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thereon, and of the decree of the 31st July 1868; that it be referred to the Court of the Subordinate Judge of Shahabad to assess the last-mentioned costs upon that footing; and that the cause be remitted with a declaration that the costs when so assessed, together with the said sum of Rs. 2,499-13-5, are to be set off against the costs found due to the respondents. Interest should be charged as ordered by the decree of the 26th April 1869.

Their Lordships will make an humble recommendation to Her Majesty to that effect.

With regard to the costs of these latter proceedings, their Lordships have had considerable doubt, because the appellant does not wholly succeed; but having regard to the fact that the whole of the appellant's claim was opposed in the Court below upon a ground which their Lordships think entirely wrong, they do not see sufficient reason for departing from the sound general rule that the party who is defeated in the controversy that is raised shall pay the costs.

They, therefore, think it right that the appellant should have the costs of this appeal, and also the costs in the High Court.

Appeal allowed.

Solicitors for the appellant: Messrs. *Burton, Yeates, Hart,* and *Burton.*

Solicitors for the respondents: Messrs. *Henderson & Co.*

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Field.

1883 *March* 19.

MOHINY MOHUN DAS (PLAINTIFF) *v.* KRISHNO KISHORE DUTT AND OTHERS (DEFENDANTS.)*

Onus probandi—Suit for possession of land—Presumption of possession and ownership.

If, in a suit for possession of land which was covered with water more than twelve years before the institution of the suit, the plaintiff proves that he exercised acts of ownership, as by letting out the julkur to

* Appeal from Appellate Decree No. 698 of 1881, against the decree of Baboo Nobin Chunder Ganguli, Second Subordinate Judge of Furreedpore, dated the 31st January 1881, reversing the decree of Baboo Rosik Chunder Roy, Second Munsiff of Moolputgunge, dated the 11th March 1880.

tenants, that is *primâ facie* evidence of possession and ownership, and unless the defendant can make out a twelve-years' statutory title by adverse possession, the plaintiff's possession must be presumed to have continued, and it is not necessary for him to show a possession by acts of ownership within the twelve years.

Baboo *Chunder Madhub Ghose* and Baboo *Lal Mohun Das* for the appellant.

Baboo *Guru Das Banerjee* and Baboo *Bykanto Nath Das* for the respondents.

THE facts of this case sufficiently appear from the judgment of

GARTH, C.J.—In this case the Subordinate Judge has unfortunately taken an erroneous view of the law.

The subject of the dispute was a piece of land between two estates. It is admitted that one of these estates belonged to the plaintiff, and the other to the defendants. The question was, to which of the two the piece of land in question belonged.

Between these two estates there was a baor or water channel; and it seems to have been found by the Courts below that the land in question was formed by the silting up of this baor. Evidence was called on both sides to show at what time the silting up took place, or in other words, at what time the land in question, which was originally covered with water, became dry.

Upon that point the Subordinate Judge appears to have believed the defendants' witnesses in preference to those of the plaintiff. The defendants' witnesses said that the land became dry *more than twelve years before suit;* and the plaintiff's witnesses said that it became dry *within twelve years before suit*. It was upon the point of limitation that this evidence was offered.

Then, the only evidence adduced on either side as to the possession of the land during the time that it was covered with water, was given by the plaintiff. His witnesses proved that he had let out the julkur, or right of fishing in the water, which then covered the land in question, to certain tenants; and that under that letting they had exercised the right of fishing; and so far as appears this evidence was not contradicted.

Now, as regards these two points, namely, that of possession

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and that of limitation, the Subordinate Judge has dealt with the case in this way.

As to the question of possession, he finds, as I understand him, that there is no evidence to show that the land ever belonged to the plaintiff; because he says: "I cannot find that the land below the water of the baor belonged to the plaintiff, merely because he was in possession of the water by letting it out to tenants as julkur. This fact may show that he had an interest in the julkur superior to that of those tenants, or that he was the proprietor of the julkur; but this fact I do not consider sufficient for the purpose of finding that the land covered by water belongs to him. I cannot, therefore, find that the land belongs to the plaintiff."

Now, if the plaintiff really did give reliable evidence that he had let out the julkur to tenants, and that they under that letting had exercised the right of fishing there, I think that was clearly evidence, and strong evidence too, that the land covered by the water, over which the right of fishing was enjoyed, belonged to the plaintiff.

Primâ facie, in the case of land covered by water, the water belongs to the person to whom the land belongs; *cujus est solum, ejus est usque ad cœlum*. The owner of land is entitled, *primâ facie*, to everything either over or under it; and the ordinary, if not the very best means, of proving the ownership of land covered by water, is to show that rights of fishing have been exercised in and over the water. There are few other means of proving ownership over such land, except perhaps by working minerals, or carrying on other works below the surface of the soil.

And if the plaintiff in this instance proved such acts of ownership by fishing, they would clearly be *primâ facie* evidence of his possession and ownership, unless it could be shown that his taking the fish was referable to some other right or title.

And yet I understand the Subordinate Judge to say: "Assuming what the plaintiff's witnesses say with regard to these acts of ownership to be true, I consider it *no evidence of possession at all*, because it may be referable to some other right." He does not say to what right, nor is it even suggested that the plaintiff had any other right which would account for his ownership of the fishery.

I think, therefore, that the Subordinate Judge in this respect was clearly wrong. Unless there is some good reason for disbelieving the plaintiff's evidence, or unless it can be shown that these acts of ownership, which were exercised by the plaintiff in the julkur, are referable to some other right than the ownership of the soil itself, the Subordinate Judge was bound to give full and proper effect to the plaintiff's evidence.

But then the Subordinate Judge says: "Even assuming that I were to consider these acts of ownership as proving that the land covered by water belonged to the plaintiff, he is nevertheless barred by limitation; because he has not shown that the land which was covered with water has silted up and become dry within twelve years before suit; and it is therefore not shown that he has exercised any acts of ownership over the land within the twelve years."

Upon this point also I consider that the Subordinate Judge has taken a wrong view. In a case decided by a Full Bench of this Court only a few days ago *Mahomed Ali Khan* v. *Kajah Abdul Gunny* (1) the law upon this subject has been laid down very clearly.

In that case the question arose, (with reference to the law of limitation), how far it is necessary for the plaintiff, in cases of this kind, to prove a possession by acts of ownership within twelve years before suit. There is no doubt that he is bound to satisfy the Court that he has had a possession, and that he has lost that possession within the 12 years. The question is, how far it is necessary for him *to prove that possession by positive acts of ownership*, or how far the Court may presume in his favour from the fact of previous title and possession.

This is a question upon which some difference of opinion has prevailed in this Court, but which is now, I trust, satisfactorily settled. I regret that I was obliged to differ to some extent from my learned brothers of the Full Bench, but the difference is not one which affects the present suit. In such a case as this we were all agreed that possession ought to be presumed in favor of the plaintiff.

(1) *Ante*, p. 744.

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The principle laid down in that case by my learned brothers is as follows. I will read from their judgment:

"The true rule appears to us to be this, that where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes—at such a time and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in s. 114 of the Evidence Act."

Now, applying that rule to the present case, it may be that, so long as the land was covered by water, the plaintiff might, as, in fact, he did, prove acts of ownership over it by the exercise of the right of fishing.

But it was proved to the satisfaction of the Subordinate Judge that previous to the twelve years the land emerged from the water, that is, the baor silted up, and from that time it, of course, became impossible for the plaintiff to prove acts of ownership over it by fishing.

Then it seems to have been found by the Munsiff—and there is nothing to the contrary found by the Subordinate Judge—that the land was waste, and did not become fit for cultivation until within six or seven years before suit.

This is, therefore, just one of the cases which are alluded to in the Full Bench judgment, and it discloses almost the same state of things which occurred in the case of *Radha Gobind Roy* v. *Inglis* (1), decided by the Privy Council. In that case the land in question had formerly been covered by a bheel or lake, and after the bheel became dry the defendants took possession of it. The plaintiff proved, *primâ facie*, his title to the bheel and possession of it in one of his ancestors, but he gave no proof of acts of ownership within the twelve years before suit. It did not appear clearly when the bheel became dry, and the defendants failed to prove possession of the land for twelve years before suit. Under these circumstances the Privy Council held that, as the plaintiff had proved a title to, and possession of, the bheel, his possession

(1) 7 C. L. R., 364.

must be presumed to have continued, unless the defendant could make out a twelve years' statutory title by adverse possession.

Unfortunately in this case the Subordinate Judge has taken a view, (which my brother Field tells me he has erroneously taken in other similar cases), that no such presumption can be made in favour of the plaintiff, but that he must show a possession by acts of ownership within the twelve years.

Here, again, therefore he is wrong. If it was shown that the plaintiff exercised acts of ownership over the land when covered by water, and that when the land became dry it was in such a state that it would be very difficult, if not impossible, to prove any acts of ownership over it, the Court might, and ought to, presume (according to the rule laid down in the Full Bench case), that the plaintiff's possession continued until the contrary was shown.

I think, therefore, that the case should be remanded to the Court below to be reconsidered, with due regard to the law laid down by this Court.

The costs in this Court and in the lower Appellate Court will abide the result.

FIELD, J.—I am of the same opinion on both points.

With reference to the question of limitation I shall merely refer to one more case in addition to those quoted by the very learned Chief Justice, that is the case of *Rao Karan Singh* v. *Raja Bakar Ali Khan* (1).

Then, with reference to the evidence as to the enjoyment of the julkur being evidence of title, I desire to add that, under the special circumstances of this particular case, it appears to me that the evidence of possession and enjoyment of the julkur ought, if believed and unrebutted, to be taken to be good evidence of the title to the land. I say under the special circumstances of this particular case, because there are cases in this country in which it might be impossible to consider evidence of the ownership and enjoyment of a julkur to be evidence of the title to the land covered by the water, for example, the case of a julkur in a deep and navigable river. In the present case, the water which forms the julkur is a small piece of water in a small estate. The

(1) L. R. 9 I. A., 99.

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enjoyment of that julkur would presumably belong to the owner of the estate, unless he had leased it out to tenants. It would follow that if the owner of the estate could show that he had enjoyed the julkur, this would be good evidence that the land under the julkur belonged to him, that is, in the absence of any suggestion, which has not been made in this case, that his enjoyment of the julkur was referable to a lease of an incorporeal right taken from a third party.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883 *February* 19.

MUSYATULLA (DEFENDANT) *v.* NOORZAHAN (PLAINTIFF).*

Landlord and Tenant—Ejectment—Right of Occupancy—Forfeiture—Beng. Act VIII of 1869, s. 52.

The mere omission to pay rent for five years does not of itself amount to forfeiture of a ryot's right of occupancy, and will not be sufficient to sustain an action by the landlord for the recovery of the ryot's holding.

A ryot having a right of occupancy cannot be legally ejected, unless under an order regularly obtained under s. 52 of the Rent Law, that is, under a decree for arrears of rent unsatisfied within fifteen days from the passing of the decree.

THIS was a suit for ejectment and khas possession. It was found as a fact that in 1882 (1875-76) the defendant had a right of occupancy in the lands in dispute; that he paid no rent for the years 1283, 1284, 1285, or 1286; and that a notice to quit had been served upon the defendant on the 28th of Pous 1286 (11th January 1880), requiring him to give up possession by the end of Cheyt 1286 (*i.e.*, before the 12th of April 1880). The Court of first instance gave the plaintiff a decree on the authority of *Hem Nath Dutt* v. *Ashgur Sirdar* (1), and this decree was affirmed on appeal. The defendant appealed to the High Court on the following grounds, amongst others :—

(1.) That under s. 22, Beng. Act VIII of 1869, the learned Judge below appears to have erred in holding that your petitioner's

*Appeal from Appellate Decree No. 661 of 1882, against the decree of F. Comley, Esq., Judge of Purnea, dated the 21st January 1882, affirming the decree of Baboo Lal Behary Dey, Munsiff of Kissengunge, dated the 19th September 1881.

(1) I. L. R., 4 Calc., 894.