(1922) 01 CAL CK 0028

Calcutta High Court

Case No: None

Rakhal Chandra Ghose and Others		APPELLANT
	Vs	
Durga Das Samanta and Another		RESPONDENT

Date of Decision: Jan. 13, 1922

Acts Referred:

- Limitation Act, 1963 - Article 142

Citation: AIR 1922 Cal 557 : 67 Ind. Cas. 673

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

Bench: Division Bench

Judgement

1. This appeal arises out of a suit for recovery of possession of the land in dispute on declaration of plaintiff''s title thereto, The plaintiff and the defendant are patnidars under the owners of Touzi Nos. 92 and 14, respectively, both the Touzis being situate in the same village. The plaintiff claimed the land as appertaining to Touzi No. 92 while the defendant claimed it as part of Touzi No. 14.

2. The Court of first instance held that the plaintiff had failed to prove both title and possession and dismissed the suit. The learned District Judge on appeal found that plaintiff''s title was proved, but that he failed to prove possession within 12 years and accordingly dismissed the suit. The plaintiff has appealed to this Court.

3. It is contended on behalf of the appellant, first, that the title having been found to be with the plaintiffs the onus was upon the defendant to prove that the claim was barred by limitation by reason of adverse possession on his part. Secondly, that in any case, having regard to the nature of the land, the onus should have been placed on the defendant. Thirdly, that the evidence on both sides having been found to be unsatisfactory, there was a presumption that possession follows title.

4. With regard to the first contention, it is to be observed that plaintiff alleged that he was in possession of the land which was khas patit, and that the defendant excavated a tank on the land in spite of the objections of the plaintiff four or five years before the suit claiming the same as part of his patni mahal, and he was accordingly dispossessed from the land. The case, therefore, clearly was one under Article 142 of the Limitation Act. It is well settled that, where the plaintiff while in possession has been dispossessed and is out of possession at the date of suit the onus is upon him to prove that he was in possession and was dispossessed within 12 years of the suit,

5. It is contended, however, on behalf of the appellant that come of the authorities show that where plaintiff''s title is proved, the onus is upon the defendant to show that the plaintiff lost that title by adverse possession for 12 years on the part of the defendant. It is necessary, therefore, to examine the authorities on the point.

6. One of the earliest cases is that of Maharajah Koowar Baboo Nitrasur Singh v. Baboo Nund Lall Singh 8 M.I.A. 199 : 1 Suth. P.C.J. 420 : 1 Sar. P.C.J. 744 : 1 W.R.P.C. 51 : 19 E.R. 506. In that case, it appears that decrees were made in the year 1813 in suits respecting disputed boundaries of certain mouzahs in two Zemindaries, and the boundary line was determined. In 1845 a suit was brought by the representatives of one of the parties in the above suits to recover land alleged to be part of one of these mouzahs which land it was admitted by the plaintiff that the defendant had been in possession of since the year 1834. It was pleaded in defence, first, that the land claimed was within the boundary declared by the decrees of 1816 to belong to the defendant; and, secondly, that the plaintiff or those under whom he claimed had been out of possession for Upwards of twelve years and that the cause of action was consequently barred by Regulation III of 1793, Section 16. Lord Justice Turner, in delivering the judgment of the Judicial Committee, observed that "the issue of possession is the first to be considered in this case, and that it is wholly independent of the boundary question. The appellant is seeking to disturb the possession admitted to have existed for about eleven 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 (for that is the way in which the Regulation puts it) on a dispossession within twelve years next before the commencement of the suit, end, therefore, that he, or some person through whom he claims, was in possession during that period. 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 lands in question may have been part of Mouzah Gopaulpore, and as such may have been enjoyed by his, ancestor, and yet he may have lost, by lapse of time, his right to recover them. Their Lordships, therefore, proposed to consider, in the first place, what evidence there is that the appellant, or any person through whom he claims, was in possession of the lands, in question at any time

within twelve years next before the commencement of the suit."

7. In 1869, in the case of Rajah Sahib Perhlad Sein v. Maharaja Rajender Kishore Sing 12 M.I.A. 292 at p. 337 : 2 Suth. P.C.J. 225 at p. 239 : 2 Sar. P.C.J. 430 : 20 E.R. 349 the Judicial Committee affirmed the same principle. Their Lordships observed: "The appellant comes into Court admitting upon the face of his plaint that he is out of possession, and has been so for more than ten years: and the date which he assigns to his dispossession in the 20th of March 1851. Upon the issue as settled by the Court it lay upon him to establish that he was in possession up to that date, or, failing in that, that the date at which he or some former proprietor of Ramnuggur was last in possession is consistent with a right to institute this suit. Act No. VIII of 1859, Section 32, shows, that the plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time."

8. In 1870, again, in the case of Beer Chunder Jobraj v. Deputy Collector of Bhullooah 13 W.R. 23 where the plaintiff brought a suit to recover Immovable property which was in the possession of the defendant since 1845 and at the time of the institution of the suit, it was held by their Lordships that, "it was essential for the appellant (the plaintiff in that case) to have proved two things--first, possession within twelve years before his suit, and, secondly, title to possession...the onus of proof rests with the appellant."

9. The question again came up before the Judicial Committee in 1888 in the case of Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi 7 C.L.R. 364 : 3 Suth. P.C.J. 809 .

10. There the plaintiffs had shown that they formerly were proprietors of the lands to which they alleged title, and from which they claimed to oust the defendants but they had been dispossessed or their possession had been discontinued some years before the suit was brought by them, and the land was occupied by the defendants who denied their title. The plaintiffs were found to be the rightful owners, bat their Lordships observed that the question for decision was not "whether or not the title of the defendants was treated just after the disturbance or otherwise, but when were the plaintiffs dispossessed or when did they discontinue possession...." This is in reality what in England would be failed an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession, and a fortiori where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff mast recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within 12 years before the commencement of the suit, namely, for the two or three years prior to the year 1875, or 1874, and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed." In the next year (1889) in the case of Mahammud Amanulla Khan v. Badan Singh 17 C. 137 : 16 I.A.

148 : 13 Ind. Jur. 330 : 5 Sar. P.C.J. 412 : 23 P.R. 1890 : 8 Ind. Dec. 629 the Judicial Committee again held that if a claim tomes within the terms of Article 142 adverse possession is not required to be proved in order to maintain a defence.

11. Lastly, in 1906 under Act XV of 1877 in that case of Rani Hemanta Kumari Debi v. Maharaja Jagadindra Nath Roy Bahadur 10 C.W.N. 630 : 3 A.L.J. 363 : 8 Bom. L.R. 400 : 1 M.L.T. 135 : 16 M.L.J. 272 the Judicial Committee affirmed the same principle: Their Lordships observed: "The difference between the admitted possession and the period of limitation being so narrow (one year) the question of onus is important; and their Lordships adhere to the principle stated in the Privy Council case cited by the learned Judge in the High Court [Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi 16 C.473 : 16 I.A. 23 : 5 Sar. P.C.J. 321 : 8 Ind. Dec. 312] and hold that it is for the appellant, as plaintiff in a suit for ejectment, to prove possession prior to the dispossession which she alleges."

12. In all these cases it was clearly held that where the plaintiff has been dispossessed and the suit is one for recovery of possess on the onus is upon the plaintiff to prove that he was in possession within 12 years of the suit.

13. It is contended, however, that a different principle has been laid down in some other cases, viz., Karan Singh v. Bakar Ali Khan 5 A. 1 : 9 I.A. 99 : 4 Sar. P.C.J. 382 : 2 Ind. Dec. 1044 Radha Gobind Roy v. Inglis 7 C.L.R. 364 : 3 Suth. P.C.J. 809 Secret try of State for India in Council v. Raja 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 L.A. 192 (P.C.) Basanta Kumar Roy v. Secretary of State for India 40 Ind. Cas. 337: 410. 858 at p. 873 : 1 P.L. VV. 693 : 32 M.L.J. 505 : 21 C.W.N. 642 : 15 A.L.J. 398 : 25 C.L.J. 487 : 19 Bom.L.R. 480 : (1917) M.W.N. 482,6 L.W. 117 : 22 M.L.T. 310 : 44 I.A. 104 (P.C.),

14. In Karan Singh v. Bakar Ali Khan 5 A. 1 : 9 I.A. 99 : 4 Sar. P.C.J. 382 : 2 Ind. Dec. 1044 their Lordships in dealing with the contention that the plaintiff must prove that he was in possession within twelve years held that it was not correct under the Limitation Act IX of 1871. Their Lordships observed: It would have bean correct under the old Jaw, under which the suit must have been brought within twelve years from the time of the cause of action, but under the present law it may be brought within twelve years from the time when the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff."

15. It was a case under Article 145 of Act IX of 1871 (see page 6 of the report) corresponding to Article 144 of Act XV of 1877 and Act IX of 1908, and there can be no doubt that the suit was dealt with by the Judicial Committee as coming under Article 145 of Act IX of 1871 because that Article deals with cases where the limitation runs from the date when the possession of the defendant became adverse to the plaintiff. Under Act XIV of 1859, the period of limitation for suits for the recovery of Immovable property or of any interest in Immovable property to

which no other provision of the Act applied (there were no other provisions in the Act similar to those of Article 143 or 145 of Act IX of 1871), was twelve years from the time when the cause of action arose. So that all suits, whether they came under Article 143 or 145 of Act IX of 1871, had to be brought u/s 15 of Act XIV of 1859 within twelve years from the time when the cause of action arose. Under Act IX of 1871, for the first time, a distinction was drawn between, (1) suits for possession when the plaintiff while in possession has been dispossessed or has discontinued the possession, and (2) suits for possession of Immovable property or any interest therein not otherwise provided for. In the first class of cases, the starting point was the date of the dispossession or discontinuance, and came under Article 143 (Article 142 of Act XV of 1877 and Act IX of 1908). In the second class of cases the starting point was the date when the possession of the defendant became adverse to the plaintiff (Article 145 of Act IX of 1871 and Article 144 of Act. XV of 1877 and Act IX of 1908). Karan Singh''s case 5 A. 1 : 9 I.A. 99 : 4 Sar. P.C.J. 382 : 2 Ind. Dec. 1044 fell under Article 145 of Act IX of 1871, and the Judicial Committee was merely referring to the change in the law stated above. Their Lordships did not and could not have laid down that the law of limitation had been in any way changed so far as suits coming under Article 143 of Act IX of 1871 (Article 142 of the present Act) were concerned, as the reference to "twelve years from the time when the possession of the defendant became adverse to the plaintiff" unmistakably shows that their Lordships were dealing with cases under Article 144 (Article. 145 of Act IX of 1871). It is unnecessary to further discuss this matter which is clear enough, but we may refer to the Full Bench decision in Mahomed Ali Khan v. Khaja Abdul Gunny 9 C. 744 at p. 751 : 13 C.L.J. 257 : 4 Ind. Dec. 1145 which was a case under Act IX of 1871, and where it was stated: "There is no doubt as to the general rule, that under the former Limitation Act the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the prescribed period, and that it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, it has more than once been held by the Privy Council that the plaintiff is bound to prove possession and dispossession within twelve years."

16. The case of Radha Gobind Roy v. Inglis 7 C.L.R. 364 : 3 Suth. P.C.J. 809 was also considered by the Full Bench in Mahomed Ali Khan''s case 9 C. 744 at p. 751 : 13 C.L.J. 257 : 4 Ind. Dec. 1145 . Wilson, J., observed: "We do not understand that case as establishing the broad proposition contained in the head-note, which would be in conflict with the earlier decisions of the same Tribunal."

17. In that case, their Lordships having disposed of the other questions which were raised say: "The question regains whether the disputed land had or had not been occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff by the operation of the Statute of Limitation. On this question, undoubtedly the issue is on the defendant. The plaintiff has proved his title; the defendant must prove that the plaintiff has lost it by reason of his, the

defendant''s adverse possession." But the land in dispute in that case had formed part of the bed of a beel or lake; the title to the beel and its bed was found to be in the plaintiff, and he had been in possession so long as the land was covered with water. The beel gradually dried up, and the defendant occupied the land so formed, There was a controversy as to when the land dried up and the defendant occupied the land. It was found by the High Court that the land had been formed quite recently within six or seven years or at all events within less than twelve years before the suit and their Lordships held that, "if the High Court are right in that finding, of course the Statute cannot apply." The constructive possession of the rightful owner continued till within 12 years of the suit, and the defendant relied upon adverse possession for more than 12 years. The observations with regard to the onus of proof quoted above must be taken with the facts of the case.

18. Math reliance is placed upon the case of Secretary of State for India in Council v. Rajah 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 L.A. 192 (P.C.). The disputed lands in that case formed part of islands which had formed in the bed of the sea within the territorial limits, and which, therefore, belonged to the Crown, and the lands were constituted a Reserved Forest under the Madras Forest Act (Madras Act V of 1882). The respondents claimed proprietary rights in the said lands, which were disallowed by the District Judge in a proceeding under the Act, holding that the title being originally in the Crown, the onus was upon the claimants to prove adverse possession for sixty years, and that they had failed to do so. The High Court was of opinion that it rested upon the Crown to show that the possession became adverse to the Crown within sixty years prior to the Notification under which the land was constituted a Reserved Forest. The Judicial Committee held that it was for the claimants to prove that they or their predecessors-in-title had been in adverse possession for sixty years.

19. The principle laid down is consistent with that laid down by the Judicial Committee in previous cases. The claimants in that case were in the position of plaintiffs, and they claimed a title to the property by adverse possession. Their Lordships observed: "in their Lordships'' opinion objectors to afforestation thus preferring claims are in law in the same position as persons bringing a unit in an ordinary Court of justice for a declaration of right. To such a situation in the one case, as in the other, their Lordships think that Article 144 of the Limitation Act XV of 1877 (Schedule II) applies, the period of twelve years thereunder being, however, extended to a period of sixty years by Article 149, In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the plaintiff. In their Lordships'' opinion the situation of a claimant under afforestation proceeding is the same upon this point. Reference may be made to Radha Gobind Roy v. Inglis 7 C.L.R. 364 : 3 Suth. P.C.J. 809 decided by this Board." Referring to the view taken by the High Court that the Crown had to prove that it has a subsisting title by showing that the possession of the

claimants commenced or became adverse within the period of limitation their Lordships observed: "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. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, ''I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough, to fulfil all the legal conditions.'' Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory, including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of Government officers, would disappear, because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors'' possession for sixty years, their Lordships'' opinion is, as stated, that this is erroneous. But, secondly, with reference to the ''subsisting title,'' it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for the period of sixty years that fundamental fact remains, and that fact forms ''subsisting title.'' And, thirdly, it is no part of the obligation of the Crown to fortify its own fundamental right by any inquiry into possession or the acceptance of any onus on that subject.

20. The title of the Crown to the land could not be disputed; the claimants set up a title by adverse possession, and there can be no question that it was upon the plaintiff who wanted a declaration of his title by adverse possession to prove that he acquired such a title by adverse possession for the statutory period. That is all that was laid down in that case, and the general observations made at page 204 must be taken with the facts of that case, in which the claimants stood in the position of a plaintiff seeking a declaration of his title to the property, Such a person, on the strength of possession for a short period, cannot throw upon the opposite party the burden of proving that he, the claimant, had not been in possession for the statutory period. We do not think, therefore, that that decision laid down any principle different from that laid down previously in a series of cases by the Judicial Committee.

21. It is to be observed that their Lordships, while dealing with the cases coming under Article 144, referred to Radha Gobind Roy v. Inglis 7 C.L.R. 364 : 3 Suth. P.C.J. 809 which clearly shows that the latter case also was treated as one falling under Article 144.

22. The case of Basanta Kumar Ray v. Secretary of State for India 40 Ind. Cas. 337: 410. 858 at p. 873 : 1 P.L. VV. 693 : 32 M.L.J. 505 : 21 C.W.N. 642 : 15 A.L.J. 398 : 25 C.L.J. 487 : 19 Bom.L.R. 480 : (1917) M.W.N. 482,6 L.W. 117 : 22 M.L.T. 310 : 44 I.A. 104 (P.C.) also does not help the contention of the appellants. There the land was diluviated, and parts of the diluviated land emerged during part of the year. It was held that the annual cultivation of such parts of diluviated lands as emerge during part of the year is not a Dispossession of the owner of the lands within Article 112 of the Limitation Act, and that the constructive possession of lands while diluviated being in the true owner cannot be continuous adverse possession within Article 144 while it is diluviated during part of every (sic), and that no rational distinction could be drawn between the case where the re-flooding was seasonal, and Secretary of State for India v. Krishnamoni Gupta 20 C. 618 (P.C.) : 29 I.A. 104 : 6 C.W.N. 617 : 4 Bom. L.R. 537 : 8 Sar. P.C.J. 260 where the lands were submerged for several years.

23. Their Lordships observed: "if, as their Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, Article 144 is the Article applicable, and not Article. 142. It is not easy to see, in the circumstances of a case such as this, how conduct insufficient to evidence dispossession of the plaintiffs can be used to evidence adverse possession available to the defendants: but, be that as it may, in their Lordships'' opinion the defendants'' contention resting on Article 114 fails on another ground."

24. This case, therefore, is no authority for the proposition that, in a case coming under Article 142, the onus is upon the defendant. Their Lordships were dealing with the question what constitutes dispossession in cases of diluviated lands coming out of water during part of the year, and the Question of adverse possession having regard to the nature of the land, and the nature of possession exercised upon the land.

25. None of the four cases relied upon by the appellant, therefore, is any authority for the proposition contended on behalf of the appellant.

26. It is to be observed that Radha Gobind Roy v. Inglis 7 C.L.R. 364 : 3 Suth. P.C.J. 809 (P.C.) was decided in 1880, and that of Karan Singh v. Bakar Ali Khan 5 A. 1 : 9 I.A 99 : 4 Sar. P.C.J. 382 : 2 Ind. Dec. 1044 in 1882. Had those cases intended to lay down any different principle, the Judicial Committee in 1888 in Mohima Chunder''s case 16 C.473 : 16 I.A. 23 : 5 Sar. P.C.J. 321 : 8 Ind. Dec. 312 without even referring to these cases, could not have laid down tee principle that the plaintiff in a suit for ejectment cannot succeed without proving possession within 12 years although his title is proved. They were not referred to evidently because they were cases falling under Article 144. Mohima Chunder''s case, 16 C.473 : 16 I.A. 23 : 5 Sar. P.C.J. 321 : 8 Ind. Dec. 312 was expressly followed 18 years afterwards (in 1906) by their Lordships in Rani Hemanta Kumari Debi''s case 10 C.W.N. 630 : 3 A.L.J. 363 : 8 Bom. L.R. 400 : 1 M.L.T. 135 : 16 M.L.J. 272 (P.C.).

27. We do not think it reasonable to hold that the Judicial Committee in Secretary of State for India in Council v. Rajah 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 L.A. 192 (P.C.) laid down any principle at variance with that enunciated so far back as 1860 in Maharajah Koowar Baboo Nitrasur Singh''s case 8 M.I.A. 199 : 1 Suth. P.C.J. 420 : 1 Sar. P.C.J. 744 : 1 W.R.P.C. 51 : 19 E.R. 506 and which was followed in all cases (where the plaintiff while in possession was dispossessed) up to 1906 Rani Hemanta Kumari Debi''s case 10 C.W.N. 630 : 3 A.L.J. 363 : 8 Bom. L.R. 400 : 1 M.L.T. 135 : 16 M.L.J. 272 (P.C.) i e, for nearly half a century. Even leaving aside the earlier cases which were decided under the Regulations or Act XIV of 1859, (though as stated above, there was no difference in the law so far as cases coming under Article 142 are concerned) their Lordships laid down the same principle in Mohima Chunder''s case 16 C.473 : 16 I.A. 23 : 5 Sar. P.C.J. 321 : 8 Ind. Dec. 312 Mahammud Amanulla Khan''s case 17 C. 137 : 16 I.A. 148 : 13 Ind. Jur. 330 : 5 Sar. P.C.J. 412 : 23 P.R. 1890 : 8 Ind. Dec. 629 and Rani Hemanta Kumari Debi''s case 10 C.W.N. 630 : 3 A.L.J. 363 : 8 Bom. L.R. 400 : 1 M.L.T. 135 : 16 M.L.J. 272 .

28. There is in fact no inconsistency in the decisions of the Privy Council because the decisions relied upon by the appellant, as stated above, show that they were cases not falling under Article 142 of the Limitation Act, and the contention of the appellant is based merely upon some general observations in some of the judgments detached from the context and the facts of the cases. So far as this Court is concerned, the principle laid down by the earlier Privy Council decisions, and in Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi 16 C.473 : 16 I.A. 23 : 5 Sar. P.C.J. 321 : 8 Ind. Dec. 312 and Rani Hemanta Kumari Debi''s case 10 C.W.N. 630 : 3 A.L.J. 363 : 8 Bom. L.R. 400 : 1 M.L.T. 135 : 16 M.L.J. 272 (P.C.) and the Full Bench decision in Mahomed Ali Khan''s case 9 C. 744 at p. 751 : 13 C.L.J. 257 : 4 Ind. Dec. 1145 has always been taken as settled law on the point, and we need only refer to the case of Mirza Shamsher Bahadur v. Munshi Kunj Behari Lal 12 C.W.N. 273 : 3 M.L.T. 212 : 7 C.L.J. 414 where Mookerjee and Caspersz, JJ., observed: it is now firmly settled beyond all probability of controversy, that the plaintiff in an action for ejectment must not only prove his title but also his possession within 12 years of the suit." A recent full Bench of the Patna High Court also, upon a review of the decisions on the point has taken the same view. See Shiva Pratap Singh v. Hira Singh 62 Ind. Cas. 1 : (1921) Pat. 305 : 2 P.L.T. 487 : 6 P.L.J. 478 : 3 C.P.L.R. (Pat.) 81].

29. We are accordingly of opinion that, in cases coming under Article 144, although the plaintiff''s title is proved, the onus is not upon the defendant to show that the plaintiff lost his title by adverse possession on the part of the defendant.

30. The next question it, whether the onus of proof is upon the defendant having regard to the nature of the land, and this brings us to the question as to what the plaintiff has to prove in order to show that he was in possession within 12 years of

the suit. As pointed out by Wilson, J., in the judgment of the Full Bench in Mahomed Ali Khan''s case 9 C. 744 at p. 751 : 13 C.L.J. 257 : 4 Ind. Dec. 1145 possession is not necessarily the same thing as actual user. The nature of the possession is to be looked for, and the evidence of its continuance must depend upon the character and condition of the land in dispute. Where the land is incapable of actual enjoyment, as in the case of diluvion by a river, if the plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue to long as the lands continue to be submerged. The cases of Kally Churn Sahoo v. Secretary of State for India 6 C. 725 : 8 C.L.R. 90 : 4 Shome L.R. 95 : 3 Ind. Dec. 470 [overruled by Secretary of State for India v. Krishnamoni Gupta 20 C. 618 : 29 I.A. 104 : 6 C.W.N. 617 : 4 Bom. L.R. 537 : 8 Sar. P.C.J. 260 in so far as it held that there was constructive possession in favour of a wrong-doer]. Mano Mohun Ghose v. Mothura Mohun Roy 7 C. 225 : 8 C.L.R. 126 : 3 Ind. Dec. 694 Radha Gobind Roy v. Inglis 7 C.L.R. 364 : 3 Suth. P.C.J. 809 Rajkumar Roy v. Gobind Chunder Roy 19 C. 680 at p. 674 (P.C.) : 19 I.A. 140 : 6 Sar. P.C.J. 140 : 9 Ind. Dec. 888 (where, however, possession of the plaintiff was held to be proved) Secretary of State for India v. Krisnnamoni Gupta 20 C. 618 (P.C.) : 29 I.A. 104 : 6 C.W.N. 617 : 4 Bom. L.R. 537 : 8 Sar. P.C.J. 260 and Basanta Kumar Roy v. Secretary of State for India 40 Ind. Cas. 337: 410. 858 at p. 873 : 1 P.L. VV. 693 : 32 M.L.J. 505 : 21 C.W.N. 642 : 15 A.L.J. 398 : 25 C.L.J. 487 : 19 Bom.L.R. 480 : (1917) M.W.N. 482,6 L.W. 117 : 22 M.L.T. 310 : 44 I.A. 104 (P.C.) illustrate the principle that where the rightful owner proves possession until the land goes under water or otherwise becomes wholly incapable of enjoyment in the usual modes, he is deemed to be in constructive possession until the land emerges but of water and becomes capable of enjoyment in the usual mode and he is actually dispossessed by the defendant. No such presumption, however, arises in the case of a wrong-doer.

31. In Basanta Kumar Roy v. Secretary of State for India 40 Ind. Cas. 337: 410. 858 at p. 873 : 1 P.L. VV. 693 : 32 M.L.J. 505 : 21 C.W.N. 642 : 15 A.L.J. 398 : 25 C.L.J. 487 : 19 Bom.L.R. 480 : (1917) M.W.N. 482,6 L.W. 117 : 22 M.L.T. 310 : 44 I.A. 104 (P.C.) the Judicial Committee observed: "The Limitation Act of 1877 does not define the term ''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) 49 L.J. Ex. 220 : 6 Ex. D. 264: 42 L.T. 463 : 28 W.B. 452 : 44 J. P.488. 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."

31. In cases where the land is not incapable of enjoyment, but may produce some profit, though trifling in amount and only of occasional occurrence, as is often the case with jungle land, it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership at are natural under the existing condition of the land, and in such cases, when he has done this his possession it presumed to continue to long as the state of the land remains unchanged unless he is shown to have been dispossessed. [See Mahomed Ali Khan v. Khaja Abdul Gunny 9 C. 744 at p. 751 : 13 C.L.J. 257 : 4 Ind. Dec. 1145]. In Watson & Co. v. Government 3 W.R. 73 at p. 80 Sir Barnes Peacock, C. J., referred to the "cutting or preserving the wood, gathering wax or wild honey collecting stick lac, etc.," as evidence of possession of jungle lands. In waste lands (and jungle lands also) possession may be exercised by grazing of cattle, putting up boundary marks or fences and the like.

33. The cases of diluviated lands or jungle or waste lands, however, are no exception to the general rule that a plaintiff who is dispossessed and brings a suit for recovery of possession must show that he was in possession within 12 years of the suit. The rule of law, as pointed out by the Judicial Committee in Rani Hemanta Kumari Debi v. Maharaja Jagadindra Nath Roy Bahadur 10 C.W.N. 630 : 3 A.L.J. 363 : 8 Bom. L.R. 400 : 1 M.L.T. 135 : 16 M.L.J. 272 (P.C.), it that it is for the plaintiff in a suit for ejectment to prove possession prior to the alleged dispossession, at the same time in this question of possession the initial fact of plaintiff''s title comes to his aid with greater or less force according to the circumstances established in evidence.

34. Bearing the above principles in mind, we have to see what the plaintiff has proved in the present case. The land was asserted by the plaintiff to be khas patit formerly but it was admitted in the plaint that the defendant had excavated a tank on the land 4 or 5 years before the suit. The Court of first instance found that the tank was excavated more than 12 years before the suit. Upon that finding there can, of course be no question of any presumption in favour of the plaintiff because he was ousted from possession 12 years before the suit by the excavation of the tank. The Court of first instance further found that, before the excavation of the tank, the land was under cultivation of certain persons (Hirina and Jala Majhis) with whom the land was exchanged by the defendant. Had these findings been affirmed by the Court of Appeal below, no question of onus of proof or any presumption could arise. The learned District Judge, however, while agreeing with the Munsif that the suit was barred by limitation, observes that the best evidence regarding excavation of the tank had not been produced by the defendant, It is not clear what he meant, because the excavation of the tank 4 or 5 years before the suit was admitted by the plaintiff in his plaint, and spoken to by his own witnesses. Probably, he meant that the excavation of the tank earlier, and the exchange of land, as set up by the defendant, was not satisfactorily proved, and that the evidence of possession on both sides prior to the excavation of the tank was unsatisfactory. It is contended on

behalf of the appellant that in this conflict of evidence the Court ought to have presumed that possession went with the title. That presumption, however, can arise only where the evidence is equally strong on both sides. In Runjeet Ram Panday v. Goburdhun Ram Panday 20 W.R. 26 (P.C.) the Judicial Committee observed: "Now the ordinary presumption would be that possession went with the title. That presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary but where there is strong evidence of possession, as there is here, on the part of the respondents,--opposed by evidence, apparently strong also on the part of the appellant,--their Lordships think that, in estimating the weight due to the evidence on both sides, the presumption may, under the peculiar circumstances of this case, be regarded: and that, with the aid of it, there is stronger probability that the respondents'' case is true than that of the appellant." See also Dharm Singh v. Hur Pershad Singh 12 C. 38 : 6 Ind. Dec. 26 Babu Kasturi Singh v. Rajkumar Babu Bissun Pragas Narain Singh 8 C.W.N. 876., Mirta Shamsher Bahadur v. Munshi Kuni Behari Lal 12 C.W.N. 273 : 3 M.L.T. 212 : 7 C.L.J. 414 (the word ''unsatisfactory'' at page 280 Page of 12 C.W. N.--[Ed.] is evidently a slip). The principle does not apply to a case where the evidence is equally unworthy of reliance on both aides, see Thakur Singh v. Bhogeraj Singh 27 C. 25 : 14 Ind. Dec. 17 Lala Singh v. Latif Hossein 28 Ind. Cas. 477 : 21 C.L.J. 480 Fakira Lal Sahoo v. Munshi Ram Charan Lal 35 Ind. Cas. 554 : 1 P.L.J. 146 (the observations with regard to waste or jungle lands are obiter).

35. The question was discussed by a Full Bench of the Patna High Court in the resent case of Shiva Prasad Singh v. Hira Singh 62 Ind. Cas. 1 : (1921) Pat. 305 : 2 P.L.T. 487 : 6 P.L.J. 478 : 3 C.P.L.R. (Pat.) 81 where it was held (overruling two decisions of that Court) that the presumption tan be raised only where the evidence is equally strong on both sides and cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. The subject-matter of dispute in that case was cultivated land. In the Order of Reference the learned Judge expressed the opinion that the cases of submerged or jungle or waste land, the continuance of possession may be presumed if antecedent title and possession are proved. The observation has reference to land of such a nature that possession cannot be expected to be proved by acts of actual user and enjoyment and the learned Chief Justice referred with approval to the observations of Wilson, J., in the judgment of the Full Bench in Mahomed Ali Khan''s case 9 C. 744 at p. 751 : 13 C.L.J. 257 : 4 Ind. Dec. 1145 (with regard to jungle lands) that the plaintiff should show such acts of ownership as are natural under existing conditions and that where this has been done prior possession may be presumed to have continued until the plaintiff is shown to have been dispossessed.

36. In the present case, the plaintiff alleged that the land was waste but it was not the case of the plaintiff that no acts of ownership could be or were exercised upon the land. The plaintiff adduced some evidence of possession, viz., grazing of cattle upon the land prior to the excavation of the tank by the defendant. The defendant adduced evidence to show that the land was under cultivation before he excavated

the tank, According to both patties, therefore, acts of possession were exercised upon the land, now where definite evidence of acts of possession is forthcoming there is no difference between the proof of possession in the case of jungle, waste or uncultivated lands and in that of cultivated lands. But whereas in the case of cultivated lands the plaintiff will fail if he does not prove his possession within 12 years; in the case of jungle or waste lands, if he proves his title, there is a presumption in his favour where having regard to the nature of the land possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the plaintiff asserts that he exercised acts of ownership upon the land and adduces evidence in support of such assertion, he cannot, where such evidence is disbelieved by the Court, turn round and rely upon any presumption, because the case set up by him negatives the existence of circumstances which would give rise to the presumption, and is inconsistent with it.

37. In the present case, if the plaintiff had been able to show that neither party had exercised any act of possession, or that he had exercised such acts of ownership as were natural under the existing conditions, a presumption could have been raised in his favour on the question of possession of the land prior to his dispossession by the defendant''s excavation of the tank. He attempted to prove such acts of possession, but the evidence was not accepted by the Courts below.

38. It is contended, however, on behalf of the appellant that the learned District Judge should not have held that "plaintiff''s witness No. 1''s statement that cattle of all villagers grazed on the disputed land, was consistent with the plaintiff''s case as much as with the defendant''s," and ought to have held that plaintiff''s possession prior to the excavation of the tank by the defendant was thereby proved. But in that passage the learned Judge was merely commenting upon the statements of the plaintiff''s witness No. 1 and what he meant was that "villagers" who are said to have grazed their cattle on the land were tenants under the paint taluks, of both the plaintiff and the defendant, both the taluks being in the same village. He did not find that the plaintiff''s tenant grazed cattle on the land, because further on referring to the plaintiff''s witnesses who all deposed to the same effect, he says: "The lower Court rightly disbelieved them as they were clearly not independent and disinterested witnesses." In these circumstances, we do not think that there was any presumption in favour of the plaintiff.

39. The appeal accordingly fails, and must be dismissed with costs.