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I would, therefore, accept this appeal and increase the amount payable under the decree by Rs 3,875. I do not think it necessary to pass any orders as to future interest because the principal amount has already been realised in execution. The appellants will be entitled to their costs in this court.

A. N. C.

Appeal accepted.

PRIVY COUNCIL.

Before Lord Thankerton, Lord Russell of Killowen, Sir Lancelot Sanderson and Sir George Lowndes.

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June 17.

JAHANDAD KHAN AND OTHERS (DEFENDANTS) Appellants,

versus

ABDUL GHAFUR KHAN (PLAINTIFF) Respondent.

On Appeal from the Court of the Judicial Commissioner, North-West Frontier Province.

P. C. Appeal No. 68 of 1928.

Adverse Possession—Uncultivated Land—Government Record—Presumption—Onus of Proof—Punjab Land Revenue Act, XVII of 1887, section 44—Indian Limitation Act, IX of 1908, Sch. I, art. 144.

In 1922 a suit was brought claiming certain uncultivated jungle land, bearing shisham trees of value and grass, on the ground of adverse possession during twelve years before suit. Revenue records from 1895 onwards showed the defendants as being in possession. Much oral evidence as to possession was adduced by both parties at the trial, but it was unsatisfying. The plaintiff was in a position to appreciate the importance of the entries in the records, but had not challenged them earlier. The Court of the Judicial Commissioner, being of opinion that the evidence of acts of possession adduced by the plaintiff was more worthy of credit than that adduced by the defendants, decreed the suit.

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Held that the suit should be dismissed, as the plaintiff had not discharged the *onus* of proof. Under section 44 of Act XVII of 1887, the entries were to be presumed to be correct, and in the circumstances of the case very clear and definite evidence was required to rebut that presumption; the Court of the Judicial Commissioner had adopted the wrong criterion of proof.

Radhamoni Debi v. *Collector of Khulna* (1), and *Kuthali Moothavar* v. *Peringati Kunharankutty* (2), referred to as to the nature of the evidence necessary to show adverse possession.

Appeal (No. 68 of 1928) from a decree of the Court of the Judicial Commissioner, N.-W. F. P. (February 3rd, 1927), reversing a decree of the District Judge of Peshawar (July 17th, 1924).

The respondent instituted a suit against the appellants claiming by adverse possession for twelve years certain land which was uncultivated and unassessed, but bore *shisham* trees of considerable value and grew natural grass useful for grazing.

The District Judge dismissed the suit, but it was decreed on appeal to the Court of the Judicial Commissioner.

The facts appear from the judgment of the Judicial Committee, 1930, May 9th, 12th, 13th, 15th.

DEGRUYTHER K. C. and PARIKH, for appellants.

DUNNE K. C. and WALLACH, for respondent.

The arguments were upon the evidence, reference being made to Act XVII of 1887, Indian Limitation Act, 1908, Schedule I, articles 142, 144, the two cases referred to in the judgment, also to *Basanta Kumar Roy* v. *Secretary of State for India* (3).

(1) (1900) I. L. R. 27 Cal. 943, 950: L. R. 27 I. A. 137, 140.
(2) (1921) I. L. R. 44 Mad. 883, 886: L. R. 48 I. A. 395, 398.
(3) (1917) I. L. R. 44 Cal. 858, 871: L. R. 44 I. A. 104, 113.

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The judgment of their Lordships was delivered by—

SIR GEORGE LOWNDES—The Khans of Zaida and Hund are owners of adjacent landed estates on the bank of the Indus. Near by and situated between two branches of the river is an island of waste ground, a portion of which, comprising about 20 acres, is covered with shisham trees of considerable value. This plot is known as Bela Fakir Buti, and now bears survey number 2084, but is unassessed. The part of the island in which the Bela lies is just opposite to a bungalow belonging to the Khan of Zaida in the village of Rana Dheri, and has for long been a subject of dispute between the rival estates. Prior to 1875 the Bela, together with most of the rest of the island, then bearing Khasra numbers 1—6, was entered in the revenue records as the property and in the possession of Zaida. In that year the Khan of Hund instituted a suit in respect of this area, claiming both title and possession, and praying that it might be recorded as his property. His suit succeeded; it was held that the area claimed was part of the Hund estate, and it was ordered that the Revenue authorities should make the necessary entry in the settlement papers. The decree also directed possession to be given, but there is no evidence that this was done.

In the present proceedings it is only the Bela that is in dispute. It is admitted that it was part of the area covered by the decision of the 1875 suit, and it is clear, therefore, that so far as the claim of Zaida is based upon title, it must fail.

The real question in the case, however, is whether the Khan of Zaida has established a right to the Bela

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by adverse possession. The suit out of which this appeal has arisen followed upon proceedings taken under S. 145 of the Criminal Procedure Code. In 1922 the Khan of Zaida commenced to fell trees on the Bela and his men were forcibly evicted by the Khan of Hund. The Khan of Zaida then applied to the District Magistrate under the section above referred to, alleging that he was in possession, and praying for reinstatement and protection. The District Magistrate held an enquiry and came to the conclusion that ownership and possession were with Hund. Thereupon the suit was instituted by the Khan of Zaida praying for a declaration of his title and for possession.

Under these circumstances it lay upon him to establish affirmatively his adverse possession of the Bela for 12 years prior to 1922. The District Judge of Peshawar, by whom the suit was tried, held that he had not done so, and dismissed his suit. The Judicial Commissioner, on appeal, held that he had, and gave him a decree for possession as owner. The Khans of Hund now appeal to His Majesty in Council. The Khan of Zaida is the respondent.

The possession which the respondent is required to prove "must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor" (*per* Lord Robertson, in delivering the judgment of the Board in *Radhamoni Devi* v. *Collector of Khulna* (1). Their Lordships think that there is special difficulty in establishing this in the case of uncultivated jungle land such as the Bela in dispute, which produces nothing beyond self-sown trees and a seasonal crop of wild grass: see

(1) (1900) I. L. R. 27 Cal. 943, 950: L. R. 27 I. A. 137, 140.

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the remarks of Lord Shaw in *Kuthali Mootha:ar* v. *Peringati Kunharankutty*, (1).

There is, as might be expected in such a case, a mass of oral evidence on both sides, most of which is unsatisfying. Standing out from it is the evidence of the Government records, in which, apparently from 1891, and certainly from 1895 right down to 1922, when the present dispute arose, possession is shown as being with the appellants. It is not disputed that these records come within the terms of S. 44 of Act XVII of 1887, and, therefore, that the entries of the appellants' possession must be presumed to be true until the contrary is proved.

In the course of the settlement proceedings of 1894 the old dispute between the two estates was re-opened, and the settlement collector ordered all the land except certain plots, which admittedly do not include the Bela in dispute, to be entered as the property and as in the possession of Hund. This order was carried out by the records above referred to. It is clear that the respondent was a party to and fully informed of these proceedings, but he took no steps thereafter to establish his title, though his case even now is that his possession had continued undisturbed after and in despite of the 1875 decree. The Patwari of Hund, who had held office from 1919, and whose duty it was to inspect twice a year every survey number in his circle and to enter, with other particulars, in whose possession they were, was a witness in the case. In addition to vouching the Government records he deposed to having found at his biennial inspections prior to 1922 men from Hund in possession of the Bela. The trial Judge attached

(1) (1921) I. L. R. 44 Mad. 883, 886: L. R. 48 I. A. 395, 398.

considerable weight to his evidence, supported as it was by the records, and their Lordships think that he was right in so doing, and that the Judicial Commissioner who disagreed with him on this point failed to appreciate its true significance. Entries of possession would be open to the inspection of the respondent, who was not merely an educated man, but a first-grade District Judge, and their Lordships find it hard to believe that if he had in fact been in open and continuous possession of the Bela for a number of years, a man of his position and experience would have allowed such entries to pass unchallenged. This would, their Lordships think, be the more remarkable if, as the respondent stated in his application to the District Magistrate in 1922, the appellants and their ancestors had been "incessantly trying to secure possession of the Bela from 1875."

Under these circumstances their Lordships must hold that it would require very clear and definite evidence of possession by the respondent to discharge the *onus* which is upon him. Their Lordships doubt whether the Judicial Commissioner approached this question in the right way. He seems rather to have thought that where both sides gave evidence of possession it was sufficient for him to be satisfied that the evidence adduced for the respondent was more worthy of credit than that on the other side. He says that "though none of the individual points" upon which the respondent relied "may be very strong, yet the cumulative effect of all of them is sufficient to discharge the initial burden of proof which lay upon the plaintiff," and that "this being so it is for the defendants to show that they have maintained their title and have not been excluded by the plaintiff."

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It is impossible for their Lordships to accept this as the true criterion in such a case. The only question can be whether the respondent has established affirmatively his exclusive possession of the Bela for the requisite period of 12 years, and this, in their Lordships' opinion, he has failed to do.

Their Lordships have been taken through all the evidence upon which the respondent's counsel relies, and they have come to the conclusion that taken with the other facts, to which reference has already been made, it falls short of establishing his case. The cutting of trees by the respondent does not go back beyond 1916, and it is at least noteworthy that as soon as felling was planned on any large scale the appellants interfered. The marking of the trees to which one witness deposes is not even referred to by the respondent in his examination, and if it in fact took place may be ascribed to no earlier pondent's permission is of no real significance. The date. The grazing and carrying away of grass and the cutting of firewood could be little more than sporadic invasions of a conveniently adjacent jungle. The temporary occupation by a fakir with the resabsence from the long tale of witnesses of Shera, who is said to have been employed by the respondent for eight or nine years as his custodian of the Bela, and whose evidence would have been most material, is altogether unexplained. The fact that in 1911 the respondent succeeded in establishing his title by adverse possession to certain cultivated plots on the other side of the river which were within the Hund boundary, is clearly no evidence of his possession of the Bela.

Their Lordships think that the trial Judge approached his examination of the case from the right

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point of view, and that he came to a correct conclusion upon the evidence. They think that the decree of the Judicial Commissioner should be set aside, and that of the District Judge restored, and they will humbly advise His Majesty accordingly. The respondent must pay the costs before the Judicial Commissioner and here.

A. M. T.

Appeal accepted.

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

Solicitor for respondent: *H. S. L. Polak.*

PRIVY COUNCIL.

Before Lord Tomlin, Sir Lancelot Sanderson, and Sir George Lowndes.

1930

June 26.

SHALIG RAM AND OTHERS (DEFENDANTS) Appellants

versus

CHARANJIT LAL (PLAINTIFF) Respondent.

On Appeal from the Court of the Judicial Commissioner, North-West Frontier Province.

P. C. Appeal No. 3 of 1929.

N.-W. F. P. Civil First Appeal No. 143-12 of 1922.

Hindu Law—Will—Construction—Devise to Widows and Son's Widow—Heirs (Waris)—*Absence of Gift over.*

A Hindu testator by his will, after devising a house to his daughter for her life, provided that his property should be divided into three shares, and that his two widows and the widow of his son, who was childless, should be heirs (*waris*). The will contained no gift over upon the death of the widows.

Held that the intention of the testator was to confer upon each of his two widows and his daughter-in-law full proprietary rights in a one-third share in the residue of his estate.

Bhaidas Shivdas v. *Bai Gulab* (1), followed. *Ramachandra Rao* v. *Ramachandra Rao* (2), explaining *Surajmani* v. *Rabi Nath Ojha* (3), referred to.

(1) (1921) I. L. R. 46 Bom. 153: L. R. 49 I. A. 1.

(2) (1922) I. L. R. 45 Mad. 320, 327, 328: L. R. 49 I. A. 129, 135.

(3) (1907) I. L. R. 30 All. 84: L. R. 35 I. A. 17.