Before Mr. Justice Hill and Mr. Justice Rampini.

GUNGA KUMAR MITTER AND ANOTHER (DEFENDANTS) *v.* ASUTOSH GOSSAMI AND OTHERS (PLAINTIFFS) AND G. M. REILY AND OTHERS (DEFENDANTS).* 1896 *June* 26.

Limitation Act (XV of 1877), Article 144—Diluviation—Subordinate tenure—Suit for recovery of possession of land—Re-formation on the site of plaintiff's villages—Burden of proof.

In a suit, brought by the plaintiffs on 10th December 1888, for recovery of possession of three plots of land, on the allegation that they were re-formations on the site of their villages *K.* and *M.*, which were let out in *patni* and *dar-patni* to third parties in 1868; and that the rights of the *patnidar* and the *dar-patnidar* were re-acquired by them in the years 1878, 1880, 1883, and 1892; the defence was that the suit was barred by limitation, and that the lands were not re-formation, but accretion to the defendants' village *C*.

Held that, as a grantor of a subordinate tenure is not bound to sue for trespasses committed against his tenant during the tenure, and as his right of action accrues when the tenancy comes to an end, the suit was not barred by limitation.

Held, also, that as the plaintiffs' title to, and possession of, the villages *K.* and *M.*, down to the time of their diluviation, was not denied; and as it was found that the disputed plots of land were part of the villages, it was not for the plaintiffs to prove possession of the lands in dispute previous to the diluviation, but the onus lay on the defendants to prove adverse possession for more than twelve years prior to the institution of the suit.

Woomesh Chunder Goopto v. *Raj Narain Roy* (1) and *Davis* v. *Kazee Abdul Hamed* (2) referred to.

THE facts of the case and the arguments appear sufficiently from the judgment of the High Court.

Mr. *W. C. Bonnerjee*, Babu *Lal Mohun Doss*, Babu *Chunder Kant Sen* and Babu *Surendra Chunder Sen* for the appellants.

Mr. *W. Jackson*, Babu *Nil Madhub Bose* and Babu *Shib Chunder Palit* for the respondents.

* Appeal from Appellate Decree No. 1968 of 1893, against the decree of R. R. Pope, Esq., District Judge of Jessore, dated the 14th of June 1893, reversing the decree of Babu Brojo Behary Shome, Subordinate Judge of Jessore, dated the 15th of September 1892.

(1) 10 W. R., 15. (2) 8 W. R., 55.

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The judgment of the High Court (HILL and RAMPINI, JJ.) was as follows :—

This suit, which was instituted on the 10th December 1888, was for the recovery of possession of three plots of land. The suit, as at first brought, was for the possession of a 14-annas' share of these three plots of land. Afterwards, the plaintiffs acquired the title to the remaining 2-annas' share in these plots, and the plaint was accordingly amended on the 21st June 1892.

The plaintiffs claimed these plots of land as re-formations of their villages of Monia and Kewagram, which, it is said, had been swept away by the river Madhumati. The defendants, on the other hand, claimed them as re-formations of their village of Chandani.

The District Judge has found in favour of the plaintiffs. He has decided that the three plots are re-formations of the plaintiffs' villages, Monia and Kewagram, and that the suit is not barred by limitation.

The defendants now appeal, but their appeal has been admitted only on the question of limitation, so that is all that we need concern ourselves with in this appeal.

The plaintiffs, it appears, had an 8-annas' share of the proprietary right in the villages of Monia and Kewagram, and a *patni* right of the remaining 8-annas' share. In 1275 (or 1868) they created a *patni* of their zemindari right, and a *dar-patni* of their *patni* right. They re-acquired these rights in 1878, 1880, and 1883, so that now they are, as regards their title to these three plots, in the same position as before the creation of the subordinate tenures. In these circumstances, the District Judge has held that the suit is not barred by limitation, because, according to the decision of this Court in the case of *Woomesh Chunder Goopto* v. *Raj Narain Roy* (3), the plaintiffs were not in a position to sue for the possession of the land in dispute until after the acquisition by them of the rights of the subordinate tenure-holders. As long as the subordinate tenures were in existence, and the holders of them were paying rent to the plaintiffs, the plaintiffs

(1) 10 W. R., 15.

could not sue for the possession of the subject of the tenures, and limitation cannot be held to have run against them. The District Judge has further found that the defendants have not succeeded in showing that the three plots of land in question were in existence, or had emerged from the bed of the river, more than twelve years before the institution of the suit ; and, that, accordingly, they have not proved their adverse possession of them for such a period as to give them thereby a title to them against the plaintiffs.

On behalf of the defendants, the learned District Judge's findings on both points have been disputed. In the first place, it has been argued that the judgment of Sir Barnes Peacock in the case of *Woomesh Chunder Goopto* v. *Raj Narain Roy* (1) merely laid down the law as regards sales under the Patni Regulation, and that inasmuch as the sales at which the plaintiffs purchased the under-tenures were not all sales under Regulation VIII of 1819 (one of them only having been held expressly under that regulation), and as the plaintiffs purchased at these sales only fractions of the tenures, they did not acquire the tenures free of incumbrances, but only the rights, titles and interests of the judgment-debtors, and, therefore, they would be as much bound by any adverse possession on the part of the defendants as their tenants, the subordinate tenure-holders, would have been.

But we are of opinion that the judgment of Sir Barnes Peacock in question was not meant to apply only to sales held under the Patni Regulation. The tenure referred to in that judgment was not in strictness a *patni*-tenure, though called so, and though apparently saleable in accordance with a stipulation entered into by the tenure-holder under the same conditions as *patni* tenures are sold. We think rather that from the latter part of the judgment it is apparent that Sir Barnes Peacock intended to lay down, and did lay down, the rule that a grantor of a subordinate tenure is not bound to sue for trespasses committed against his tenant during the continuance of the tenure, and that his right of action accrues when the tenancy comes to an end. That this was the meaning of the learned Chief Justice is further apparent from the case of *Davis* v. *Kazee Abdul Hamed* (2), in which, in the

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language of the head-note, it was held that "a landlord's cause of action to recover possession from a tenant, or any one claiming under the tenant, only accrues from the time when he determines the tenancy, and that there can be no limitation or adverse possession as long as the tenancy continues." In short, the rule of law to be deduced from these cases would seem to be as laid down in Mitra's Law of Prescription, 3rd edition, p. 145, where it is said: "The possession of a trespasser does not become adverse to the lessor, until the latter acquires a right to the *khas* possession of the demised premises. To hold that twelve years' possession by a trespasser of the whole or part of the demised premises would bar the right of the lessor, although the lessee does not renounce his character as such, and the lease is still subsisting, is to violate the maxim that 'prescription does not run against a person who is unable to act.' The general principle of the law is to bar a person who has a right to enter, if he does not exercise that right in a certain time, not to bar those who cannot exercise that right."

We are, therefore, of opinion that the first reason given by the District Judge for holding that the suit is not barred by limitation, is a good one, and we see no reason to disturb his judgment on this ground.

We also consider that he was right in finding that inasmuch as the defendants have failed to prove adverse possession on their part, or indeed the existence of the three plots in dispute, for more than twelve years prior to the institution of the suit, the plaintiffs are entitled to succeed. It has been said that it was incumbent on the plaintiffs to prove possession of the disputed plots previous to the diluviation. But it has been found as a fact that the three plots are part of the plaintiffs' villages of Monia and Kewagram. If this finding be correct, and it cannot now be disputed, the plaintiffs must have been in possession of these plots previous to their diluviation as part of the villages of Monia and Kewagram.

The plaintiffs' title to, and possession of, these villages down to the time of their diluviation is not denied. They were found to be in possession of them at the time of the Thak. Their possession of the disputed plots must, therefore, be presumed to have continued during the period of their submergence, and though the defendants seem to have taken possession of them as soon as

they re-appeared, yet as they have not proved that they did so more than twelve years before the institution of the suit, they have acquired no statutory title to them, and their plea of limitation on this ground also fails.

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For these reasons we dismiss this appeal with costs.

S. C. G. *Appeal dismissed.*

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Rampini.

AUGADA RAM SHAHA AND ANOTHER (PLAINTIFFS) v. NEMAI CHAND SHAHA (DEFENDANT No. 1).*

1896 *June* 29.

Defamation—Libel in judicial proceeding—Privilege—Liability for damages in a civil action.

A defamatory statement made in the pleadings in an action is not absolutely privileged.

Nathji Muleshvar v. *Lalbhai Ravidat* (1) dissented from.

THE plaintiffs, Augada Ram Shaha and others, brought a suit against the defendants, Nemai Chand Shaha and others, in the Court of the Munsif of Netrakona, for damages for defamation on the allegation that the defendants in a suit for recovery of money against the plaintiff No. 2, Brojo Mohun Shaha, designated him therein as Brojo Mohun Sho, and subsequently they informed the co-villagers and acquaintances of the plaintiffs that they were *Shos* of a very low class; that the term *Sho* applied to persons who were slaves of *Shahas*; and that the defendants designated them as such for the purpose of disgracing them in society. The defendant, Nemai Chand Shaha, contended that the plaintiffs had no cause of action, as he designated the plaintiff No. 2 as *Sho* in good faith and without any malice; that the suit was bad for misjoinder of parties; and that the plaintiffs were *Shos* and not *Shahas*. The Court of first instance gave the plaintiffs a decree for one anna. On appeal to the learned District Judge, he dismissed it with costs. The defendant appealed to the High Court, and the Bench, presided over by Mr. Justice Hill, decreed

* Letters Patent Appeal, in appeal from Appellate Decree No. 331 of 1895, against the decree of Mr. Justice Hill, reversing the decree of F. H. Harding Esq., District Judge of Mymensingh, dated the 5th of November 1894, as well as the decree of Babu Purna Chunder Mittra, Munsif of Netrakona, dated 28th December 1893.

(1) I. L. R., 14 Bom., 97.