

(1881) 01 CAL CK 0015

Calcutta High Court

Case No: None

Kally Churn Sahoo and
Others

APPELLANT

Vs

The Secretary of State
for India in Council

RESPONDENT

Date of Decision: Jan. 24, 1881

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 530

Citation: (1881) ILR (Cal) 725

Hon'ble Judges: KT., C.J; White, J; Richard Garth, J; Maclean, J

Bench: Full Bench

Judgement

Richard Garth, C.J.

This suit is brought by the plaintiffs to recover from the defendant possession of about 140 bighas of milik land, forming part of their estate of Mouza Ghurghut, for which they have paid rent to Government for many years past.

2. The plaintiffs say that this land was diluviated previously to 1865 ; that it then partially re-formed, and was diluviated again in 1869 ; that it reappeared in 1875, and was then wrongfully appropriated by the Government.

3. The answer to the claim is, that the land in question does not belong to the plaintiffs" mouza at all, but forms part of an adjoining estate, called Binda Deara, belonging to Government; and that even if it does form part of the plaintiffs" mouza, it was surveyed by the Collector in the early part of 1865 as part of Binda Deara and was held by the Government as such until the year 1869, when it was again diluviated; and that when it re-formed in 1875, it was taken possession of by the Government, who have held it up to the present time.

4. The defendant, therefore, says that, in either case, the suit must fail. If the land is not part of the plaintiffs" mouza, the plaintiffs of course have no claim. If, on other

hand, it is part of the plaintiffs" mouza, then the suit is barred by limitation. The Limitation Act which governs the case is Act IX of 1871, and whether art. 143 or art. 145 applies, the defendant contends that the plaintiffs are equally barred.

5. Both the lower Courts have decided against the plaintiffs upon the plea of limitation. There has been no express decision, whether the land formed part of the plaintiffs" mouza or not; but it would seem that in a survey map made in 1847, a portion of it, if not the whole, was demarcated as forming part of that mouza, and there certainly seems reason for supposing that, so far as the original title is concerned, the plaintiffs have a good case ; but, as it is found that they have not been in possession for upwards of twelve years before suit, both Courts have held that their suit is barred.

6. On second appeal to this Court, as the learned Judges of the Division Bench differed in opinion, the case was referred to myself as a third Judge, and we have heard the whole matter argued again on both sides.

7. The plaintiffs contend, on the one hand, that even if it is shown that the Government took possession of the land in question previously to 1865, they did so as trespassers; and that as the land was diluviated again in 1869, their possession as trespassers then ceased, and the true owners of the property must be considered as having been in possession from that time till the Government again took possession in 1875. They contend that, strictly speaking, no one can be considered as in [729] actual possession of land covered by water, and that no suit could have been brought by the plaintiffs against the Government from 1869 to 1875; but that if any one is to be considered in point of law as constructively in possession whilst the land was diluviated, it is the true owner, and not a party who previously to the diluvion was a mere trespasser upon the property.

8. They say, moreover, that, apart from the question under the Limitation Act, the proceedings of the Collector in 1875 were improperly received in evidence in both Courts against the plaintiffs, as proving that previous to 1865 the Government had taken possession of the property, these proceedings not being evidence against the plaintiffs, who were not parties to them.

9. On the other hand, the defendant says that as the Government was found to have held undisturbed possession from 1865 to 1875 under a claim of right, their possession did not cease at the time when the land was diluviated in 1869, but must be presumed to have continued until it re-formed in 1875; that, during all that time, the plaintiffs might, if they pleased, have brought a suit against the Government to recover possession; and that, consequently, the possession of the Government has been continuous from the beginning of 1865 to the present time. They contend, moreover, that, having regard to the strict language of arts. 143 and 145 of the Limitation Act, the suit is barred, and as regards the evidence upon which the lower Courts founded their decision, they say that there was oral evidence, besides that of

the Collector's proceedings, to show that the Government took possession more than twelve years before suit.

10. Now it seems to me very clear that if the plaintiffs in a case of this kind could show that the land in question was in fact a part of their mouza, of which they had been in possession before it was diluviated, their possession must be considered in law as continuing during the time of the diluvion, and, indeed, until they were dispossessed by some other party. It is not because land becomes covered with water, and it therefore becomes difficult or impossible for the owner [730] to turn it to any useful purpose, that it therefore ceases to be in the owner's possession.

11. It seems to me that the possession of the owner in such a case must be deemed to continue during the diluvion, and in fact until he has proved to have been dispossessed by some other person ; and I think that this view of the law is quite in accordance with Lopez's case (13 Moore's I. A. 467), and with the decision of the Privy Council in *Radha Prosad Singh v. Ram Coomar Sing* (I. L. R. Cal. 800). We certainly acted upon that principle in this Court in deciding the important case of *Mohunt Chutterbhooj Bharto v. The Secretary of State for India* (Reg. Ap. No. 184 of 1877), which, I believe, is not reported, but against which, so far as I am aware, no appeal has been preferred.

12. The plaintiffs in that case were shown to have been in possession of an estate in the year 1846, which soon afterwards became diluviated, and upon its reappearance many years afterwards, it was taken possession of by the Government, and resettled with other persons. We held, that, under such circumstances, the plaintiffs' possession must be considered as continuing during the period of diluvion and until possession was shown to have been taken of the land by the Government.

13. It is contended by the defendant that this principle is opposed to the law as laid down by the Privy Council in the case of *Moharajah Koowur Singh v. Nund Loll Singh* (8 Moore's I. A. 199), and with other cases decided by this Court in accordance with what was supposed to be their Lordships' view, see *Syud Ameer Ali v. Maharani Indurjeet Kooer* (15 W. R. 43), *Niljaree v. Mujeeboollah* (19 W. R. 209), *Coomar Runjit Singh v. Schoene Kilburn* (4 C. L. R. 390), and *Mahomed Ibrahim v. M. B. Morrison* (I. L. R. Cal. 36). Some, of these cases appear to have turned rather upon the question, on whom the onus of proof lies in a suit for dispossession, than upon the question, whether the possession of an owner of diluviated land is presumed by law to continue during the period of the dilu-[731]vion. But the two questions are often almost inseparable in cases of this kind; and it certainly seems rather difficult at first sight to reconcile the case of *Moharajah Koowur Singh v. Nund Loll Singh* (8 Moore's I. A., 199) with the late decision in *Radha Gobind Roy v. Inglis* (7 C. L. R. 364) which, as it seems to me, lays down the true rule upon the subject very clearly.

14. In the case of *Moharajah Koowur Singh* (8 Moore's I. A. 199), the plaintiff brought his suit to recover a large tract of land, which as he contended, had been

adjudged to be part of his estate of Gopaulpore by certain decrees made in suits between his own and the defendants' ancestors, in the year 1816. The defendants, on the other hand, contended, that by those very decrees the land in question had been adjudged to be part of their estate of Rampore. There was considerable difficulty in ascertaining which of the parties was right in this contention, but it was admitted that, as regards possession, the defendants had been possessed of the disputed land for at least eleven years before suit, and the plaintiff had not proved to the satisfaction of the Court that he was in possession within twelve years before suit. The law of limitation in force, when the suit was brought, was the Beng. Reg. III of 1793, Section 16.

Upon this state of facts their Lordships say :

15. " Again, their Lordships concur with the majority of the Sadr Court in thinking 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 the 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 dispossession within twelve years next before the commencement of the suit; and 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 [732] adversaries by compelling them to prove the time and manner of dispossession."

16. This would seem to show that, according to the law then in force, a plaintiff bringing a suit upon a dispossession by the defendant, although he may have proved a clear title, is also bound to show that he has had actual possession of the property within twelve years before suit. Otherwise he must fail. On the other hand, the case of *Radha Gobind Roy v. Inglis* (7 C. L. R. 364) was as follows:

17. The plaintiff sued to recover possession of certain land, which, as he alleged, formed part of his estate, but which was originally covered by water, and formed a large bheel or lake. He alleged that of late years the water had receded from this land, so that it had become dry and culturable ; that it had then been taken possession of by the defendant; and that, in certain proceedings which had been taken u/s 530 of the Criminal Procedure Code, the Magistrate had decided the question of possession in favour of the defendant.

18. The plaintiff then brought his suit to recover possession from the defendant, and the first question raised was one of title. This was decided in favour of the plaintiff; and the Privy Council further found upon the evidence, that one Bebi Luchmi, who was the plaintiff's predecessor in title, was many years ago the possessor, under the Government of the taluk, of which the land in question formed a part.

19. The defendant was thus driven to rely upon his possession, which had, undoubtedly, been found by the Magistrate in his favour ; and considering the nature of the case, and the difficulty in ascertaining when the bed of the bheel had become dry, and had first been taken possession of by the defendant, the question upon whom the onus of proving the dispossession lay became a very material one.

20. Upon this point their Lordships say:-" The question remains, whether the disputed land, which must now be taken all to be within the yellow line, 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 [733] 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. The High Court came to the conclusion that the defendant had not satisfied the burden of proof thrown upon him, and their Lordships are not prepared to reverse that judgment."

21. Now here, as in the case of Moharajah Koowar Singh (8 Moore's I. A., 199), the suit was brought as upon a dispossession by the defendant. The Limitation Act which governed the case was Act IX of 1871 ; and I am not aware that there had been, since the year 1846, any change in the law as to the party upon whom the onus of proof lies in such a case, or as to the nature of the proof which a plaintiff bringing such a suit is bound to bring forward.

22. The distinction, as I conceive, between the two cases is this : In the case of Moharajah Koowar Singh (8 Moore's I. A. 199) the plaintiff had not proved any possession at all of the land in dispute at any time before suit. He had only attempted to prove a title to it under the decree of 1816. And their Lordships say that, even if he had proved such a title, there was no proof of his possession, either actual or constructive, within twelve years before suit. Whereas in the case of Radha Gobind Roy (C. L. R., 364) the plaintiff not only proved his title, but a possession in his ancestor, which was equivalent to a possession in himself; and that possession was presumed by their Lordships to have continued until the dispossession by the defendant ; so that the onus was thrown upon the defendant to prove when his dispossession first occurred.

23. I am aware that this view of the law is opposed to several decisions in this Court ; but I think that those cases have proceeded upon a misapprehension of the true meaning of the Privy Council. I consider myself bound to follow this last decision of their Lordships, which I trust will set the question at rest ; and it certainly seems to me that any other view must needs be productive of the greatest injustice.

24. Take for example the case of an area of jungle land, which [734] a man buys and takes possession of by going upon the land, laying down boundary marks, or the like. He does nothing more upon it for twenty years ; and at the end of that time he finds a wrong-doer cultivating a portion of it, and he brings a suit against him to

recover possession. Under these circumstances, unless the possession, which the true owner had twenty years before, is presumed to continue till the contrary is shown, the plaintiff's suit must fail. He may be quite unable to prove at what particular time the defendant first took wrongful possession ; that must be a matter within the defendant's own knowledge. All the plaintiff would probably know, and all he could reasonably be expected to prove in such a case, is, that whereas he was possessed of the land and had a good title to it twenty years ago, he now finds the defendant wrongfully in possession. It is obviously unjust to oblige the plaintiff to prove, under such circumstances when the defendant's dispossession first occurred. Every successive moment that the defendant holds wrongful possession of that land is a dispossession of the plaintiff. And it is surely enough for the plaintiff to prove prima facie his title and possession, and that the defendant has been in wrongful possession within twelve years before suit, leaving the defendant, if he can, to prove a statutory title by a twelve years' adverse possession. And the same with diluviated land : a man may prove title to and possession of land twenty-five years ago. The land is then diluviated for several years. It then reappears, and is taken possession of by a wrong-doer. The true owner finds the wrong-doer in possession and brings his suit. According to the rule laid down by the Privy Council, the onus lies upon the defendant to show that he has a twelve years' title by the law of limitation which has put an end to the plaintiff's rights.

25. And the same principle must surely apply in every case. There cannot be one principle applicable to the case of jungle land, or diluviated land, and another principle applicable to the case of other land. The Limitation Act and the CPC made no distinction between different kinds of land. The presumption must, in one case, be the same as in another. Dispossession must mean the same thing in one case as in [735] another, and the reason of the law applies equally in the case of cultivated land, as in the case of jungle land, or land covered by water.

26. A man may have been in possession of cultivated land fifteen years ago, but by reason of his absence from home, or from droughts or some other cause he may have ceased to occupy it, and left the place for years. On his return he finds a wrong-doer in possession, and brings a suit to eject him. It seems to me that it would be, under such circumstances, a monstrous injustice to say that the burthen of proving exactly when the defendant took possession should be thrown upon the plaintiff.

27. In my opinion, therefore, if the plaintiff's in this case could have proved that the land in question formed part of their mouza, and that they were in possession of it before it was diluviated, the diluvion, although it lasted for more than twelve years, would not have affected their rights, if the dispossession by the defendant took place within twelve years before suit.

28. The plaintiff's difficulty here is, that their dispossession by the Government is found by the lower Courts to have taken place in 1865 or earlier, at any rate more

than twelve years before suit; and if that finding is correct, unless they can show that they have since resumed possession, either actually or constructively, it seems to me that their claim is barred.

29. But their contention is, that if the Government were in fact wrong-doers whilst they remained in possession from 1865 till 1869, no presumption ought to be made in favor of their possession continuing after the land became diluviated, as if they had been the rightful owners. But it seems to me very difficult to act upon that principle. If the Government had merely committed a casual act of trespass, that would not have had the effect of permanently disturbing or discontinuing the plaintiffs' possession. But if what they did amounted to putting the plaintiffs, the true owners, out of possession, and they kept possession themselves under a claim of right for so long a period as four or five years, I see no reason why the fact of the land becoming diluviated should be considered as putting an end to their possession. If this were the law, it would have a most important effect upon many titles in Bengal, which are founded upon adverse possession, because we all know that large tracts of land are always, more or less, covered with water during the rainy season; and if the fact of their becoming thus covered with water had the effect of putting an end to the possession of any person other than the true owner, and of restoring the true owner to possession during the time that the submersion continued, it would cause a very material change in the law of limitation.

30. I think, therefore, that if the Government were in possession under a bona fide claim of right at the time when the land became diluviated in 1869, their possession must be considered as continuing up to the time when they resumed actual possession, and therefore virtually up to the commencement of this suit

31. It follows that, if the Government did actually take wrongful possession of the land in question more than twelve years before suit, the plaintiffs are barred, whether the case comes under art. 143 or art. 145 of the Limitation Act. If it comes under art. 143, the plaintiffs were dispossessed more than twelve years before suit; if it comes under art. 145, the possession of the Government became adverse more than twelve years before suit.

32. There are some points, however, in this case which in my opinion the lower Courts, and especially the lower Appellate Court, do not appear to have tried satisfactorily ; and as the plaintiffs desire to have those points considered and decided, I think they are entitled to a remand for that purpose.

33. It should be distinctly ascertained by the lower Appellate Court, in the first place, whether the land in dispute, or any and what portion of it, formed part of the plaintiff's mouza ; and, in the next place, whether the Government took possession of that land, or any and what part of it, so long ago as twelve years before suit.

34. The plaintiffs are clearly entitled to any part of the property in question which belonged to their mouza, and which cannot be distinctly proved by the defendant by

legal evidence to have been taken possession of by the Government at least twelve years before suit.

35. For the purpose of ascertaining these facts, the proceedings before the Collector are clearly not admissible as against the plaintiffs. The plaintiffs were no parties to them, and those proceedings were improperly admitted as evidence in the Court below. The lower Appellate Court will be at liberty to receive any fresh evidence that may be adduced by either party on the above points.

36. If the plaintiffs establish their right to recover the land in question, or any part of it, they will be entitled to costs from the defendant, proportionate to the quantity of land recovered, in all the Courts, including the High Court.

37. If the plaintiffs can prove that the land in question, or any substantial part of it, formed part of their mouza, and they are defeated upon the plea of limitation only, each party will pay his own costs in this Court and in the lower Appellate Court ; because in that case it will be clear that, the Government have been wrongfully appropriating land, which belongs, properly speaking, to the plaintiffs, and for which the plaintiffs, have been paying revenue to them up to the present time. This would undoubtedly be a great injustice to the plaintiffs, and the attention of the proper authorities might, with good reason, be invited to the subject.

38. On the other hand, if the land in question never formed any part of the plaintiffs' mouza, it is only right that the plaintiffs should pay the defendant's costs in all the Courts.

White, J.

39. This is an appeal against a decree of the District Judge of Bhaugulpore, confirming a decree of the Munsif, which has dismissed the suit of the appellants.

40. The object of the appellants' suit is to recover possession of certain chur land, on the ground that it had reformed on the site of a portion of milik land within their Mouza Ghurghut and lying to the north of the mal land of the same village. The quantity of land is stated in the plaint to be 1396. 14c. and 6d., but on measurement the Amin of the first Court has found it to be 140b. 3c. 6d. The appellants allege, and it does not appear to be disputed, that since the diluviation they have continued to pay revenue to Government for the whole of their milkeit land in Ghurghut.

41. The Officiating Collector of Monghyr, on behalf of the Secretary of State for India, who is the respondent and the defendant below, alleges that the lands in suit does not form part of the milik lands of the plaintiffs' Mouza Ghurghut, but is parcel of Mouza Binda Deara, which belongs to Government. He further pleads that the plaintiffs are barred by the law of limitation. Both the lower Courts have held this suit to be barred.

42. The specific land which is sought to be recovered admittedly did not appear as dry land until 1875 ; and as this suit was brought on the 5th of September 1877, no question, under ordinary circumstances, could be raised founded on the law of limitation. But it is also admitted that, upon the site of the land in suit, land of nearly the same extent had previously appeared and been washed away. In other words, the site of the disputed land has been the subject of a double diluviation and a double re-formation of chur land within a comparatively recent period. It is out of this somewhat unusual circumstance, coupled with the fact the Government on both occasions of the re-formation took possession of the re-formed land, that the plea of limitation has been raised, and by the lower Courts sustained. The dates of the first diluviation and re-formation and of the possession taken by Government of the land that first re-formed are not given by the lower Appellate Court, but it seems that the site was diluviated for the first time shortly before 1847; that it continued for some years under water; that a year, or a few years, before 1865, land re-formed upon the site which Government then, or shortly before, took possession of, and which was nearly equal in extent to the land in suit ; that Government kept possession of the re-formed land until 1869, when the site was again diluviated. In 1875, land was again formed upon the site and taken possession of by Government, in whose possession it still is.

43. The District Judge has held that it was for the plaintiff's to show that they had been in possession within twelve years before the suit, and that as they could not do this, their suit must fail.

44. The Judge has applied Section 141

[Section 141

Description of suit

Period of limitation.

By a remainderman a
reversioner, (other than a
landlord) or a devisee, for
possession of immoveable
property.

Twelve years.

of the Indian Limitation Act of 1871 (the Limitation Act which was in force when this suit was brought). But I think that the plaintiff's suit does not fall [739] within that article or any of the other descriptions of suit specially provided for by Part VIII of the first division of the 2nd schedule of the Act, but it is governed by art. 145, which prescribes twelve years from the time when the possession of the defendant became adverse to the plaintiff's.

45. I think that the dispossession, or discontinuance of possession, mentioned in Section 140

Description of suit.

Period of limitation.

By a landlord to recover
possession from atenant.

Twelve years.

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W

is that which occurs where the property is taken actual possession of, or is capable of being taken such possession of, by another, and does not apply to the case where the property is submerged by the act of God, and so made impossible of occupation or actual possession.

46. Taking into account the admitted fact that land re-formed twice on the same site, and that on both occasions Government took possession of the land which so re-formed, the question is, when did the possession of Government become adverse to the plaintiffs ?

47. When this case was first argued, I was of opinion that, as regards the land in suit, the period of limitation began to run against the plaintiffs when Government took possession of the land which re-formed in 1875. It appeared to me that as the possession which Government took of the land which re-formed on the site previously to 1865 was the possession of a wrong-doer, Government could not avail itself of the doctrine of constructive possession in order to connect its possession of the first re-formation in 1865 with its possession of the second re-formation in 1875; and that its possession of the first re-formation was in fact swept away or put an end to by the second diluviation. I was struck with the apparent hardship which was involved in a construction of the law of limitation which should permit a wrong-doer, who might have held possession of a newly formed chur for only a year before it was again washed away, to oust the true owner in the event of land subsequently re-forming a second time, although an interval of twenty or more years might elapse before the second re-formation took place. It seemed to me contrary to justice that a wrong-doer's possession should thus ripen, as it was, under the water into a title, although his actual and possible occupation of the land in question only continued for a year.

48. [740] But after hearing the case reargued, and having had the advantage of reading the judgment which his Lordship the Chief Justice has delivered, I have come to the conclusion that my first opinion was wrong, and that as the law of limitation is at present framed by the Legislature, and as that law has been construed by this Court, Government is, in the ease before us, entitled to date its adverse possession of the land in suit from the period when it first took possession of the land which first re-formed upon the present site.

49. Assuming, as I do, for the purpose of the argument on the question of limitation that the land in suit on both occasions re-formed on the site of the plaintiffs' diluviated milkeit lands, the land, although under. water, continued, after the first diluviation, in the constructive possession of the plaintiff's, until Government took

possession of the lands which first re-formed on the site. That act of Government was admittedly an adverse act as against the plaintiffs, and put an end to their constructive possession. Until this suit was brought the plaintiff's did not act with a view to resume possession, and the adverse possession of Government, which commenced when it occupied the lands first re-formed, must be considered as continuing until this suit was brought, although for six years of the time its actual occupation ceased by reason of the second diluviation. It appears to me unnecessary to determine whether Government as a wrong-doer, when it first took possession, could be said to have constructive possession during the period of the second submersion. It is enough to say that the time began to run against the plaintiffs when Government first took adverse possession, and that, as the plaintiffs have not resumed or recovered possession before suit, it continued to run according to the ordinary law of computing the period of limitation, and this irrespective of whether the land was or was not capable of occupation by reason of its submersion.

50. The result of our decision will be that, in similar cases to the present owners of land, which has suffered from successive diluviations and re-formations, must, if they wish to preserve their rights, bring their suit within twelve years of the time when adverse possession is first taken of land re-forming on the 741] original site, whether at the time of suit the land is capable of occupation or lying under water in consequence of a second diluviation. I have not in my experience known of a suit of this character being brought where the land in dispute at the time of suit had disappeared and formed part of the bed of a river ; and I can foresee many difficulties in the way of such a suit, chiefly arising from the difficulty of identifying lands which are at the bottom of a river. But there is no doubt that such a suit would lie, and so long as land which is exposed to successive diluviations and re-formations is subject to the ordinary law of limitation, it will be a matter of prudence to bring such a suit.

51. I agree that the case should be remanded to the lower Appellate Court to try the questions mentioned in the judgment of the Chief Justice.

Macleay, J.

52. In this suit the plaintiffs claimed 139b. 14c. 6d. of land, which they alleged to be part of their estate Milik Ghurghut. They stated that the greater portion of the estate had diluviated before the " former survey,"-that is, before 1847. Before the next survey of 1865 accretion had commenced, but this was washed away in 1273 P. (1865-66). The present land commenced to re-form in 1278 F. (1870-71), and became culturable in 1282 F. (1874-75). This suit has, therefore, been brought against the Government for possession of the land. The cause of action being laid in the last mentioned year.

53. The Government denies that the land is a portion of the plaintiffs' Milkeit Ghurghut as laid down in the survey of 1847. The case put forward by Government is, that the Ganges, which in 1847 flowed south of Milik Ghurghut, changed its course in 1861 and intersected the Government estate of Binda Deara, and the old channel or bed, and the land in suit, came into the possession of Government as part of Binda Deara, and was surveyed as part of it in 1865. It is admitted that the land again disappeared in 1869, and reappeared in 1876, but it is urged that the land now sued for is identical in site with the land which was held by Government from 1861 to 1869.

54. The first Court found that 128b. 14c. 19d. out of the land is identical in site with the land surveyed in 1865 as part of the Government estate of Binda Deara, and found to be in the possession of the tenants of Government. It also found that the remainder is part of Binda Deara, and is not part of plaintiffs' estate of Milkeit Ghurghut. The possession held by Government in 1865 is found to have been adverse to the plaintiff's, and their suit declared to be barred by the first Court and also by the lower Appellate Court.

55. In this Court it is contended that, taking it as found that the land is identical in site with the land in the possession of Government in 1865, the plaintiffs are entitled to prove that it is part of their estate and re-formed upon its old site, and that their cause of action can only be said to have commenced when the last re-formation commenced.

56. This contention is entirely unsound, if it is established that the land held by the Government down to 1865-66 is identical in site with the present land. If that land was re-formed on the site of the plaintiffs' estate as it existed in 1847 or earlier, the plaintiffs were undoubtedly the owners of it, and entitled to take possession when it reappeared in 1861 or 1862. This was laid down as far back as 1848, in the case of *Mussamat Imam Bandi v. Hargovind Ghose* (4 Moore's I. A. 403), and again in *Roma Nauth Thakoor v. Ghunder Narain Chowdhry* (Marshall 136 in 1862). *Lopez v. Muddun Mohun Thakoor* (13 Moore's I. A. 467), decided in 1870, affirmed the law laid down in these cases.

57. The plaintiffs, therefore, were entitled to take steps to assert their title and to rectify the survey map of 1865, but failed to do so. This neglect is not explained in any way, and we find that the proprietor of Mouza Ghurghut, within which the plaintiff's milik lands lie, was more alive to his interests, and actually opposed the survey, alleging that the land was part of Mouza Ghurghut. He was defeated in the Revenue Courts, and took no further steps to establish his title.

58. The plaintiffs now seek, by a suit instituted in 1877, to disturb a possession which commenced in 1862, and continued even after the subsequent submersion in 1866. This, in my opinion, they cannot do. It was contended that the possession which commenced about 1862 did not continue after 1866, and that no [743] suit

could have been brought during the submergence, which lasted from 1866 to 1876. But if the action of the Government in annexing the land to their estate of Binda Deara, by taking possession and survey, was an invasion of the plaintiffs' title, it did not cease to be so when the land was submerged. On the contrary, the land and the water above the land continued to belong to the estate to which it had been annexed, until this state of things was put an end to by resort to law; and it is the failure of the plaintiffs to put an end to it, either during the possession, or after it had been submerged again, that is fatal to their present case. I do not agree with the argument that a suit would not lie for land submerged in a river. On the contrary, julkar, tulkar, and other rights, not to mention the right to subsequent alluvial re-formation on old sites, are all things which might be asserted in a suit: *The Government v. Baboo Radhay Singh* (20 W. R. 117). For these reasons I would affirm the decision of the lower Courts on the question of limitation.

59. I understand the plaintiffs now wish for a finding by the lower Appellate Court whether the land in suit is identical with the land held by the Government down to 1866. This was not pressed when the case was before the Division Bench ; but the plaintiffs are, strictly speaking, entitled to the finding they ask for. If the lower Appellate Court affirms the finding of the first Court that 1286. 14c. 19 1/2d. are identical with the land held by Government down to 1866, and that the remainder 116.14c. 19 1/2d. are part of the estate of Binda Deara, the plaintiffs' suit will be dismissed. I concur in the order proposed by the learned Chief Justice.