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opinion upon that. Their Lordships understand that rule has been superseded; but at any rate, they do not find it necessary to express any opinion on the question whether there is any contradiction between the two clauses. They are of opinion here that the registration was before the proper officer, and substantially a registration at the office of the Pargana District.

Their Lordships will, therefore, humbly recommend Her Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

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

C. B.

MOHIMA CHUNDER MOZOOMDAR AND OTHERS (PLAINTIFFS) v. MOHESH CHUNDER NEOGHI AND OTHERS (DEFENDANTS).

P. C.* 1888. *Nov.* 19 *and* 20

[On appeal from the High Court at Calcutta.]

Limitation Act (XV of 1877), sched. ii, Art. 142—Burden of proof—Date of dispossession or discontinuance of possession.

The claimants had shown that they formerly were proprietors of the land to which they alleged title, and from which they claimed to oust the defendants; but they had been dispossessed, or their possession had been discontinued, some years before this suit was brought by them, and the land was occupied by the defendants who denied their title. That being so, the burden of proof was on the claimants to prove their possession at some time within the twelve years (prescribed by Art. 142 of sched. ii of Act XV of 1877) next preceding the suit.

That the claimants certainly showed an anterior title was not enough, without proof of their possession within twelve years, to shift the burden of proof on to the defence to show that the defendants were entitled to retain possession.

APPEAL from a decree (15th March 1886) of the High Court reversing a decree (10th June 1884) of the Subordinate Judge of Pubna.

On July 30th, 1883, the plaintiffs, now appellants, filed their plaint in the Court of the Subordinate Judge of Pubna, against 81 defendants, for the possession of land, of which the plaintiffs

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH, and MR. STEPHEN WOULFE FLANAGAN.

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alleged that they were wrongly dispossessed in Assin 1282, corresponding to September 1874. Of the defendants, numbers 1 to 27 were sued as claiming to be proprietors of the land as part of their own village of Machuakandi. Numbers 78 to 81 were *pro formâ* defendants, having an interest in the land if belonging to Rajapur. The remaining defendants were tenants under the first 27.

The question, which was practically decisive, on this appeal was whether the admitted dispossession of the plaintiffs took place at a period within, or beyond, twelve years before the 30th July 1883.

From the revenue records of 1822 it appeared that of the contiguous mauzahs Rajapur and Machuakandi, the latter was in 1844 diluviated by the river Ichamatti, which had till then been the boundary between it and Rajapur. The river then went further in the same direction, eastward from its former channel, leaving land re-formed on the old site.

This was resumed by the Government, and was afterwards measured and assessed as part of Machuakandi. The proprietors of Rajapur, however, claimed the re-formation as part of their mauzah, and, on the 3rd August 1846, the whole of the lands, measured and assessed as appertaining to chur Machuakandi, were re-leased to the proprietors of Rajapur as accretions to it. Some time before 1861, ryots were settled on this disputed land. According to the defendants' evidence, the cultivators and tenants all came from Machuakandi.

It was admitted by the plaintiffs that from the month of Assin 1282 (September 1874), the defendants had refused to acknowledge their rights as proprietors. No attempt was made to assert their title until May 1882, when some of the plaintiffs' tenants preferred a complaint to the Magistrate of Serajgunge, against some of the present defendants, alleging acts of violence to prevent their paying rent to the plaintiff proprietors. On the 12th July 1882 the Magistrate, proceeding under s. 530 of the Code of Criminal Procedure, found that the land in dispute was, and had been, in the possession of the Machuakandi ryots, and not of the ryots from the

original Rajapur. This led to the present suit, in which the plaint was founded upon an alleged continuous title to the land in dispute as part of the mauzah Rajapur. It alleged dispossession in Assin 1282 (September 1874), complained of the Magistrate's order of 12th July 1882, claiming that the plaintiffs' title should be established, they be put into possession, and receive mesne profits.

The answer of the defendant proprietors asserted that the land belonged to Machuakandi and not to Rajapur, and set up limitation under Art. 142 of sched. ii, Act XV of 1877. The issues raised the question of the plaintiffs' possession within the period of twelve years. The Subordinate Judge, upon the evidence, came to the conclusion that the plaintiffs had acquired title to the land in dispute, as accertions to their ancestral mauzah Rajapur, and were in possession of it from 1848; and their possession was upheld at the time of the survey measurement of the mehal Rajapur in 1852 and 1853. Then, it was to be seen whether the plaintiffs' claim was barred by limitation in consequence of their having been out of possession between the years 1870 and 1882. As to this, the Subordinate Judge found that it had been proved that although the plaintiffs and their old tenants were dispossessed from the greater part of the lands in dispute in 1875, yet they retained part of them, till ousted under the proceedings in 1882; and that, therefore, the plaintiffs' claim was not barred by limitation as to the whole of it. He accordingly decreed the claim in part.

Against this decree defendants 1 to 18 appealed to the High Court; the plaintiffs cross-appealing for what had not been decreed.

The judgment of a Division Bench, (McDonell and Beverley, JJ.,) was that the decree of the lower Court was wrong, and that the suit should have been dismissed. The evidence, in the opinion of the Court, was unsatisfactory, the witnesses were tenants and interested, the absence of zemindary papers unexplained; and the judgment concluded as follows:—

"Now it is quite true that, as regards the small piece of land, measuring ten or fifteen pakhis, which was the subject

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of the proceedings under s. 530, Code of Criminal Procedure, the plaintiffs' claim would not be barred, and if those proceedings had been put in, or if there was any evidence to show where these ten or fifteen pakhis were situated, the plaintiffs would be entitled to a decree for that quantity of land. There is, however, no such evidence, and the mere fact that the plaintiffs retained possession of an insignificant portion of the land, will not save their claim as regards the rest from being barred."

Mr. *C. W. Arathoon*, for the appellants, contended that, on the evidence, the Subordinate Judge's finding that these appellants had possession of part of the property in suit, within twelve years before the institution of the suit, was clearly right. The presumption then was that what had been shown to be the antecedent state of things continued; and this if not establishing the plaintiffs' possession within twelve years of the suit being brought, was sufficient, at all events, to throw the burden of proving when they were dispossessed on to the defence.

He referred to *Rao Karan Singh* v. *Bakar Ali Khan* (1) and the Bengal Administration Report for 1872-1873.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the respondents, argued that the decision of the High Court was right, the suit, having been barred by the law of limitation of Art. 142 of sched. ii of Act XV of 1877.

Mr. *C. W. Arathoon* replied.

Their Lordships' judgment was delivered by

MR. STEPHEN WOULFE FLANAGAN.—This is an appeal from a decree of the High Court of Bengal dated the 6th March 1886, reversing a decree of the lower Court of the 10th June 1884. The action in this case was brought to recover possession of certain lands which need not be particularly described. It is sufficient to say that they are lands in the possession of the respondents. A great deal of evidence has been given on the one side and the other as to the original title to these lands which were claimed by the plaintiffs as part of "Rajapur," and by the defendants as part of "Machuakandi." It appears to be unneces-

(1) L. R., 9. I A., 99; I. L. R., 5 All., 1.

sary to go into that title. The question is whether, assuming the plaintiffs to have been at some time lawfully in possession, the plaint which was filed on the 30th July 1883, was filed within 12 years, as required by the 142nd article of the Limitation Act of 1877, from the date of their dispossession or discontinuance of possession.

It is conceded by the plaintiffs that in fact they were dispossessed, or their possession was discontinued from the year 1875, a period of eight or nine years prior to the bringing of this suit, and that the defendants have ever since been in undisturbed possession; but they allege that they were in possession within four years or more immediately prior to that date

Now the only question in this case being one of fact with reference to the Limitation Act, it will he well to turn to the judgment of the Judge of the lower Court and see upon what grounds he based his decision in favour of the plaintiffs and to contrast these with the reasons of the High Court reversing his decision. After referring to certain chittas, (which, in their Lordships' opinion are not evidence of possession within the time in question) he goes to the substantial question upon which his decision is based. He says: "It is also to be observed that the title of the defendants Nos. 1, 3, 4, and 5, to the mauzah Machuakandi was created just after the agrarian disturbance in this district. This circumstance alone is sufficient to lead me to believe that the defendants took advantage of the opportunity to revive their lost right to the mauzah Machuakandi by inducing the ryots of the chur Rajapur to admit them as their landlords." Then he says: "It was argued by the defendants' pleader, that the plaintiffs failed to prove collection of rent from their alleged tenants, as they did not file any collection papers, and their loss is not properly accounted for. It is proved by the plaintiff No. 1, and the plaintiffs' witnesses that in 1279 the plaintiffs' cutchery house was blown down by rain and storm, and greater part of the papers were lost, and the defendants' witness No. 1 deposed that occasionally he and his brother Kali Komul used to take papers from their ijmali serishta, and he made over certain papers to his co-sharers at the time of instituting this suit."

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Now, merely making a short comment on the first passage which has been just read, it appears to their Lordships that the question for decision is not whether or not the title of the defendants was created just after the disturbance or otherwise, but when were the plaintiffs dispossessed or when did they discontinue possession? The plaintiffs by their own witnesses have admitted in fact that their possession was discontinued, at all events, in July 1875. By one of their witnesses,—their principal witness,—Gomashta Panaulla, it appears that in fact they were dispossessed in the year 1873. Many witnesses were examined on behalf of the plaintiffs in this case, to prove their possession within the four years prior to 1875, but it is not necessary to go through their evidence in detail. These witnesses may be grouped in fact into two classes: witnesses who either are or have been in the employment of the plaintiffs, or witnesses who have been tenants upon the lands—witnesses who in fact had been dispossessed by the respondents, whose evidence, therefore, when it has to be balanced against other evidence of a contrary tendency, is subject to the remark that it is in accordance with their interests. It is a very singular fact in this case that there appears to be no documentary evidence whatsoever in support of the case which has been made by the plaintiffs here, to show their possession or their receipt of rent for a period within 12 years before the time when the action was brought. Many documents were proved in support of their title to the lands some years previous to that date, but none to prove their possession. The statement by the witnesses in reference to the cyclone in the year 1872 and the destruction of their house and the place where they alleged all the papers were kept, and the scattering of those papers, is certainly one which cannot be relied on in a case of this kind as proving that documentary evidence of value in support of their possession had ever existed, nor as affording a sufficient reason for its non-production. It is also a singular circumstance in reference to the destruction of their cutcherry house by the cyclone in the year 1872, that all the earlier papers, namely, the papers which were referred to at great length in the case as proving the title of the plaintiffs as distinguished from their possession are all forthcoming. How

it is that they were not destroyed with all the other papers in that cyclone is not explained, but it is a remarkable thing and throws the greatest possible doubt and suspicion on the allegation in reference to the destruction of the papers, that papers of that class should be all forthcoming, and that the material papers, those relating to possession, are not produced at all. Bearing in mind that the lands are all cultivated and in the possession of tenants, there is also another class of papers which certainly ought to have been produced and have been either in the possession of the plaintiffs, if they really existed, or in the possession of their tenants, but which have not been produced. These papers are, amongst others, the receipts for the rents alleged by the plaintiffs and their tenants to have been paid for the years between the cyclone of 1872 and the year 1875, when they allege their possession was first determined; these, although alleged to exist, were not produced. The learned Judge then says: "When I showed above that the plaintiffs are the rightful owners of the disputed land, it is for the ryot defendants to show that they are entitled to retain possession of these lands." That, as a proposition of law, is one which hardly meets with the approval of their Lordships.

This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession, and *á fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within 12 years before the commencement of the suit, namely, for the two or three years prior to the year 1875, or 1874, and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed.

Now, turning from the judgment of the Judge of the Court below, to the reasons which were given by the Judges of the High Court for the decree they made reversing the decision

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of the Court below and dismissing the plaintiffs' suit with costs, the Court says in reference to the Law of Limitation: "This suit was instituted in the month of Srabun 1290, and it was, therefore, for the plaintiffs to show that they had been in possession of the land in suit since Srabun 1278. Now, admittedly, according to the plaintiffs, they were ousted in the year 1282, that is, eight years before the institution of the suit. And we find from the evidence, and particularly from the evidence of their gomashta Panaulla, that virtually they admit having been dispossessed so far back as 1280." That would be the year 1873. "In that year, according to the evidence for the plaintiffs, their tenants first grew refractory; and it does not appear that the plaintiffs ever collected rent, or were in possession after that year. That being so, it appears to us that a very heavy onus lay upon them to prove that they were in possession during the two years previous, that is, from 1278." With that observation their Lordships entirely concur: "and we are further of opinion that they have not succeeded in proving this." In that observation their Lordships also concur. "The only documentary evidence adduced on this point is a chitta of the year 1280. This chitta purports to have been prepared by one Tamiz Sircar, who, though alive, has not been called." What its contents may have been it is impossible from the record here to collect, but, at all events, this chitta having been prepared by Tamiz Sircar, who appears to be alive, Tamiz Sircar was not produced. "His signature on the paper has been proved by the gomashta Panaulla. But whether the chitta was really prepared by Tamiz Sircar and under what circumstances and how far it would be evidence of possession, are matters upon which there is really no evidence. This being so, it may be said that, practically, there is no documentary evidence whatever of the plaintiff's possession." Then the Court goes on to say: "No dakhilas, kabuliyats, or pottahs have been put in." Their Lordships have already made a comment as to the non-production of some of these documents. "The only evidence on the question of possession consists of certain oral statements made by the servants and tenants of the plaintiffs. These tenants admit that they are now holding the lands of

usli Rajapur and that they would benefit if the plaintiffs succeed in this suit. We think that very little reliance can be placed upon the evidence of such witnesses, unsupported, as they are, by a single scrap of documentary evidence." Then the learned Judges commenting on the manner in which the absence of documentary evidence is attempted to be accounted for, namely, by a reference to the cyclone and the suggestion that one of the defendants having become a lunatic, he had got possession of some material papers; but why the papers, whether in his possession or that of his family, if the papers ever got in his possession, should not have been produced and proved has not been accounted for or explained in any way, say: "We think that neither of these reasons is satisfactory; and, in the absence of better evidence, we think the plaintiffs have not discharged the onus that lay upon them." Then the Judges of the High Court go on to say: "Now it is quite true that, as regards the small piece of land, measuring ten or fifteen pakhis, which was the subject of the proceedings under s. 530, Code of Criminal Procedure, the plaintiffs' claim would not be barred, and if those proceedings had been put in, or if there was any evidence to show where these ten or fifteen pakhis were situated, the plaintiffs would be entitled to a decree for that quantity of land. There is, however, no such evidence, and the mere fact that the plaintiffs retained possession of an insignificant portion of the land, will not save their claim as regards the rest from being barred." It appears to their Lordships that the High Court, in making that observation in reference to the criminal proceedings, must have mistaken the decision of the Magistrate, because so far as appears from the judgment in that case, it would seem that in point of fact the Magistrate finds that for a period of at least four years prior to the institution of those proceedings there had been peaceable possession on the part of the owners or ryots or tenants of the land of *mauzah Machuakandi*, and this finding, so far from being in support of any contention that these particular lands, whatever they may have been, were in the possession of the tenants or ryots of Rajapur, is distinctly to the contrary. Upon the whole, in this case, their Lordships, without going further into the matter, or considering the

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defendants' evidence, which is, however, cogent to show that they have in fact been in possession for more than 12 years prior to the filing of the plaint, are of opinion that the appeal from the decision of the High Court of Bengal should be dismissed, and the decree appealed from affirmed, and they will humbly advise Her Majesty accordingly.

The appellants will pay the costs of the appeal.

Appeal dismissed.

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

Solicitors for the respondents : Messrs. *Oehme, Summerhays & Co.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Beverley.

BINDESSURI PERSHAD SINGH AND OTHERS (DEFENDANTS) *v.* JANKEE PERSHAD SINGH (PLAINTIFF).*

1889 *February* 14.

Superintendence of High Court—Arbitration—Award—Application to file award, objection to—Decree on award, finality of—Private Arbitration—Revisional powers of High Court—Jurisdiction—Civil Procedure Code (Act XIV of 1882), *s.* 520, 521, 525, 526 *and* 622.

Certain disputes between parties were referred under a written agreement to an arbitrator, who, in due course, made his award. The plaintiff then applied to the Subordinate Judge to have the award filed in Court under the provisions of s. 525 of the Code of Civil Procedure. The defendants came in and objected to the award on the following amongst other grounds :—

(1) That the value of the property in suit was Rs. 500 only, and therefore that the application should have been made in the Munsiff's Court and not in that of the Subordinate Judge.

(2) That the agreement of submission was vague and indefinite and did not clearly set out the matters in dispute.

The Subordinate Judge overruled the objection without taking any evidence, and directed the award to be filed and a decree to be passed

* Appeal from Order, No. 362 of 1888, against the order of Baboo Upendra Chunder Mullick, Subordinate Judge of Bhaugulpore, dated the 18th of May 1888.