

APPELLATE CIVIL.

1906
June 21.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
Sir George Knox.

MAZHAR HUSAIN (DEFENDANT) v. BIHARI SINGH (PLAINTIFF).*

*Suit for possession—Adverse possession—Title—Burden of proof—
Submerged land.*

When a suit for possession is met by a plea of adverse possession during the limitation period, the question of limitation becomes a question of title and the plaintiff must first furnish *prima facie* proof of subsisting title at the date of the commencement of his suit before the defendant is required to establish his adverse possession. *Jafar Husain, v. Mashuq Ali* (1) followed.

Where land has been submerged proof of actual possession at the date of submersion would apparently be sufficient *prima facie* evidence of possession during the submersion. *Secretary of State v. Krishnamoni Gupta* (2), referred to.

THIS was a suit for possession of various plots of alluvial land amounting to 466 bighas 14 biswas. The suit was resisted upon the ground, amongst others, that the defendant had been in adverse possession of the land in suit for more than twelve years. The Court of first instance decreed the plaintiff's claim. As to the plea of adverse possession that court held that the burden of proving their possession lay upon the defendant and he had failed to discharge it. On appeal the lower appellate Court (Officiating Additional Subordinate Judge of Moradabad) to some extent modified the decree of the Munsif; but took the same view as to the burden of proof on the question of limitation. That Court held that as the defendant had admitted that the land in dispute at one time appertained to the plaintiff's village and mahal, "this clearly amounts to an admission of the plaintiff's title," and . . . "such being the case, the *onus* of proving adverse possession for more than 12 years lay on the defendant." The finding was that this defendant had failed to prove the adverse possession set up by him. The defendant appealed to the High Court urging that the burden of proof had been wrongly laid by the Court below; and that it was for the plaintiff to prove, his title having been

* Second Appeal No. 62 of 1905, from a decree of Pandit Alopi Prasad, Additional Subordinate Judge of Moradabad, dated the 3rd of December 1904; modifying the decree of Pandit Mohan Lal Hukhu, Munsif of Haveli, Moradabad, dated the 18th of March, 1904.

(1) (1892) I. L. R., 14 All., 193. (2) (1902) I. L. R., 29 Cal., 575.

challenged, that he had been in possession of the property in suit at some period within twelve years of the date of institution of the suit.

Messrs. *B. E. O'Connor* and *Muhammad Ishaq*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, for the respondent.

STANLEY, C.J., and KNOX, J.—We cannot satisfactorily dispose of this appeal without having a finding upon an issue which the lower appellate Court has failed to determine. The suit is one for the recovery of possession of land. The main defence raised by the defendants was that they had been in adverse possession of the land in dispute for upwards of twelve years, and consequently the plaintiff's suit was barred. When a defence of this kind is raised the question of limitation becomes a question of title, and it lies upon the plaintiff in such a case to prove that he was in possession at some time within the period of limitation, and not for the defendant in the first instance to prove that he was in adverse possession for twelve years. The rule is laid down in the case of *Jafar Husain v. Mashuq Ali* (1), in which Edge, C. J., and Blair, J., held in a similar case, that before going into the question as to whether the defendants had or had not title by adverse possession, the District Judge ought to have satisfied himself and expressed an opinion that there was *prima facie* proof that the plaintiff had a subsisting title at the commencement of the suit. On the question of the *onus* of proof both the Courts below appear to us to have erred. The Court of first instance in the course of its judgment observes:—"For the purposes of limitation actual adverse possession for 12 years must be proved and the *onus* of proof is on the defendant who sets up the plea of limitation to the detriment of the real owner's title." The learned Officiating Additional Subordinate Judge falls into the same error. He says in the course of his judgment that the appellant and his *karinda* having admitted in their depositions that the land in the claim once belonged to the plaintiff's village and mahal, "this amounts clearly to an admission of the plaintiff's title." Such an admission, we may point out, is no more than an admission that the land in dispute at some time or other, not necessarily within

(1) (1892) I. L. R., 14 All., 193.

1903

 MAZHAAR
 HUSAIN
 " .
 BHARTI
 SINGH.

1906

MAZKAR
HUSAIN
v.
BIHAR
SINGH.

the period of limitation, did belong to the plaintiff. Then later on he observes:—"Such being the case, the *onus* of proving adverse possession for more than 12 years lay on the defendant," and subsequently he held that the defendant had failed to prove adverse possession. The land which is the subject-matter in dispute in this litigation appears to be land which has been submerged by the overflow of a stream called the Kosi River and Mr. *Sundar Lal*, on behalf of the respondent, has pointed out the difficulty which in some cases would lie in the way of a person entitled to land so submerged of proving actual possession within the period of limitation, but he has to a large extent solved that difficulty by a reference to a decision of their Lordships of the Privy Council to be found in the case of *The Secretary of State for India v. Krishnamoni Gupta* (1) to the effect that where a party is dispossessed by the *vis major* of floods, the constructive possession of land is, if anywhere, in the true owners, and that so long as the land remained so submerged no title could be made against the true owner. If therefore the respondent can establish that he was in actual possession of the land in dispute up to the date of its submersion, that would apparently be sufficient *prima facie* evidence of the possession of the plaintiff during the submersion. This issue, however, has not been decided by the lower appellate Court. That Court has simply found that the defendants had failed to prove their title by adverse possession. We therefore refer to the lower appellate Court the following issue under the provisions of section 566 of the Code of Civil Procedure:—

"Was the plaintiff respondent in possession, either actual or constructive, of the property in dispute, at any time within 12 years next before the institution of the suit?"

The Court may take such relevant evidence as the parties may tender for the determination of this issue. On return of the findings the parties will have the usual ten days for filing objections.

Cause remanded.

(1) (1902) I. L. R., 29 Cal., 518.