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order to remedy this defect the Art. 147 was for the first time introduced into the present Limitation Act. The other cases cited by the learned pleader for the appellant merely follow the Allahabad Full Bench decision. I am of opinion that the present suit is governed by Art. 132 of the present Limitation Act, and is consequently barred. The result will be that the appeal will be dismissed with costs.

Appeal dismissed.

K. M. C.

PRIVY COUNCIL.

P. C.* 1887 *March* 10 & 11.

ANANGAMANJARI CHOWDHRANI AND OTHERS (PLAINTIFFS) *v.* TRIPURA SUNDARI CHOWDHRANI AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Title, Evidence of—Presumption arising from Possession—Issue as to identity of land re-formed on a site formerly submerged.

In a suit for the possession of a chur, formerly carried away and afterwards re-formed upon its former site, the issue was whether the land belonged to the plaintiffs or to the defendants. This issue was found in favor of the plaintiffs by the first Court; and the Appellate Court, finding that the plaintiffs had been in possession for more than twelve years, concluded that, at all events, they had a title by adverse possession. On an appeal, the High Court considered that the latter decision was not upon the issue raised, the plaintiff's claim being founded on an original title to the site of the chur—a title denied by the defendants; and remanded the suit for judgment on this issue, whereupon the Appellate Court maintained the judgment of the first Court in favor of the plaintiffs, finding on the evidence that the land belonged to the plaintiffs.

Upon a second appeal the High Court reversed the decree of the Appellate Court, and dismissed the suit, on the ground that there was an entire absence of evidence as to which party was entitled at the date to which the dispute related. *Held*, that this was erroneous. On a question of parcel or no parcel, when possession has been established for a period, there is not an entire absence of evidence of anterior ownership, because *presumitur retro*.

APPEAL from a decree (3rd April, 1882) of a Divisional Bench of the High Court, reversing a decree (12th April, 1881) of the District Judge of Pubna.

* *Present:* LORD WATSON, LORD FITZGERALD, and SIR B. PEACOCK.

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The parties to this appeal were at one time entitled, as joint owners, to villages Nalchongi and Nalchongi Silpatta in Rajshahye, which were partitioned between them in two lots: one consisting of a 13½ annas share which fell to the plaintiffs, appellants; and the other lot, consisting of a 2½ annas share, which went to the defendants, respondents.

The subject of the present suit was some chur land which had re-formed, after having been carried away by the river Ichamutti, on a site which was part of one or other of the above shares. The plaintiffs alleged that the chur had re-formed within the boundaries of the 13½ annas share. The defendants alleged that it had re-formed within the 2½.

The District Magistrate, when disputes arose about the year 1872, the chur having re-appeared many years before, proceeded under s. 530 of the Code of Criminal Procedure of 1872 then in force; and by an order of 24th February, 1873, maintained the possession of the appellants. But the respondents, on the 30th April of the same year, obtained a judgment, under Act XIV of 1859, for possession, under which the appellants were dispossessed on the 15th Jeyt 1280, corresponding to 27th May, 1873.

The present suit (5th September, 1876) was instituted by the appellants in the Court of the Subordinate Judge of Rajshahye, and an issue raising the above question having been fixed, and a report made by an Amin, it was found that the chur was covered by the 13½ annas share; and judgment was given, accordingly, for the plaintiffs.

This judgment the District Judge, on appeal, considered himself bound to accept (with only a slight variation as to a portion, which he found to belong to a third and different village), as it had not been shown to be erroneous, but he placed his decision of the case on a title by adverse possession accrued to the plaintiffs who had, as he found, been in possession for upwards of twelve years.

The High Court (MORRIS and PRINSEP, JJ.), on an appeal against the above decision, observed that the plaintiffs had not claimed the land upon the latter title, but as forming part of their original estate, and as having been taken out of their possession in 1873. They pointed out that it was not the case made out

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by the plaintiffs, but one found by the lower Appellate Court, that they had occupied the chur in suit for a sufficient time to confer title upon them, even supposing that, before its diluviation, the land was part of the 2½ annas allotment, and not part of the 13½. It was also, in their opinion, apparent that the Judge had no definite opinion of his own, as to whether the chur originally belonged to one or the other. And what he, in effect, decided was, that whether it fell within either the one or the other, it had, as a re-formation upon its old site, been so long in the possession of the plaintiffs as to confer upon them a title by prescription. This, however, was not the issue raised between the parties, and the Judges felt bound to adhere to the principle laid down in *Shiro Kumari Debi* v. *Gobind Shaw Tanti* (1), that no title can be claimed by prescription unless it has been put in issue against an adversary. The Judges were also dissatisfied with the mode in which the District Court had dealt with the evidence, remarking that "it was incumbent on the Appellate Court to form an independent judgment on the evidence, and not to give a decree in favor of the plaintiffs, unless they had, in its opinion, established their case."

The High Court, for these reasons, remanded the suit to the lower Appellate Court for judgment.

On this remand, the District Judge decided that the Subordinate Judge's finding was correct, the chur having been formed upon the land covered by the 13½ annas share.

There was again an appeal to the High Court on behalf of the principal defendants. A Division Bench (WHITE and MACPHERSON, JJ.), reversed the decree of the lower Appellate Court, and dismissed the suit. After referring to the remand order, and its grounds, the High Court said that, although this had been correctly understood by the lower Appellate Court, it appeared in Mr. Peterson's judgment that there was not a particle of evidence offered to prove when the chur lands re-formed, nor where they re-formed, much less evidence which showed that they re-formed upon the site of the 13½ annas share which originally belonged to the respondents. "Such remarks," continued the judgment, "as the District Judge has made upon the evidence, are

(1) I. L. R., 2 Calc., 418.

limited to the proof which was given by the respondents of the long and continuous possession which they enjoyed previous to their ouster by the appellants.

"Such being the case, the decree of the lower Court cannot be sustained. It is not suggested that there is any evidence on the record showing when the re-formation took place, or that it was a re-formation on the 13½ annas share, nor does the remand order allow of further evidence being given. After reading the various judgments of the three Courts below, which have had possession of this case for so long a time, and hearing what the pleaders for the parties have to say, it becomes plain that there is no evidence in this case on the above points, and that when the remand order was made which tried the respondents' case up to the third issue, their suit was virtually decided against them.

"As there is no evidence in the case as to the date or site of the re-formation, and the Court below has no materials upon which it could come to a finding on the third issue, it would be useless to send this case down again to the lower Court, and we have no alternative but to reverse the decree of the lower Appellate Court, and dismiss the suit of the plaintiffs, which we do with costs in all Courts."

On this appeal,—

Mr. *R. V. Doyne*, and Mr. *C. W. Arathoon*, for the appellants contended that the judgment of the High Court was erroneous. Upon a second appeal, the Courts below having concurred, the High Court had not to decide upon the weight of the evidence as to the site of the chur. That there was some evidence was apparent, whether weighty or not and whether sufficient or not. They referred to *Shiro Kumari Debi* v. *Gobind Shaw Tanti* (1).

Mr. *T. H. Cowie*, and Mr. *J. H. A. Branson*, for the respondents, argued that the judgment of the High Court was correct. The issue was as to the re-formation of the chur in question having taken place on a particular site, within a certain period. The fact of possession, inasmuch as the right to that possession had been all along disputed, was not relevant evidence upon the point raised, which was that the chur had been re-formed, *in situ*, under such circumstances [see *Lopez* v. *Muddun Mohun*

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Thakoor (1)] that the original owner had a right to have possession of that which remained his property, the right of property never having been lost.

Counsel for the appellants were not called upon to reply.

Their Lordships' judgment was delivered by

LORD WATSON.—In this case the parties are the respective owners of two divided shares of mouzahs Nalchongi and Silpatta. The plaintiffs are interested in the larger of those shares, extending to 13 annas 10 gundahs. The defendants are proprietors of the smaller share, extending to 2 annas 10 gundahs. The area of land which is in dispute in this action is situated on the bank and close to the alvens of the Ichamutti river. It is subject to the action of the stream; and it appears that from time to time the soil on the surface of the area has been washed away, and new soil has been subsequently deposited capable of cultivation. The exact date when the surface was last denuded does not appear; but it seems to be admitted on all hands that for many years past a new deposit has been growing up, and that in point of fact such deposit, since some time after the year 1850, has become culturable. In the end of 1872, or the beginning of 1873, disputes arose between the appellants and respondents as to the right to the disputed ground. The Magistrate intervened in February, 1873, and, after inquiry, he adjudged that the plaintiffs were in possession, and had a right to retain possession of it. The defendants then instituted a possessory suit, and on the 13th of April, 1873, they obtained a decree affirming their right to possess. That led to the institution of the present action, in which the plaintiffs, who were ousted under the decree of April, 1873, claimed the property of the disputed area as having been all along in their possession as part of their 13 annas 10 gundahs share of the two mouzahs in question. The defendants resist the action on the ground that they had been in possession, and that the land in dispute was an integral part of their smaller share of these mouzahs—the 2 annas 10 gundahs share. Throughout these proceedings, at least since proof was closed, it is admitted on both sides that the area in dispute belongs to one or other of these two demarcated shares.

(1) 13 Moore's I. A., 467; 5 B. L. R., 521.

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Issues were adjusted by the Subordinate Judge. It is only necessary to deal with the third of them: because it is conceded now that, if the plaintiffs shall be held to have a right to the land, as part of their 13 annas 10 gundahs share, they are not barred by limitation from prosecuting the present suit. The third issue adjusted was in these terms: "Is the land in claim a re-formation on the site of the original diluviated land of the 13 annas 10 gundahs share of Kismat Nalchougi and Silpatti, held by the plaintiffs and *pro forma* defendants, or of the 2 annas 10 gundahs share held by the substantive defendants?" The Subordinate Judge, after an elaborate review of the evidence before him, came to the conclusion, which is embodied in this finding: "The allegation made by the plaintiffs that the land in claim is a re-formation on the site of the original land of Nalchongi and Silpatti covered by their 13 annas 10 gundahs share, and that they have from before been in possession of it is found true." In other words his finding amounts to an express affirmation of the first alternative branch of the third issue, which exhausts the issue.

Upon appeal by the defendants to the District Judge, he came to the conclusion that the judgment of the Subordinate Judge ought to be maintained. He concurs to a great extent in the view taken by the Judge of that evidence, but he differs from him in his estimate of that evidence in many respects. The conclusion which he came to upon the part of the case which we are now dealing with was this, that the plaintiffs "held, occupied, and enjoyed the lands in suit by the title above set forth as part and parcel of the lands appertaining to the 13½ annas demarcation for much more than 12 years before ousted by the defendants." That was not a simple affirmation of the conclusion at which the Subordinate Judge had arrived. It pointed to a very different kind of case from that to try which issue No. 3 had been adjusted. It affirms a title, at least it is sufficient to affirm a title by adverse possession, which is a title in derogation of the defendant's right, even assuming it to be proved that at an earlier period the land in dispute formed part of the smaller share, and not of the 13 annas 10 gundahs share belonging to the plaintiffs. Accordingly when the case was carried by appeal before the High Court of Calcutta, the learned Judges

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came to the conclusion that the decree of the District Judge ought to be set aside, and the case remanded for re-trial. The High Court were of opinion that the District Judge had not disposed of issue No. 3, that his finding No. 2 was not an answer to that issue, but the affirmance of a title which would prevail over the title which would have arisen to the defendants by the negation of the first branch of issue No. 3, and the affirmance of the second branch; and they were also of opinion, although their Lordships are not altogether disposed to concur with them in that respect, that the District Judge had not applied his judicial mind to the consideration of the somewhat intricate evidence before him.

On remand the case was heard and disposed of before the successor of the District Judge, who had first disposed of the case. He, in the main, agrees with the Subordinate Judge in his estimate of the evidence, and he affirms the judgment of the Subordinate Judge. The conclusion which he came to on the evidence is very concisely expressed in these words: "On the whole then I come to the conclusion that the Subordinate Judge's decision is correct, and that the plaintiffs have proved that the lands claimed by them belong to their 13½ annas share of mouzahs Bil Nalchongi and Bil Silpatta."

Again the defendants appealed to the High Court, and the cause there was heard and determined before two fresh Judges, who came to the conclusion that the decree of the lower Appellate Court ought to be reversed, and the suit dismissed, and accordingly they gave effect to that opinion in their judgment.

The grounds upon which the learned Judges of the High Court came to that conclusion are very distinctly expressed in their judgment. They are two-fold; and, in the opinion of their Lordships, neither of these grounds is sufficient to sustain the judgment which was pronounced. They came, in the first place, to the conclusion that Mr. Peterson, who last disposed of the case, had fallen into the same error as his predecessor, and, instead of dealing with the identity of this disputed parcel with one or other of the two shares of the mouzahs in question, had disposed of the case on the footing that the plaintiffs had enjoyed prescriptive possession which vested them with a good

title as against the defendants. The learned Judges say: "The judgment now before us contains a finding by the Court that, prior to the ouster by the appellants, the plaintiffs had a sufficiently long and continuous possession of the chur lands to confer upon them a title to it." Their Lordships are of opinion that the learned Judges erred in supposing that the judgment of Mr. Peterson contains any finding to that effect.

Then having come to the conclusion that Mr. Peterson had erred in the same way as his predecessor, and had not dealt with the proper issue in the case, they proceed to consider whether they ought to remand the cause for the purpose of having that third issue tried. They came to the conclusion that it was unnecessary to do so for these reasons: "As there is no evidence in the case as to the date or site of the re-formation, and the Court below has no materials upon which it could come to a finding on the third issue, it would be useless to send this case down again to the lower Court." They came to a conclusion the very reverse of that at which their predecessors, who remanded the case, arrived; they were of opinion that there was evidence in the case bearing upon the subject-matter of the third issue, which ought to be disposed of by the Judge in the Court below. The High Court, on this last occasion, came to the opposite conclusion—that there was no evidence whatever which was fit for the consideration of the Judge, or had any bearing on that issue.

It must be borne in mind that the decree appealed from to the High Court on this occasion being a decree after remand, on a second or special appeal, the learned Judges had not, and accordingly they did not profess to have, jurisdiction to deal with it on its merits. But it was, in the opinion of their Lordships, within their jurisdiction to dismiss the case if they were satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge.

Their Lordships are very clearly of opinion that the reasons assigned by the learned Judges cannot be sustained. They are of opinion, with the Judges who made the remand, not

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only that there was an issue proper to be tried, but that there was evidence in support of that issue, or bearing upon that issue which was proper to be considered and disposed of by the District Judge. The theory upon which the learned Judges who last disposed of the case proceeded, so far as one can gather from their observations, appears to have been this: that evidence of possession is not receivable as evidence of the identity of a piece of ground; that, in other words, evidence of possession is not material or good evidence in a question of parcel or no parcel. Perhaps they do not go quite so far as that, but they certainly go the length of indicating their opinion that evidence of subsequent possession is not good evidence upon the question of parcel or no parcel at a previous date. To countenance that proposition would be to introduce an entirely new rule into the law, and their Lordships do not think that a judgment resting upon such a ground can be upheld. When the state of possession for a long period of years has been satisfactorily proved, in the absence of evidence to the contrary, *presumitur retro*. In the present case there is evidence tending to prove possession by the plaintiffs for a considerable period antecedent to February, 1873. Whether it is sufficient to establish the plaintiffs' possession, and whether, if established, that possession is sufficient to warrant the inference of fact derived from it, are questions upon the merits of the case. The evidence has been disposed of by the Judge below as a Court of appeal, after careful consideration, and upon the merits his judgment was final in the High Court, which was sitting upon a second appeal, and is final and binding upon this Board.

Their Lordships will accordingly humbly advise Her Majesty that the last judgment of the High Court ought to be reversed, the judgment of Mr. Peterson, the District Judge, affirmed, and the appeal dismissed with costs in the High Court. The respondents must pay to the appellants the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Messrs. *Watkins & Lattey.*

C. B.