurani shebait Basudeb (Book No. II, page 407), and the kobala Exhibit 05) dated the 15th Falgoon

119 (Book No. II, page 312) shows that Basudeb sold 4 bighas 19 cottas of land which he possessed as the shebait of the Goddess Bisalakshmi

Thakurani. The cutta (Book No. II, page 406) mentions 2 bighas 8 cottas as debutter of Sri Iswar Daskhin Ray Thakur in the name of Radha

Charan Sarkar, and the kobala Exhibit O--40 dated the 21st Magh 1183 (Bonk No. II, pige 297) shows that Radha Charan Sarkar sold 2 bighas

5 cottas out of the lands of debuitar lands to Keamuddi Nacker. These documents go to show that, prima facie, all the lands of the village were not

mil not in the possession of the Zemindar.

13. With regard to the first question, it is cantended on behalf of the plaintiffs that the defendants never set up any case of adverse possession from

before the creation of the patni. It appears, however, from the written statement that the defence was two fold. In the first place, they pleaded that

the lands did not appertain to Taluk No. 156 owned by the plaintiffs. So far as that plea was concerned, the Commissioner found on enquiry that,

with the exception of some plots, the rest appertained to (he Zemindari, and we have already dealt with the matter in our order of remand. In the

next place, however, they pleaded (see paragraph 10 of the written statement) that if the lands were held to be vial, Ramjan Nacker and his heirs

having enjoyed and possessed all those properties for long upwards of 12 years adversely to the plaintiffs, they (Ramjan Nacker and his heirs) had

acquired good title thereto adorning from adverse possession, and that the defendant had acquired a good title on the basis of purchase from them.

In the 11th paragraph the question of limitation was raised. It is true that the defendant did not expressly state that the adverse possession

commenced from before 12fcl (the creation of the patni), but the thoka of 1280 shows that at any rate some of the lands were held by Ramjan in

that year which was before the creation of the patni. Besides, there is a general statement in the 10th paragraph of the written statement that the

plaintiffs never had any right to or concern or possession of the lands of Schedules ga and gha. The Zemindar and the former patnidar and dar

patnidar are also meant to be included in the word plaintiffs,"" as Ramjan died before the ""plaintiffs"" purchased at the rent--sale.

14. It is to be observed that the question of limitation was raised in the fourth issue in a qualified way. But the question of limitation was gone into

by the Court below, and in fact that Court dismissed the claim with respect to the lands of Schedules ga and gha in the ground of limitation before

remand.

15. The fifth issue, as amended, raised the question. ""Are the lands of Schedule ga and gha the mal lands of the plaintiffs?"" And the sixth issue was

have the defend ants any right to the lands described in Schedules ga and gha of the plaint by advene possession against the plaintiffs?"" We thick

that, in these circumstances the question of possession before the creation of the patni was raised though not expressly. Evidence was adduced on

both sides on the point; and our remand order directed an express finding on the question of adverse possession.

16. That being so, the question arises whether it is for the plaintiffs to show that the lands of Schedules ga and gha of which they seek to recover

possession, as part of the pitni purchased by them, from the defendants as trespassers, were in the possession of the Zemindar when the patni was

created in 1281; or whether it ""lay upon the defendant to show that their possession commenced from before the creation of the patni. Upon this

question we may refer to the case of Kalikananda Mukherjee v. Bipro Das Pal Choudhurji 26 Ind. Cas. 436 : 19 C.W.N. 18 : 21 C.L.J. 265,

where the plaintiff, a purchaser of a patni taluk at a sale held in execution of a rent--decree under the Bengal Tenancy Act, brought suits against the

defendants within 12 years from the date of his purchase for declaration of his title to the lands held by them within the patni taluk, and for recovery

of possession thereof. It was held in that case that the plaintiff, before he could succeed, must prove that the proprietor was in possession when the

patni was created, and that where the proprietor is cut of possession he cannot, merely by the devise of the creation of a subordinate taluk, arrest

the effect of the adverse possession which had already commenced to run against him and such possession would be effective not only as against

the subordinate tenure holder, but also as against the superior proprietor. That case is bought to be distinction on the ground that there it was found

that the Zemindar was out of possession when he created the patni.

17. It is true that in that case the learned Judges observed: The District Judge be not found that in the cases before us the adverse possession of the

defendants and their predecessors commenced after the creation of the patni. On the other hand, there is ample evidence that the adverse

possession of the defendants and their predecessors commenced before the creation of the patni. There are traces on the record to show that there

had been adverse assertions of hostile title before the patni title itself was created". But the decision was not based on that ground. It appears from

the report of the case See Kalikananda Mukherjee v. Bipro Das Pal Choudhri 26 Ind. Cas. 436 : 19 C.W.N. 18 : 21 C.L.J. 265, that, after

Counsel for the defendant appellant read the judgment, the Court sailed upon the Vakil for the respondent (the plaintiff) to argue why the suits

would not be barred if the plaintiff respondent could not prove that the Zamindar was in possession of the disputed lands before 1807. The learned

Judges observed: "On behalf of the plaintiff--respondent, however, it has been suggested that there is some evidence of ancient possession of the

disputed land by the proprietor of the estate. But before we deal with the evidence, to which allusion has been made in the course of argument, it

may be pointed out that the plaintiff, before he can succeed, must prove that the proprietor was in possession when the patni was created. In order

to establish that the proprietor was in possession at that time it has been argued that; we should presume that possession follows title. In our

opinion that doctrine has no application to case of this description. No doubt, it was pointed out by their Lordships of the Judicial Committee in the

case of Runjeet Ram Panday v. Gouardhun Ram Panday 20 W.R. 25 (P.C.), that in the decision of the question of imitation if there is conflicting

evidence on both sides, the Court may presume that possession was with the party whose title has been established. But it does not follow that,

when the plaintiff has to establish possession at a particular point of time, he is entitled to call upon the Court to presume that, because his title has

been established possession must be presumed to have been with the holder of the title at that specific period of time", and then referred to certain

cases on the point. Had the decision proceeded upon the ground that there was ample evidence of defendants' adverse possession before the

creation of the patni, it would have been unnecessary to consider the question whether the plaintiff was bound to show that, the Zamindar was in

possession before the creation of the patni.

18. Reliance was placed on behalf of the plaintiff upon the decision of the Judicial Committee in the case of secretary of State for India v. Chelikani

Rama Rao 35 Ind. Cas. 902 : 20 C.W.N. 1311 : 31 M.L.J. 324 : (1916) : 2 M.W.N. 224 : 39 M. 617 : 14 A.L.J. 1114 : 20 M.L.T. 435 : 4

L.W. 486 : 18 Bom. L.R. 1007 : 25 C.L.J. 69 : 43 I.A. 192 (P.C.). In that case their Lordships observed that nothing is better settled than that

the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession; and it would

be contrary to all legal principles to permit a squatter to put the owner to a negative proof that the possession of the squatter was not long enough

to fulfill all legal conditions. There is no doubt that that is so. But the person who set up the--right by adverse possession in that case was the

plaintiff. Their Lordships observed:

The position of the objectors to afforestation in this case was in law the same as that of persons bringing a suit in an ordinary Court of Justice for a

declaration of right by adverse possession, with this difference only that the period of twelve years provided by Article 144 is extended by Article

149 to sixty years.

19. We do not think that the decision of the Judicial Committee lays down any principle contrary to that laid down in the case of Kalikananda

Mukherjee v. Bipro Das Pal Choudhri 26 Ind. Cas. 436 : 19 C.W.N. 18 : 21 C.L.J. 265, referred to above. The latter case, we understand, has

been appealed to Privy Council, but so long as the decision is not set aside, we should follow it. The lands were not waste or jungly lands The

Court below found that the lands" were cultivated and homestead lands, tanks and other things, and were capable of possession in the ordinary

modes, The defendants and their predecessors in--title have been in possession of the lands from before the plaintiffs," purchase of the point and

the plaintiffs are suing to eject them from the lands as trespassers. Had the Zemindar brought the suit for possession and had the defendant pleaded

that the Zemindar was out of possession he could not have succeeded without adducing some evidence that he was in possession. The plaintiffs

cannot be in a better position than the Zemindar merely because they are purchasers at a sale for arrears of rent. We think, therefore, that it was

for the plaintiffs to show that the Zemindar was in possession of these lands before the creation of the patni, and that the possession of the

defendants commenced after the patni came into existence, or that such possession was not adverse. There is no evidence of possession before the

creation of the patni. One of the plaintiffs was examined in the case, and he admitted that there is no collection paper showing realization of rent in

respect of these lands. It is true that the Nackars held many mal lands (the lands of Schedules ka and kha) as tenants under the Zemindar, but that

fact alone is not sufficient to shift the onus of proof upon the defendants unless it appears that any particular plot of land of Schedules ga and gha is

intermingled with or surrounded by mal lands, and we have been referred to only two such cases. The question, moreover, is not whether the lands

are lakhera, but whether the Zemindar was in possession before the creation of the patni. It is found, however, by the learned Subordinate Judge

that many of the plots were mentioned in a Road Cess Return (Exhibit U) filed by Ramjan Nackar on the 22nd July 182. That Return was filed in

respect of lands held by Ramjan under the Zemindar. The lands entered in the Return prima facie were not held by Ramjan in a right adverse to the

Zemindar, and, unless the defendant can satisfactorily establish that the inclusion of the land was erroneously made, we must hold that the lands

entered in the Return were not held adversely to the Zemindar.

20. The next question is, whether the adverse possession of the defendants in respect of any of the lands subsequent to the creation of the patni

constituted an incumbrance which it was necessary for the plaintiffs to annul under the provisions of Section 167 of the Bengal Tenancy Act.

21. It is found that there is no evidence of adverse possession before the thoka of 1295. The sale at which the plaintiffs purchased war, no doubt,

more than twelve years after 1295. But the dar-patni was granted in 1302, i.e, 7 years after the defendants' adverse possession commenced. The

interest of an adverse possessor is an incumbrance only when the adverse possession has continued for the statutory period See Gokul Bagdi v.

Debendra Nath 11 Ind. Cas. 453 : 14 C.L.J. 136, and Satish Chandra v. Munjamali Debt 15 Ind. Cas. 869 : 17 C.W.N. 340,. Adverse

possession in the present case having commenced from 1295, had not ripened into an incumbrance when the dar-patni was created in 1302, The

defendants, no doubt, continued in possession even after the grant of the dar-patni and the statutory period was completed while the mahal was in

the hands of the dar-patntdar. The plaintiffs have annulled the dar-patni according to the provisions of Section 167 of the Bengal Tenancy Act, and

the incumbrance of the defendants (by virtue of adverse possession) was upon the dar-patni and not upon the patni. It is accordingly contended on

behalf of the plaintiffs that they were not bound to annul any incumbrance on the dar patni under the provisions of section 167 of the Bengal

Tenancy Act. On the other hand, it is contended on behalf of the defendants that it is necessary to annul all incumbrances whether created by the

patnidar or by any other subordinate tenure holder by service of notice u/s 167, and we were referred to the case of Mafizuddin Sardar v.

Ashutosh Chukerbutty 5 Ind. Cas. 189 : 14 C.W.N. 352 : 11 C.L.J. 140. Now, u/s 161 of the Bengal Tenancy Act the term "incumbrance, used

with reference to a tenancy, means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in

limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section.

22. The incumbrance, therefore, must be some interest created (or suffered to be acquired, as in the case of adverse possession) by the tenant on

his tenure or in limitation of his own interest therein, and we do not think that the words refer to the creation of an interest by a tenure-holder of any

inferior grade. In the case of Mafizuddin Sardar v. Ashutosh Chukerbutty 5 Ind. Cas. 189 : 14 C.W.N. 352 : 11 C.L.J. 140, referred to above,

the purchaser of a tenure at a rent-sale annulled a subordinate interest leaving untouched a superior interest immediately subordinate to the interest

purchased by him. Obviously, he could not do so, and it was observed that, where there is a succession of subordinate tenures, the purchaser, if

he chooses to exercise his power to annul any incumbrance at all, must begin with the highest subordinate tenure and may proceed downwards as

far as he chooses, but he cannot elect arbitrarily any link in the chain and destroy it while he allows those above it to remain unaffected. The latter

proposition cannot be disputed and with regard to the observation that the "purchaser, if he chooses to exercise his power to annul any

incumbrance at all, must begin with the highest subordinate interest and may proceed downwards as far as he chooses," it is to be noted that the

learned Judges do not say that notices u/s 157 of the Bengal Tenancy Acts have to be served upon all these subordinate tenure-holders, The

purchaser must annul the incumbrance created by the tenant, i.e., the highest subordinate interest, by service of notice u/s 167 of the Bengal

Tenancy Act and, he may, if he chooses, avoid any tenure of inferior grade by a suit if necessary, or he may affirm such tenure. The case does not

lay down that the purchaser must serve notices u/s 167 upon all grades of subordinate interests. There may be a chain of subordinate interests

under a patni, such as dar-patni, se-patni, mokurari, dar-mukarari, to mokurari and there may be incumbrances (adverse possession for the

statutory period) on each of these various grades of subordinate tenures, and we do not think that the purchaser of the patni at a rent-sale is to

find out all these interests and serve notice upon each of them u/s 167. The sub-tenancy created by the tenant (in this case the patnidar) is the dar-

patni; that is an incumbrance u/s 161 and that only has to be annulled under the provisions of Section 167. The notice under that section upon the

dar-patnidar is operative upon incumbrances created by the dar-patnidar or the holders of interests subordinate to him, which are carved out of the

dar-patni. What is required to be annulled u/s 167 is the sub tenancy created by the patnidar i.e, thadar patni as it was created, and which would

include all the interests created or carved out of it. In the case of Makhan Das v. Ram Chandra 18 Ind. Cas. 372 : 17 C.W.N. 1064, where the

purchaser at a sale for arrears of rent purchased a patni, and annulled a dar-patni under the provisions of Section 167, but did not take any steps

to annul a ge-patni created by the dar-patnidar, it was held by Holmwood and Chapman, J.J., that the extinction of the dar-patni necessarily

carried with it the extinction of the ge patni which is not a protected interest under the definition in Section 160 of the Bengal Tenancy Act.. The

objection in that case was taken by the tenant under the ge patnidar, and it may be contended that the question whether the se-patni was

extinguished or not would depend upon the purchaser of the patni, because he might choose to affirm the to-paini. But, probably, the learned

Judges had in view the fact that the purchaser of the patni in the previous suit had sought to avoid the se-patni also, though the latter was

subsequently dismissed from the action for some supposed defect of parties. However that may be, we agree with the principle laid down in that

case that the se-patni is extinguished with the extinction of the dar-patni, provided, of course, the purchaser chose to disaffirm it, and we are of

opinion that any incumbrance created by any tenure--holder of an inferior grade can be avoided by a suit within 12 years from the date of the sale

being final, under Article 121 of the Limitation Act, such interest coming into existence after the creation of the patni. In this view it is unnecessary

to consider whether a person who by adverse possession has acquired a statutory title against a tenant, becomes a co-sharer with the tenant, and

whether the interest of such a person passes at a sale of the tenure.

23. We now proceed to deal with the particular plots of lands comprise in Schedules ga and gha. The learned Subordinate Judge has dealt with

each plot separately and recorded his finding with respect to each. He has found that a large number of the plots were included in the Road Cess

Return(Exhibit U) filed by Ramjan Nacker on the 22nd July 1872. That Return was filed in respect of lands held by Ramjan under the Zemindar,

and is evidence against the defendant u/s 95 of the Road Cess Act. The lands entered in the Return prima facie were held by Ramjan as tenant

under the Zemindar, and, therefore, not held adversely to him. It is contended on behalf of the defendant that the return was in respect of lands not

only held under the Zemindar, but also in respect of lands held under other persons (brah-mottordar lakherajdars, etc.,) and the learned Pleader

refers to the word "pattai" lands at the heading of the Return in support of his contention. Then heading of the Return, however, runs as follows: ""In

respect of 147 bigha 11 cottas of land paying the annual malguzari of Rs. 200-13-18 gandas being my mourashi ancestral purchased and patta

lands whether held in my own name or in the names of others and situate within the villages of Mouzah Balaria and Arjunpore within Zemindari No.

156 belonging to the late Rajah Radha Kant Deb Bahadur." The patta lands also, therefore, refer to the mal lands held under the Zemindar.

Unless, therefore, the defendant can succeed in clearly establishing that any land included in the Return was his lakheraj land or land held under the

persons; in other words, that such land was erroneously included in the Return, the lands included in the Return cannot be taken to have been held

by Ramjan adversely to the Zemindar.

24. Out of the plots found by the Court below to be included in the Cess Return, the learned Pleader for the defendant admits that the plots Nos.

12, 14, 17, 18, 27 to 45, 47 and 55 in Schedule ga exactly tally with the entriss in the Cess Return both as regards the area and the rental. It is

also admitted that those plots are not patta lands, and that he cannot contend that they are Lekheraj or that the claim with respect thereto was

barred by limitation. He contended, however, that they were incumbrances which should have been annulled u/s 167 of the Bengal Tenancy Act.

But these lands were included in the Cess Return and were, therefore, admitted to be mal. No question of adverse possession or incumbrance,

therefore, arises in respect of such lands, and we are of opinion that the plaintiffs are entitled to a decree in respect of these plots.

25. Besides the above, there are various other plots which are found by the Court below to agree with the entries in the Oet=s Return. They are

plots Nos. 1, 2, 6, 8, 13, 46, 49, 4, 58 to 64, It is contended, however, on behalf of the defendants, they do not agree and plots Nos. 58 to 64

are said to be puttai lands held under other persons. We must, therefore, deal with each of them,

26. Plot No. 1.--Corresponds to plot No. 16 of the defendant"s kobila. It is described in the plaint as one plot Shali land 8 bighas 13 cottas 5

chataks out of 10 bighat 4 cottas 5 chataks the remaining 1 bigtia 11 cottas & chataks is plot No. 8 of ka which is admittedly mal, so that one

portion of the land is mal.

27. The land being interminglad with mal land which was held by the Nackar as tenants, it was for the defendant to show that the disputed plot was

not mal, and was held adversely, and we need not, therefore, discuss the question of the identity of the plots with some of the dags which was

raised before us.

28. Plot No. 2 is dag No. 47, the area is 19 cottas 15 chataks.

29. This plot (Bastu) is described in the plaint as being ""out of 7 bighas 1 cotta 9 chataks 10 gandas. Plot No. 47 of the kobala of the defendant

describes it as lakhraj battu, 19 cottas 15 chataks of Basudeb Pal and others out of whole plot 7 bighas 1 cottas 9 chataks 10 gandas. Deducting

19 cottas 15 chataks from 7 bighas 1 cotta 9 chataks 10 gandas there remains 6 bighas 1 cotta 10 1/2 chataks and that is the exact area of plot

No. 2 of Schedule ka which is admittedly mal. The land, therefore, is intermingled with land which was held by the Nackers as tenants, The

boundaries of the plot of 19 cottas 15 chataks in the kobala show khas patit land on the eastern boundary, and the evidence of Ram Chandra

Sarkar, witness No. 2 for the defendants, shows that there is the Cutchery of the plaintiffs on a portion of plot No. 2 of Schedule ga. See also

Taraknath Dutt, witness No. 7 for the plaintiffs, No connection with Basudeb Pal is made out, and the Kumars who are said to be tenants under

the defendants have not been examined.

30. The plot is mentioned in Exhibit U in the name of Ram Chandra Pal as 1 bigha 1 chntck at a rent of Rs. 6 4 51/2 . There is proportionate

reduction of rent of 12 gandas for 2 chataks and the present area is 19 cottas 15 chataks at a rent of Rs 6 3-13 1/2.

31. Having regard to all these facts, it seems that what was put down as lakheraj in the defendants' kobala was mal land and the possession was

not adverse.

32. Plot No. 6 corresponds to dag No. 13,

33. Dag No. 13 of the defendants chitta is a ticca land in Mouza Nij Belaraia and contains three entries. It is clear, therefore, that it is mal. Dr.

Kanjilal for the defendants says that the dag numbers refer to the dags of some chitta prepared by Ramjan, and not to "those of the chittas V-1 or

V-2, but there is no evidence of the existence of any other chitta. It is found that the area of the plot is 3 bighas 1 cotta at a rental of Rs. 10--0 16

gandas including 3 cottas 6 chataks acquired by the Mission area and that in the Road Cess Return the area is 2 bighas 14 cottas at a rent of Rs.

8--1--12 gandas in 127M, excluding the 3 cottas acquired by the Missionaries bearing a proportionate rent of Rs. 1-15-4 gandas. The Court

below has held possession is proved from 1279, but not adversely. We agree with the finding of the Court below.

34 Plot No. Section The Court below finds that the plot is mentioned in the thoka of 1295 and 1260, but is also mentioned, at last a part of is, in

the Road Cess Return. It is described as ticci in the chitta of Mouz Belaria. We think that the Court below is right in holding that the land is mal and

was not held adversely by the defendants.

35. Plots Nos. 13, 46, 54 and 58 to 64.

36. The Court below has found that the areas and rentals in the thoka of 1295, and the Road Cess Return agree in respect of plots Nos. 46, 49,

54, 60 to 64, and in respect of plots Nos. 13, 58 and 5 (in respect of the last two there is a slight difference in the rent) they substantially agree,

and although possession was proved from 1295 it was not adverse. Plot No. 49 is also mentioned in the thoka of 1880 but as it is included in the

Cess Return, the possession was not adverse.

37. We must accordingly hold that, with respect to all the plots mentioned in the Road Cess Return (Exhibit U), the possession was not adverse,

and the plaintiffs are entitled to possession.

38. The plots which are not mentioned in the Road Cess Return are plots Nos. 3, 4, 5, 7, 9, 10, 11, 15, 16, 19 to 26, 48 to 53, 56, 57 and 65 to

67. Out of these, the plaintiffs could not point out plot No. 3 to the Commissioner at the locality and the plots Nos. 20, 22 23 and 24 were found

by the Commissioner to be outside the plaintiffs' Zemindary. The Court below accordingly held that the plaintiffs' claim with respect to these plots

should be dismissed, and no objections have been preferred against the finding on behalf of the plaintiffs. The claim in respect of these plots should,

therefore, be disallowed.

39. With respect to plots Nos. 15, 16, 25, 26 56, 57 and 65 the Court below has found that they are in the thoka of 125, and possession of the

defendants has been proved. The plaintiffs have taken objections to the finding of the Court below. It is contended with respect to plots No. 15

and 16 that the Court below has made a confusion between possession and adverse possession, that the only witness who speaks to possession is

Ram Chandra sarkar, but he speaks to plot Nos. 15 and not to 16, and that the Missionary Sahebs have not been called nor any collection papers

produced. It is also urged that the Churah, according to the Commissioners' plan, scheduled plot No. 15 and is close to plot No. 16. But the

witness did not say that the Church was in these plots, he said that the Church was on plot No 6 and that there were houses of Christian converts

on plots Nos. 15 and 16 who have all along been paying rents to the defendant and his predecessors. We agree with the finding of the Court

below that adverse possession is proved. In the absence of evidence to show that possession commenced after 1281, we think the claim with

respect to these plots is barred. Plot No. 25 is a tank, and it is found that it was in the khas possession of the defendants and his predecessors.

The plaintiffs' witness No. 9 admitted that it belonged to Ramjan Nacker and two witnesses for the defendants proved their adverse possession. It

is pointed out on behalf of the plaintiffs that the defendant's gomasta and witness Bholanath Ganguly says, "my master is in possession of five tanks

which are all on the lands of Schedule ka", and it is accordingly contended that the tank is mal. But the witness says he knows only some lands in

Schedules ka and kha. The plaintiff did not claim the gur tank (plot No. 25) as appertaining to the jotes described in Schedules ka and kha. It is

not mentioned in the Road Cess Return. In all these circumstances, we are unable to differ from the finding of the Court below.

40. As for plot No. 26, Jafer Molla the witness No. 8 for the defendant says that he suits--rates the land which is his ancestral jote, that he

formerly paid rent to the Naskars, then to the Receiver and then to the defend, ant. We accordingly agree with the finding of the Court below.

With respect to plots Nos. 56 and 57 it is pointed out on behalf of the plaintiffs that the defendants conveyance mentions the name of Dharma Das

Ghose as the tenant, but his name is not mentioned by the witness Ran Chandra. However that may be, there is evidence of possession of the

defendants and their predecessors which has been believed by the Court below. And we see no reason to differ from it. The Court below has

found adverse possession proved with respect to these plots (Nos. 15, 16, 25, 26, 56 and 57), and as there is no evidence to show that

possession commenced after the creation of the patni (in 1281), we overrule the objections of the plaintiffs to the finding of the Court below with

regard to these plots. The claim of the plaintiffs with respect to these plots (Nos. 15, 16, 25, 26, 56 and 57) must accordingly be dismissed. The

plaintiffs have also preferred objections to the finding of the Court below with respect to plot No. 65. The Court below has found that in the thoka

of 1295, there is a remark that this land was purchased in 1283 as brahmottar in the name of Shiram Chakraverty (see Exhibit C--57 kobala) and

as the adverse possession commenced after the creation of the patni, the Court below held that it could not affect the Zamindars But although the

possession of R&Mjarj commenced from 1283, he acquired it by purchase from the brahmottardar in 1283, The land, therefore, appears to have

been in the possession of a person professing to hold it as lakheraj in 1283, and, in the absence of any evidence that the possession of the

brahmottardar commenced after 1281, the claim with respect to this plot (No. 65) also should be dismissed.

41. There remain plots Nos. 4, 5, 7, 9, 10, 11, 19, 21, 48, 50 to 53 and 66 and 67. Of these, plots Nos. 4 and 5 are mentioned both in the

thokas of 1280 and 1295 and a portion of plot No. 4, according to the Commissioner's map, is outside the plaintiff's Zemindari. Plots Nos. 7, 9,

10, 19, 21, 66 and 67 are mentioned in the thoka of 1295, but the Court below has found against the defendants because oral evidence of

possession was not adduced in respect of some of the plots or the evidence adduced was not satisfactory. But they are all mentioned in the thoka

of 1295 which indicates their possession in that year (in the case of plots Nos. 4 and 5 they are mentioned in the thoha of 1280 i. e., before the

creation of the patni, and again, 15 years afterwards, in the year 1295), with regard to plot No. 5, the Court below appears to think that the jama

as described in the thoka of 1280 was the Game (both--in area and rental) as that in the Road Cess Return, and Mr. Sarkar on behalf of the

plaintiffs had attempted to show the identity of a portion of this plot with the land in the Cess Return, but we are not satisfied that they agree, With

regard to plot No. 10, the plaintiffs' case was that the tenant Rup Chand Sardar held that land of this plot is in excess of the 6 bighas 5 cottas 6

chaiaiks mentioned in the Road Cess Return. No evidence, however, has been placed before us to show that the land was held as part of the jote

of Rup Chand. As for plots Nos. 65 and 67 the Court below has held that there is no dag of the thoka in the kobala, that no area is given in

respect of the jama of Krishna Panja a tenant mentioned in the thoka, and that the evidence of possession is not reliable. Plot No. 9 is said to be

included in plot No. 92 of Schedule gha and has not been crased separately and there is no oral evidence of possession. But, as stated above, the

thoka shows possession in 1295 in respeat of all the above plots.

42. The defendants were admittedly in possession at the date of the suit. These plots are not mentioned in the Road Cess Return. The thoka of

1295 indicates the possession of the defendants' predecessors in that year. That, however, does not show that possession commenced in that

year. With respect to plots Nos. 4 and 5 possession commenced from before the creation of the patni and there is no evidence to show that

possession with respect to the other plots commenced after the creation of the patni in 1281 and there is no suggestion that any one else was in

possession.

43. The Court below finds that the area of plot No. 11 in the kobala dose not agree with that in the thokus nor do the boundaries agree, that there

is no satisfactory identification and there is no oral evidence of possession; that plot No. 48 is not in the thokas and the evidence of possession is

not reliable. As for plots Nos. 50 to 53, they were acquired subsequent to the date of the thokas, and are not, therefore, included in them. The

defendant did not adduce any evidence as to possession. But the observations made above apply to these plots also, except that these plots are

not in the thoka. The defendants were admittedly in possession at the date of the suit, and the plots are not mentioned in the Cess Return. We have

held that it is for the plaintiffs to show that the Zemindar was in possession before the creation of the patni or that the possession of the Nackars

was not adverse. That being so, and there being no evidence to show that the possession of the defendants' predecessors commenced after 1281

or that such possession was not adverse (these plots not being included in the Cess Return), we must hold that the claim with regard to these plots

Nos. 11, 48 and 50 to 53 is also barred by limitation. In this view, it was unnecessary for us to discuss the question whether any particular plot of

land was or was not mentioned in the thoka of 1295 and the question whether the defendants had been able to show adverse possession with

respect to any particular plot was immaterial because the onus was upon the plaintiffs to show that the Zemindar was in possession before the

creation of the patni. But as the matter has been discussed before us, and as we were told that the case may go up to a higher Court, we have

thought it proper to discuss the matter and refer to the findings and evidence in respect of the plots under separate heads.

44. As already stated, plots Nos. 58 to 64 are claimed as pattai lands. Out of these, plot No. 64 is alleged to have been subsequently purchased

from the brahmottardar, and is, therefore, no longer pattan land, but is lakheraj. The kobala, Exhibit 0--66, dated the 6th Kartik 1280 (Book No.

II page 323) by Parbati Bhattacharjee and another, recites that the 16 bighai 2 cottai of land stood in the name of Mathuresh Bhattacharjee, elder

brother of the grand--father of the executants of the kobala in 1190, and one moiety of the lands belonging to the Executants, was sold to Aminulla

Kazi by the kobala. There was another kobala, Exhibit 0.67, dated the 14th Kartik 1281 (Book II page 325), by which another co--sharer sold 16

cottat of land in his own share to Kazi Aminulla with similar recitals. The first kobala. is prior to the grant of the patni, and the second, though

subsequent to the date of the patni, shows that the land was held as lakheraj from before the Permanent Settlement. In these circumstances, we

think the claim in respect of plot No, 64 should be dismissed. With respect to the remaining plots, viz., Nos. 58 to 63, the only evidence relied

upon is the deposition of Dwijapada Mookerjee (Book I, page 394) who speaks to payment of rent to certain other maliks. Some receipts,

Exhibits S to S--5, have been filed to prove payment of rent to such maliki, only one of them (Exhibit S) has been printed which shows payment of

rent to the owner of mahal de--buttar in the name of Krista Chandra Roy. But the learned Pleader for the defendants has not shown the identity of

the plots of plots Nos. 58 to 63 with the lands for which the rent receipts have been produced. No pottahs in respect of these lands have been

produced. The area and rentals of these plots have been found to agree in some cases entirely, and in others substantially, with the area and rentals

mentioned in the Road Cess Return, and there is no satisfactory evidence that they are held under other persons. We think, therefore, that the

defendants' possession with respect to these plots (except No. 64) was not adverse.

45. We now take up the plots of Schedule ga. Plots Nos. 79, 84 and 102 (not No. 101 mentioned in the judgment of the Court below the claim

to which had been withdrawn) 131, 145, 147, 148, 151, 153 and 157 have been found to be included in the Road Cess Return. The possession

of the defendant was, therefore, not adverse. It appears, and it is admitted by the learned Pleader for the defendant, that plots Nos. 30, 33, 9, 7, 8

and 40 of Schedule ga have been repeated in, and correspond to plots Nos. 88, 89, 82, 103 10, and 14s, 71 respectively of Schedule gha. We

have found that plot No. 8 was not held adversely, and plots Nos. 30, 33 and 40 are admittedly included in the Cess Return, We have also found

that the claim in respect of plots Nos. 9 and 7 of Schedule ga should be disallowed. These findings, therefore, will govern the corresponding plots

of Schedule gha. We accordingly hold that the possession with respect to plots No. 7, 74, 79, 84, 88, 69, 101, 131, 146, 147, 148, 151, 153 and

157 was not adverse.

46. The Court below has found that the identity of plots No. 72, 7, 87, 91, 93, 94 and 98, 124 and 125 have not been proved with the lands of

the thokas and no oral evidence of possession has been adduced.

47. It is found that the lands of plots Nos. 72 and 73 have not been identified with the lands of village Balaria. that plots Nos. 87, 91, 93 and 98,

124 and 125 have not been identified with the lands of the thoka and that plot No. 94 is outside the defendant's kobala. The defendant identified

plots Nos. 124 and 125 with dags Nos. 59 and 49 of Ahad Balaria while the disputed lands lie in Balaria, proper. No oral evidence was adduced

with respect to these plots, But, for the reasons given in connection with plots Nos. 11, 48. and 50 to 53 of Schedule ga, we must hold that the

claim with respect to plots Nos. 72, 73, 87, 91, 93, 94 and 98, 124 and 125 is barred by limitation.

48. It was contended that plots Nos. 93, 94, 98, 147, 148, 150 and 151 are pattat lands, but no patta has been produced, and the identity of

these plots with any rent receipt has not been established. We have, however, held that the claim in respect of plots Nos. 93, 94 and 98 is barred

by limitation. The other plots, viz., 147, 148, 150 and 151, being included in the Road Cess Return, the defendants must clearly prove by

satisfactory evidence that they were not held under the Zemindar but were held under other maliks. We do not think that there is any such

evidence.

49. Plot No. 83 was admitted by the defendants' gomasta Bholanath before the Commissioner to appertain to Schedule ka. It is admittedly mal

and the possession, therefore, was not adverse. The learned Pleader for the defendants states before us that plots Nos. 38, 15, 20 and 21 and 6

of Schedule ka are repeated in plots Nos. 83, 102, 140, 141, and 142 and 146 respectively of Schedule gha. These plots of gha, therefore, are

mal and the plaintiffs will get a decree for them along with the other lands of Schedule ka.

50. Plots Nos. 86 and 100 have been found to be outside plaintiffs' Zeraindari, and the claim of the plaintiffs must, therefore, be dismissed.

51. Plot No. 92 includes plot No. 9 of Schedule ga and plots Nos. 108 and 108 have been found to be included in plot No. 7 of Schedule ga and

have no separate existence. The Court below has held that the claim in respect of plots Nos. 106 and 103 should be dismissed, and there is no

objection to the finding by the Court below. We have held that the claim in respect of plot No. J of Schedule is barred the claim with regard to

plots Nos. 92, 106 and 108 should, therefore, be dismissed. As for plots Nos. 118 and 119 though they are not covered by the defendant's

kobala, the witnesses Nos. 1 and 5 for the defendants proved possession from 1293, and the Court below found that there was adverse

possession from that year, in the absence of any evidence to show that adverse possession commenced after 1281, we think that the claim in

respect of these two plots is barred.

52. We accordingly hold that the claim in respect of plots Nos. 1, 2, 6, 8, 12, 13, 14, 17, 18, 27 to 45, 46, 47, 49, 54, 55, 58, 59, 60, to 63 of

Schedule ga and plots Nos. 71, 74, 79, 84, 88, 89, 102, 131, 146, 147, 148, 150, 151, 157 of Schedule gha should be allowed, on the ground

that they are mentioned in the Road Cess Return and the possession of the defendant was, therefore, not adverse. Plots Nos. 3, 20, 22, 23 and 24

of Schedule ga and plots Nos. 86 and 100 of Schedule gha being outside the plaintiffs' Zemindari the suit should be dismissed with regard to the

said plots.

53. Out of the remaining plots, we hold, agreeing with the Court below, that the claim as to plots Nos. 15, 16, 25, 26, 56 and 57 of Schedule ga

and plots Nos. 6 and 8 of Schedule gha should be dismissed, and, differing from the finding of that Court, we dismiss the claim with respect to

plots Nos. 4, 5, 7, 9, 10, 11, 19, 21, 48, 50 to 51, 65, 66 and 67 of Scheduled and plots Nos. 72, 73, 87, 91, 92, 118, 119, 124 and 125 of

Schedule gha as there is no evidence to show that the possession with respect to plots commenced after the creation of the patni in 1281.

54. The result is, that the suit will be decreed with respect to the lands of Schedules Ka and Kha and with respect to lands of plots Nos. 1, 2, 6,

8, 12, 13, 14, 17, 18, 27 to 45, 46, 47, 49, 54, 55, 58, 59 and 60 to 63 of Schedule ga and plots Nos. 71, 74, 79, 84, 88, 83, 102, 103, 146 to

143, 150, 151 and 157 of Schedule gha. The plaintiffs will get khas possession of the said lands. They are entitled to wasil in respect of the said

lands for a period of three years prior to the institution of the suit until delivery of possession, to be ascertained in farther proceedings, The claim in

respect of plots Nos. 3, 4, 5, 7, 9, 10, 11, 19, 20, 21, 22, 23, 24, 48, 50 to 53, 64, 65, 66 and 67 of Schedule ga, and plots Nos. 72, 73, 86, 87,

91, 92, 98, 94, 98, 100, 118, 119, 124 and 125 of Schedule gha will be dismissed. It is unnecessary to make any separate order with respect to

plots NOB. 83 and 140 to 142 of Schedule gha. as they are included in the lands of Schedule ka.

55. The parties will be entitled to costs in each case in proportion, the plaintiffs getting three fourths and the defendants one-fourth, only one-half

of the costs of the paper-book will be allowed. Hearing fee in Appeal No. 164 is assessed at Rs. 301, and in No. 258 of 1914 at Rs. 100.