(1919) 05 CAL CK 0069

Calcutta High Court

Case No: Appeals from Original Decrees Nos. 164 and 258 of 1914

Monmotha Nath Mitter and Others		APPELLANT
	Vs	
Anath Bundhu Pal and Another		RESPONDENT

Date of Decision: May 16, 1919

Final Decision: Allowed

Judgement

1. These cases were remanded to the Court below for distinct findings upon the following points with respect to the lands of Schedules ha and kha, first, "whether any of the jama in Mouzah Baliari mentioned in the Chalan of 1275 (Ex. P26) or any of the jamas in Mouzah Bankipore mentioned in the Chalan of 1276 (Ex. P27) 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 he 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." The learned Subordinate Judge has carefully considered the jamas mentioned in the Chalans (Exs. P26 and P27) one by one, and has come to the following conclusion:--"The facts above discussed show that the small jamas of the Chalans (Exs. P26 and P27) cannot be identified with the lands and jamas described in Exs. V1 and V2, 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 land held by the tenants in 1275 did agree with the areas held by them respectively in 1.190, 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, ka and kha Schedules, should be answered in the negative," 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 Ex. P27 the presumption, if any, has been rebutted by the Plaintiff.

2. The learned Pleader for the Appellant has not attempted to show that the findings are wrong.

3. He admitted that the evidence adduced by the Defendant is not sufficiently satisfactory to identify the small jamas with the consolidated jamas mentioned in Exs. P26 and P27, or that the rents have all along been uniform from the time of the permanent settlement or that there is uniform payment of rent so as to raise any presumption under sec. 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.

4. The learned Pleader for the Appellant, however, has raised two points in connection with the lands of Schedules ha 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 sec. 167 of the Bengal Tenancy Act.

5. 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.

6. 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 Defendant 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 more than 12 years, the Plaintiffs purchased the putni 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 putni on the 15th August 1906 which was only seven years from the time when Defendant obtained possession; and his title had not been perfected before the putni 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.

7. The nest point taken is that the Defendant was recognised as tenant by the darputnidars. Mr. Sircar 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 darputnidars 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 receipt in his name and gave receipt 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.

8. We now come to the lands of Schedules 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 putni, and was such possession adverse? Second, whether such possession, if any, commenced from before or after the creation (a) of the putni, (b) of the darputni and (c) of the ijara? The Court below has recorded its findings with respect to the plots separately.

9. Two main questions have to be considered in connection with these lands. The first is whether the zemindar was out of possession of the lands from before the creation of the putni, 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 putni, constituted an incumbrance which the Plaintiffs were bound to annul under the provisions of sec. 167 of the Bengal Tenancy Act before they can succeed.

10. Before dealing with these questions it should be mentioned that there is no doubt that there were lakheraj, debuttar and brahmottar lands in the village at the time of the permanent settlement. The Chittas of 1190, Ex. V, printed at pp. 397 to 422 (Book No. 2) deal with debuttar and brahmottar lands. Some of these lands were purchased by the Naskars. For instance, the Chitta of 1190 (Book No. 2, p. 417) mentions 5 bighas 13 cottas of brahmottar land in the name of (wormeaten) Ram Sidhanta and Kriparam Sidhanta and the kobala, dated the 16th Ashar 1209 (Book No. 11, p. 295) shows that 5 bighas 13 cottas of brahmottar lands were sold by Kriparam Sarma to Habib Naskar. The Chitta (Book No. 2, p. 415) mentions 1 bigha 19 cottas as brahmottar and the kobala, Ex. O57, dated the 22nd Kartik 1283 (Book No. 11, p. 314) recites that 18 cottas 4[illegible] chataks out of one plot of brahmottar land in the name of Ram Ram Bapuji, 1 bigha 19 cottas were purchased by one Dost

Mamud Holla, and which together with some other lands were sold by Tomijuddin Naskar to Ramjan Naskar. The Chitta mentions several plots of brahmottar lands (without sanad) in the name of Jagannath Tarkapanchanon of Tribeni one of them being 1 bigha 8 cottas (Book No. 11, p. 411) and the kobala, dated the 19th Magh 1207 Book No. 11, p. 311), shows that Jagannath in exchange for 1 bigha 2 cottas first class lands given to him by Samsuddin Naskar, 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. 11, p. 407), and the kobala, Ex. O55, dated the 15th Falgoon 1197 (Book No. 11, p. 312), shows that Basudeb sold 4 bighas 19 cottas of land which he possessed as the shebait of the Goddess Bisalakshmi Thakurani. The Chitta (Book No. 11, p. 406) mentions 2 bighas 8 cottas as debuttar of Sri Iswar Daskhin Roy Thakur in the name of Radha Charan Sarkar, and the kobala, Ex. O40, dated the 21st Magh 1183 (Book No. 11, p. 297) shows that Radha Charan Sarkar sold 2 bighaa 5 cottas out of the lands of debuttar lands to Keamuddi Naskar. These documents go to show that prima facie all the lands of the village were not mal nor in the possession of the zemindar.

11. With regard to the first question it is contended on behalf of the Plaintiffs that the Defendants never set up any case of adverse possession from before the creation of the putni. It appears, however, from the written statement that the defence was twofold. 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 the zemindary, and we have already dealt with the matter in our order of remand. In the next place, however, they pleaded (see para. 10 of the written statement) that if the lands were held to be mat, Ramjan Naskar and his heirs having enjoyed and possessed all those properties for long upwards of 12 years adversely to the Plaintiffs, they (Ramjan Naskar and his heirs) had acquired good title thereto accruing 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 1281 (the creation of the putni) 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 putni. 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 putnidar and darputnidar are also meant to be included in the word "Plaintiffs" as Ramjan died before the Plaintiffs'' purchase at the rent sale.

12. 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 on the ground of limitation before remand.

13. The fifth issue as amended raised the question "Are the lands of Schedules ga and gha the mal lands of the Plaintiffs?" and the sixth issue was "Have the Defendants any right to the lands described in Schedules ga and gha of the plaint by adverse possession against the Plaintiffs ?" We think that in these circumstances the question of possession before the creation of the putni 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.

14. 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 putni purchased by them, from the Defendants as trespassers, were in the possession of the zemindar when the putni was created in 1281, or whether it lay upon the Defendants to show that their possession commenced from before creation of the putni. Upon this question we may refer to the case of Kalikanand Mookherjee v. Bipradas Pal Chowdhuri 19 C.W.N. 18 (1914), where the Plaintiff, a purchaser of a putni 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 putni 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 putni was created, and that where the proprietor is out of possession he cannot merely by the device 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 sought to be distinguished on the ground that there it was found that the zemindar was out of possession when he created the putni.

15. It is true that in that case the learned Judges observed: "The District Judge has not found that in the cases before us the adverse possession of the Defendants and their predecessors commended after the creation of the putni. On the other hand there is ample evidence that the adverse possession of the Defendants and their predecessors commenced before the creation of the putni. There are traces on the record to show that there had been adverse assertions of hostile title before the putni title itself was created." But the decision was not based on that ground. It appears from the report of the case [see Kalikanand Mookherjee v. Bipradas Pal Chowdhuri 19 C.W.N. 18 at p. 20 (1914)] that after Counsel for the Defendant-Appellant read the judgment the Court called 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 zemindar was in possession of the disputed land 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 putni 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 a case of this description. No doubt if was pointed out by their Lordships of the Judicial Committee in the case of Runjeet Ram v. Gobardhan Ram 20 W.R. 25 (1873) that in the decision of the question of limitation 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 putni, it would have been unnecessary to consider the question whether the Plaintiff was bound to show that the zemindar was in possession before the creation of the putni.

16. Reliance was placed on behalf of the Plaintiff upon the decision of the Judicial Committee in the case of the Secretary of State for India v. Sri Raja Chelkani Rama Rao 20 C.W.N. 1311 (P.C.) (1916). 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 fulfil 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 12 years provided by Art. 144 is extended by Art. 149 to sixty years."

17. We do not think that the decision of the Judicial Committee lays down any principle contrary to that laid down in the case of Kalikanand Mookherjee v. Bipradas Pal Chowdhuri 19 C.W.N. 18(1914) referred to above. The latter case, we understand, baa been appealed to the Privy Council but so long 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 Plaintiff purchase of the putni and the Plaintiffs are suing to eject them from 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 putni, and that the possession of the Defendants commenced after the putni came into existence, or that such possession was not adverse. There is no evidence of possession before the creation of the putni. One of the Plaintiffs was examined in the case, and he admitted that there is no collection papers showing realization of rent in respect of these lands. It is true that the Naskars held many mat 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 Defendant unless it appears that any particular plot of land of Schedules ga and gha is intermingled with or surrounded by mal lands, and we hare been referred to only two such cases. The question, moreover, is not whether the lands are lakheraj, but whether the zemindar was in possession before the creation of the putni. It is found, however, by the learned Subordinate Judge that many of the plots were mentioned in a road cess return (Ex. U) filed by Ramjan Naskar on the 22nd July 1872. 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.

18. The next question is whether the adverse possession of the Defendants in respect of any of the lands subsequent to the creation of the putni constituted an incumbrance which it was necessary for the Plaintiffs to annul under the provisions of sec. 167 of the Bengal Tenancy Act.

19. It is found that there is no evidence of adverse possession before the Thoka of 1295. The sale at which the Plaintiffs purchased was no doubt more than 12 years after 1295. But the darputni was granted in 1302, i.e., seven 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 Gocool Bagdi v. Debendra 14 C.L.J. 136 (1911) and Satish Chandra v. Munjamati 17 C.W.N. 340 (1912)]. Adverse possession in the present case having commenced from 1295 had not ripened into an incumbrance when the darputni was created in 1302. The Defendants no doubt continued in possession even after the grant of the darputni, and the statutory period was completed while the mahal was in the hands of the darputnidar. The Plaintiffs have annulled the darputni according to the provisions of sec. 167 of the Bengal Tenancy Act, and the incumbrance of the Defendants (by virtue of adverse possession) was upon the darputni and not upon the putni. It is accordingly contended on behalf of the Plaintiffs that they were not bound to annul any incumbrance on the darputni under the provisions of sec. 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 putnidar or by any other subordinate tenure-holder by service of notice under sec. 167, and we were referred to the case of Mafizuddin Sardar v. Ashutosh Chuckerbutty 14 C.W.N. 352 (1910), Now under sec. 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 in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section.

20. 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 Chuckerbutty 14 C.W.N. 352 (1910) 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 select arbitrarily any link in the chain and destroy it while he allows those above it to remain unaffected.

21. 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 notice under sec. 167 of the Bengal Tenancy Act 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 under sec. 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 under sec. 167 upon all grades of subordinate interests. There may be a chain of subordinate interests under a putni, such as darputni, seputni, mokurari, darmokurari, semokurari 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 putni at a rent sale is to find out all these interests and serve notice upon each of them under sec. 167. The sub-tenancy created by the tenant (in this case the putnidar) is the darputni, that is, an incumbrance under sec. 161 and that only has to be annulled under the provisions of sec. 167. The notice under that section upon the darputnidar is operative upon incumbrances created by the darputnidar or the holders of interests subordinate to him which are carved out of the darputni. What is required to be annulled under sec. 167 is the sub-tenancy created by the putnidar, i.e., the darputni as it was created and which would include all the interests created

or carved out of it. In the case of Makham Das v. Ram Chandra C.W.N. 1061 (1912), where the purchaser at a sale for arrears of rent purchased a putni and annulled a darputni under the provision of sec. 167, but did not take any steps to annul a seputni created by the darputnidar, its was held by Holmwood and Chapman, JJ., that the extinction of the darputni necessarily carried with it the extinction of the seputni which is not a protected interest under the definition in sec. 160 of the Bengal Tenancy Act. The objection in that case was taken by the tenant under the seputnidar and it may be contended that the question whether the seputni was extinguished or not would depend upon the purchaser of the putni, because he might choose to affirm the seputni. But probably the learned Judges had in view the fact that the purchaser of the putni in the previous suit had sought to avoid the seputni 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 seputni is extinguished with the extinction of the darputni 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 Art. 121 of the Limitation Act, such interest coming into existence after the creation of the putni. 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.

22. We now proceed to deal with the particular plots of lands comprised 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 (Ex. U) filed by Ramjan Naskar 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 under sec. 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 (brahmottardars, lakherajdars, etc.), and the learned Pleader refers to the word "pottai" lands at the heading of the return in support of his contention. The heading of the return, however, runs as follows : " In respect of 147 bighas 11 cottas of land paying the annual malguzari of Rs. 200-13-18 gds, being my mourashi ancestral purchased and pottai lands whether held in my own name or in the names of others, and situate within the villages of Mouzahs Balaria and Arjunpore within Zemindary No. 156 belonging to the late Rajah Radha Kanta Deb Bahadur."

23. The pottai 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, 21 to 45, 47 and 55 in Schedule ga exactly tally with the entries in the cess return both as regards the area and the rental. It is also admitted that these plots are not pottai lands, and that he cannot contend that they are lakheraj or that the claim with respect thereto was barred by limitation. He contended, however, that they were incumbrances which should have been annulled under sec. 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 cess return. They are Plots Nos. 1, 2, 6, 8, 13, 46, 49, 54 and 58 to 64. It is contended, however, on behalf of the Defendant that they do not agree and Plots Nos. 58 to 64 are said to be pottai 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 kobala. It is described in the plaint as one plot shall land 8 bighas 13 cottas 5 chataks out of 10 bighas 4 cottas 5 chataks. The remaining 1 bigha 11 cottas 6 chataks is Plot No. 8 of ka which is admittedly mal, so that one portion of the land is mal. The land being intermingled with mal land which was held by the Naskars 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.

27. Plot No. 2.--Is Dag No. 47, the area is 19 cottas 15 chataks.

28. 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 described it as lakheraj bastu, 19 cottas 15 chataks of Basudeb Pal and others out of whole plot, 7 bighas 1 cotta 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$\frac{1}{2}$ chataks and that is the exact area of Plot No. 22 of Schedule ka which is admittedly mal. The land therefore is intermingled with land which was held by the Naskars 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 Earn Chandra Naskar, Witness No. 2 for the Defendant, shows that there is the witchery of the Plaintiffs on a portion of Plot No. 2 of Schedule ga. See also Taiaknath 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.

29. The plot is mentioned in Ex. U in the name of Ram Chandra Pal as 1 bigha 1 chatak at a rent of Rs. 64-5 gds. There is a 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 gds.

30. 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.

Plot No. 6--Corresponds to Dag No. 33.

31. Dag No. 13 of the Defendants'' chitta is a ticca land in Mouzah Nij Balaria and contains three entries. It is clear therefore that it is mal. Dr. Kanjilal for the Defendant says that the dag numbers refer to the dags of some chitta prepared by Ramjan, and not to those of the chitta No. V1 or V2, 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 gds. including 3 cottas 6 chataks acquired by the missionaries and that in the road cess return the area is 2 bighas 14 cottas at a rent of Rs. 8-1-12 gds. in 1279, excluding the 3 cottas acquired by the missionaries bearing a proportionate rent of Rs. 1-15-4 gds. The Court below has held that possession is proved from 1279, but not adversely. We agree with the finding of the Court below.

32. Plot No. 8.--The Court below finds that the plot is mentioned in the Thoka of 1295 and 1280, but is also mentioned, at least a part of it, in the road cess return. It is described as ticca in the chitta of Mouzah Balaria. We think that the Court below is right in holding that the land is mal and was not held adversely by the Defendant.

33. Plots Nos. 13, 46, 49, 54 and 58 to 64.--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 and 60 to 64, and in respect of Plots Nos. 13, 58 and 59 (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 1280 but as it is included in the cess return, the possession was not adverse.

34. We must accordingly hold that with respect to all the plots mentioned in the road cess return (Ex. U), the possession was not adverse, and the Plaintiffs are entitled to possession.

35. 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 63, 56 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'' zamindari. 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.

36. 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 1295 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 Nos. 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 No. 15 and not to 16, and that the Missionary Shahebs have not been called nor any collection papers produced. It is also urged that the Church according to the Commissioner''s plan is outside Plot No. 15 and is dose to Plot No. 16. But the witness did not say that the Church was on 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 Defendant and his predecessors. The Plaintiffs'' Witness No. 9 admitted that it belonged to Ramjan Naskar 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 the 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 Plaintiffs 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.

37. As for Plot No. 26, Jafermollah, the Witness No. 8 for the Defendant, says that he cultivates the land which is his ancestral jote, that he formerly paid rent to the Naskars, then to the Receiver and then to the Defendant. 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 Ram 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 putni (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 Chakravarty (see Ex. O57, kobala) and as the adverse possession commenced after the creation of the putni, the Court below held that it could not affect the zemindars. But although the possession of Ramjan 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.

38. There remain Plots Nos. 4, 5, 7, 9, 10, 11, 19, 21, 48, 50 to 53, 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 Plaintiffs'' zamindari. 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 Thoka of 1280, i.e., before the creation of the putni, 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 same (both in area and rental) as that in the road cess return, and Mr. Sarkar on behalf of the Plaintiffs has 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'' tease was that the tenant Rup Chand Sardar held that land of this plot is in excess of the 6 bighas 5 cottas 6 chataks 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. 66 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 traced separately and there is no oral evidence of possession. But as stated above the Thokas showed possession in 1295 in respect of all the above plots.

39. The Defendants were admittedly in possession at the date of the suit. These plots are 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 putni and there is no evidence to show that possession with respect to the other plots commenced after the creation of the putni in 1281 and there is no suggestion that any one else was in possession.

40. The Court below finds that the area of Plot No. 11 in the kobala does not agree with that in the Thokas 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 Thoka 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 putni, or that the possession of the Naskars 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. 41, 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 putni.

41. 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. As already stated, Plots Nos. 58 to 61 are claimed as pottai lands. Out of these Plot No. 64 is alleged to have been subsequently purchased from the brahmottardar, and is therefore no longer pottai land, but is lakheraj. The kobala, Ex. O66, dated the 6th Kartik 1280 (Book No. II, p. 323) by Parbatty Bhattacharjee and another, recites that the 6 bighas 12 cottas of land stood in the name of Mathuresh Bhattacharjee, elder brother of the grandfather of the executants of the kobala in 1190, and one moiety of the lands belonging to the executants was sold to Aminullah Kazi by the kobala. There was another kobala, Ex. O67, dated the 14th Kartik 1281 (Book No. II, p. 325) by which another co-sharer sold 16  cottas of lands in his own share to Kazi Aminullah with similar recitals. The first kobala is prior to the grant of the putni, and the second, though subsequent to the date of the putni, 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 Mukherjee (Book No. I, p. 394) who speaks to payment of rent to certain other maliks. Some receipts, Exs. S to S5, have been filed to prove rent to such maliks, only one of them (Ex. S) has been printed which shows payment of rent to the owner of mahal debuttar in the name of Krista Chandra Roy. But the learned Pleader for the Defendant 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 pottas 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.

42. We now take up the plots of Schedule gha. Plots Nos. 79, 84 and 102 (not No. 101 mentioned in the judgment of the Court below the claim to which had been withdrawn) Nos. 131, 146, 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, 92, 106, 108, 74 and 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 Nos. 71, 74, 79, 84, 88, 89, 102, 131, 146, 147, 148, 151, 153 and 157 was not adverse.

43. The Court below has found that the identity of Plots Nos. 72, 73, 87, 91, 93, 94, 98, 124 and 125 have not been proved with the lands of the Thokas and no oral evidence of possession has been adduced.

44. 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, 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 Defendants 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, 98, 124 and 125 is barred by limitation.

45. It was contended that Plots Nos. 93, 94, 98, 147, 148, 150 and 151 are pottai lands, but no potta 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., Nos. 147, 148, 150 and 151 being included in the road cess return, the Defendant 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.

46. Plot No. 83 was admitted by the Defendants'' gomasta Bholanath before the Commissioner to appertain to Schedule ha. It is admittedly mal and the possession

therefore was not adverse. The learned Pleader for the Defendant states before us that Plots Nos. 38, 15, 20, 21 and 6 of Schedule ha are repeated in Plots Nos. 83, 102, 140, 141, 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.

47. Plots Nos. 86 and 100 have been found to be outside Plaintiffs'' zamindari and the claim of the Plaintiffs must therefore be dismissed.

48. Plot No. 92 includes Plot No. 9 of Schedule ga and Plots Nos. 106 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 108 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. 9 of Schedule ga 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 Defendants'' kobala, the Witnesses Nos. 1 and 5 for the Defendants proved possession from 1295, 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.

49. 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 and 60 to 63 of Schedule ga and Plots Nos. 71, 74, 79, 84, 88, 89, 102, 131, 146, 147, 148, 150, 151 and 157 of Schedule gha should be allowed on the ground that they are mentioned on the road cess return and the possession of the Defendants 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'' zemindary the suit should be dismissed with regard to the said plots.

50. 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. 106 and 108 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 53, 65, 66 and 67 of Schedule ga 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 these plots commenced after the creation of the putni in 1281.

51. 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, 81, 88, 89, 102, 131, 146 to 148, 150, 151 and 157 of Schedule gha. The Plaintiffs will get khas possession of the said lands. They are entitled to Wasilut 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 further 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, 93, 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 Nos. 83 and 140 to 142 of Schedule glut as they are included in the lands of Schedule ka. 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 rupees three hundred and in No. 258 of 1914 at rupees one hundred.