December, 1891, made a gift in his favour of the bulk of his zamindari property. Since that time the nephew had been helping Nihalo in his business and living jointly with him. Then we come to the will executed twenty-one years afterwards, in which he bequeathed to him the rest of his property. At that time Nihalo's wife was dead, and he had no near relative. As said before he was a separated Hindu. It is contended that he did not mean to leave this property to the defendant merely because he was his nephew and because had lived with him for all these years and had been the recipient of his bounty, but because he had adopted him and for no other reason. It seems to us that it would be pressing the principle laid down in the Privy Council rulings very far to hold that simply because in this will the donee is described as an adopted son it must be taken that the testator meant that unless in fact and law he was an adopted son he never meant him to get any benefit under the will. Under these circumstances we think that the court of first instance was right. We allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs.

Appeal decreed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

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June, 17.

JAI CHAND BAHADUR (PLAINTIFF) *v.* GIRWAR SINGH (DEFENDANT).*

Suit to recover possession of land from an alleged licensee—Act No. IX of 1908, *(Indian Limitation Act), schedule I, article* 144*—Defence of title by adverse possession—Burden of proof,*

The plaintiff who was the zamindar, sued to eject the defendant from certain land within the ambit of the plaintiff's zamindari, alleging that the defendant was in possession merely as a licensee. The defendant denied that he was a licensee, and claimed that he had acquired a title to the land in suit by adverse possession. The defendant, however, failed to prove that he had been in adverse possession of the land for more than twelve years.

Held that the plaintiff was entitled to succeed simply on the strength of his *prima facie* title as zamindar. It was not necessary for him to go further and prove that he had been in actual possession at some period within twelve years previous to the commencement of the suit.

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* Second Appeal No. 321 of 1917, from a decree of Murari Lal, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Cawnpore, dated the 18th of December, 1916, reversing a decree of Muhammad Junaid, Munsif of Fatehpur, dated the 2nd of September, 1916.

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In cases to which article 144 of the first schedule to the Indian Limitation Act, 1908, applies, the defence being a title acquired by adverse possession for more than twelve years, it is not necessary for the plaintiff, as in cases falling under article 142, to prove that he has been in possession at a period within twelve years from the commencement of the suit: it is sufficient if he establishes a *primâ facie* title, and it is then for the defendant to make good his plea of adverse possession. *Secretary of State for India* v. *Chellikani Rama Rao* (1) followed. *Inayat Husen* v. *Ali Husen* (2) dissented from.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellant.

Pandit *Baldeo Ram Dave* and Dr. *Surendra Nath Sen*, for the respondent.

WALSH, J:—This appeal must succeed. The plaintiff is the zamindar of the village and his title has been established in both courts. He alleged that the defendant was put in possession for certain purposes, unnecessary to mention, by leave and licence. The defendant denied the licence in his written statement and set up an adverse title. Mr. *Baldeo Ram*, for the defendant, says that it is not proved that the licence was ever granted or revoked. In our opinion, that is now immaterial. The plaintiff based his case upon it, and from the moment that the defendant repudiated the licence and set up adverse possession, it was no longer possible for the defendant to rely upon the licence or to deny its revocation. He was in the position of a trespasser without any defence to the suit unless he succeeded in establishing his title by adverse possession.

With reference to that part of the case I propose to cite two passages from the judgment of the lower appellate court. Having held that the plaintiff had shown title, the learned Judge said:—

"It is equally obvious that the appellant failed to substantiate his allegation of adverse possession. It was not at all asserted when the title of the zamindar was denied and his own asserted."

This being so, there is no finding of adverse possession, and in our opinion the defence fails and the plaintiff is entitled to succeed. The reason why the Judge in the lower appellate court gave judgment for the defendant is contained in the following words, which I propose to quote, for the reason that in my opinion a false impression of what is the actual law, has prevailed

(1) (1914) I. L. R., 39 Mad., 617. (2) (1898) I. L. R., 20 All., 182.

for a very considerable time in the lower courts. There is at least one authority in the Law Reports of this province by which the lower courts, unless they happen to be familiar with the Privy Council decisions, may reasonably hold themselves bound, and it is high time that a clear indication was given as to the actual law as it stands at the present moment in this province, as throughout India, upon this question. The learned Judge says :—

"In this case, which was an action for ejectment, where the defendant advanced the plea of adverse possession, in my opinion, the *onus* lay on the plaintiff respondent to prove not only his title but also his possession within twelve years of the suit. It was held in *Inayat Husen* v. *Ali Husen* (1), that the plaintiff should lay the foundation for his case by proving that he was in possession of the land within limitation."

In our view that is not the law and never has been the law in this or in any other province in India. The matter was recently made perfectly clear by an important decision of the Privy Council in *Secretary of State for India* v. *Chellikani Rama Rao* (2). The importance of that decision is this:—The Madras High Court in that particular case had followed a view which the Madras High Court had been taking from time to time since the year 1885; the same view apparently, as that which is declared in *Inayat Husen* v. *Ali Husen* (1), namely, that in a suit by an owner of property for possession, to which article 144 of the Limitation Act applied, the plaintiff had to show what is called "a subsisting title." The Privy Council overruled that decision and in doing so clearly overruled the three antecedent decisions of the Madras High Court cited and relied upon in the judgment of the Madras High Court which was under review, and they did so in language contained in the opinion of Lord SHAW which to our mind is as binding upon us and upon inferior courts of this province as any statute can be :—

"Their Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the *onus* of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say:—'I am here, be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all

(1) (1898) I L. R., 20 All., 182. (2) (1914) I. L. R., 39 Mad., 617.

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the legal conditions.' Such a singular doctrine can be well illustrated by the case of India . . . It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession."

We hold ourselves bound by that declaration of the law and compelled to say that *Inayat Husen* v. *Ali Husen* (1), and similar cases are no longer law, and inasmuch as the lower appellate court has held itself bound by *Inayat Husen* v. *Ali Husen* (1), we must reverse its decision.

I now propose as shortly as I can in justification of our view that the law is really settled and has only been unsettled by misunderstanding, to mention the history of the authorities upon this subject. The point arose in *Parmanand Misir* v. *Sahib Ali* (2), where it was disposed of by a three Judge Bench. It is important to observe that the character of the suit in that case was one to which article 142 of the Limitation Act would have applied.

"There is a clear distinction," they said, "as to the *onus* of proof between cases where a plaintiff sues for possession of land by redemption of mortgage and cases where the defence to a suit for possession of land is twelve years' adverse possession by the defendant. In each case the plaintiff must plead his title and if that title is in issue, he must make it out by at least *primâ facie* evidence before the defendant can be put to proof of his defence. Where the defence is twelve years' adverse possession, the defendant must plead and make out the title he alleges and thus show that the title of the plaintiff which otherwise had been proved or admitted was lost."

In *Jafar Husain* v. *Mashuq Ali* (3), the same question as to burden of proof in cases of adverse possession arose in a suit to which also article 142 of the present Act would have been applicable, and the CHIEF JUSTICE in his judgment in that case again made the matter perfectly clear. He said :—

We are satisfied that where a plaintiff comes into court alleging that he has been dispossessed within limitation and when the defence is adverse possession, the question of limitation becomes a question of title, the plaintiff must at least give some *primâ facie* evidence to satisfy the court in the first instance that he was in possession within twelve years before the defendant

(1) (1898) I. L. R., 20 All., 182. (2) (1889) I. L. R., 11 All., 438.

(3) (1892) I. L. R., 14 All, 193.

can be called upon to make out his defence of twelve years' adverse possession.

Whether the expression that the question of limitation becomes a question of title is accurate or not, that case makes it quite clear that there is a broad distinction between cases such as those covered by article 142, where the plaintiff claims possession, by reason of dispossession, and cases such as those covered by article 144, where the plaintiff stands upon his title and leaves the defendant to show that he has lost it. And the decision which I have just cited from *Jafar Husain* v. *Mashuq Ali* (1) was itself based upon a decision of the Privy Council, in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neogi* (2), where their Lordships held that the claimants had shown that they were formerly proprietors of the land to which they alleged title, but they had been dispossessed some years before the 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 next preceding the suit. The action being one to which article 142 of the Limitation Act applied, it was on the claimants or plaintiffs to prove their possession at some time within the twelve years. The reasoning of that decision, if it is not presumptuous to say so, is quite clear. Where a plaintiff comes into court complaining of dispossession, and founds his cause of action upon a specific act of the defendant of that kind, it follows that, inasmuch as he is compelled to establish a cause of action of some kind within limitation, he must show that he was in possession within limitation, otherwise he could not have been dispossessed, and dispossession is the grievance of which he complains. So that in our opinion, at any rate down to the year 1897, the law as enunciated by this Court was based upon the decision of the Privy Council and ought to have been accepted without controversy. Unfortunately a case crept into the Law Reports which is difficult to explain, and certainly never should have been reported, namely, the case upon which the learned Judge has acted in this particular decision. That is the case of *Inayat Husen* v. *Ali Husen* (3).

(1) (1892) I. L. R., 14 All., 193. (2) (1888) I. L. R., 16 Calc., 473.

(3) (1898) I. L. R., 20 All., 182.

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We are not concerned to say whether or not the case in point was rightly decided, but the vice of the decision is contained in a sentence in the judgment which I propose to quote, and which unfortunately forms a prominent feature of the head-note. "It is contended," said the Court, "that the suit is governed by article 144 and the burden of proof was on the defendants to establish adverse possession alleged by them. In our opinion in every suit for possession the plaintiff must not only prove a legal title to possession but a subsisting title not barred by the law of limitation." Where that statement of the law came from it is impossible to say. It is sufficient to say that it is inconsistent with the Privy Council decision in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neogi* (1), and has been definitely over-ruled by the Privy Council in *Secretary of State for India* v. *Chellikani Rama Rao* (2). Inasmuch as the attention of the Privy Council was directed to the several Madras decisions, it is not likely that *Inayat Husen* v. *Ali Husen* (3) was cited to them. It so happens that each of us siting alone on different occasions has taken the same view of the law as we think is now established. I happen myself to have expressed my opinion in a judgment which was reported in *Muhammad Kamil* v. *Habib-ullah* (4), where the District Judge had taken the same view as the District Judge in this case and had based himself upon the same authority, and, recognizing the danger of holding this view, I went out of my way to point out that the Privy Council had really removed all possible misunderstanding upon the question and that any cases in this country which had laid down the law to the contrary must be taken to be no longer binding. I observe that in the supplement to the most recent edition of his book Mr. Rustomji refers to that report and says that my observations must be received with some degree of caution. I have taken the trouble again to peruse the cases in Mr. Rustomji's note and the various decisions on which I had arrived at the conclusion I had formed. I cannot find anything in Mr. Rustomji's note to shake the view which I have expressed more than once, that the Privy Council decision in *Secretary of State for India* v. *Chellikani Rama Rao* (2), has in effect overruled the Madras cases and

(1) (1888) I. L. R., 16 Calc., 473. (3) (1898) I. L. R., 20 All., 182.
(2) (1914) I. L. R., 39 Mad., 617. (4) (1917) 37 Indian Cases, 794.

Inayat Husen v. *Ali Husen* (1). And I think it is not saying too much to ask the inferior courts when this question arises again, as it undoubtedly frequently arises, to pay attention to these observations and to examine the Privy Council decision and no longer to hold themselves bound by the decision in *Inayat Husen* v. *Ali Husen* (1).

RYVES, J.:—I agree generally. The finding of the lower appellate court is:—"The fact remains that the plaintiff is the zamindar and the defendant has been in long possession of the land." It has also found that the possession of the defendants has not been proved to have been adverse. That being so it seems to me that since the publication of the ruling of the Privy Council reported in *Secretary of State for India* v. *Chellikani Rama Rao* (2) the plaintiff must succeed, inasmuch as the defendant has failed to prove his adverse possession. I concur in the order proposed.

BY THE COURT:—For these reasons our order is that the appeal must be allowed with costs.

Appeal allowed.

(1) (1898) I. L. R., 20 All., 182. (2) (1914) I. L. R., 39 Mad., 617.