twenty years,—*i. e.*, till the 30th January 1876. At the end of that time, probably, the defendant will be entitled to possession on a partition being made, though not necessarily to possession except on a partition.

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I find, as a fact, that the land in front of the family dwelling-house is a part of and included in it. It was proved by one of the witnesses to be so, and I believe him.

Judgment for plaintiff.

Attorney for the plaintiff: Mr. *Paliologus.*

Attorneys for Mr. Mackintosh: *Messrs. Gray & Sen.*

Attorneys for Manmathanath: *Messrs. Beeby & Rutter.*

[APPELLATE CIVIL.]

Before Mr. Justice L. S. Jackson and Mr. Justice Macpherson

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BHAGABAT PRASAD SING AND OTHERS (DEFENDANTS) *v.* DURG BIJAI SING (PLAINTIFF).*

Regulation XI of 1825, *s.* 4—*Accretion—Tenant-at will—Occupation—Right of Zemindar.*

A tenant-at-will is entitled to occupy an accretion to his holding so long as he retains possession of his original holding.

THIS was a suit for recovery of possession of *kasht* land (holdings for the purpose of cultivation) measuring 95 bigas. The plaint stated that there were three *diaras* in the old mauza recently formed; that in each of these *diaras* the plaintiff was in possession of extensive tracts of land as his ancestral *kasht*; that in 1266 (1859), certain alluvial formation accreted to the *kasht* or tenure of the plaintiff situate in the west of the estates

* Regular Appeal, No. 273 of 1870, from a decree of the Judge of Patna, dated the 23rd September 1870.

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belonging to the plaintiff and defendants; that the plaintiff was in possession of the alluvion in accordance with the practice which prevails regarding the *diara* lands; that the plaintiff had, in consequence of certain proceedings taken by the defendants in the Revenue and Criminal Courts, been dispossessed of the said accretion; and that the plaintiff was entitled to the land which had accreted to his land; the plaintiff therefore prayed for recovery of possession thereof.

The defendants Bhagabat Prasad Sing and others set up in their written statement, that the accretion of any land, which had been once swept away by derelction to any *hahst* or tenure, did not belong to the owner of the *ksaht*; that the land in suit was not the tenure of the plaintiff; that ever since the re-formation of the *diara*, the land had been held in *kasht* successively by the defendants and their tenants; that according to the usage of the country, the alluvial accretion belonged to the landlord.

The Judge found that the local custom was that ryots on the *diara* were not liable to be ousted at will; that an accretion to a tenure could not be taken away, except by extinguishing the original tenure; and that the plaintiff's tenure had not been put an end to. He held that a tenant by the year to whose holding land had accreted in one year, was, under section 4, Regulation XI of 1825, entitled to hold the accretion, so long as he was allowed to occupy the parent holding. He further found that the land had been originally held by the plaintiff and accordingly passed a decree in favour of the plaintiff.

The defendants appealed to the High Court.

Baboo *Mahes Chandra Chowdhry* (Baboo *Chandra Madhab Ghose* with him), for the appellants, contended that as the defendants were in possession, they could not be ousted until a superior title had been made out by the plaintiff. The only title which the plaintiff had set up was, that the land in dispute was an accretion to his original holding. To establish a title to an accretion it was necessary to show that the plaintiff had a permanent interest in the parent estate. The plaintiff was a mere tenant-at-will, and consequently his holding was not a tenure within the

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meaning of clause 1, section 4, Regulation XI of 1825. It had not been shown that the particular land which is claimed as an accretion had been "grined" within the meaning of Regulation XI of 1825, or that the site upon which the re-formation was said to have taken place, had ceased to be the property of private individuals, and had been public property. In this case the re-formation had admittedly taken place upon land which formed part of the permanently settled land of the zemindar —*Lopez* v. *Maddan Thakoor* (1) applies. The zemindar was still the proprietor of the land which had appeared after submergence.

Baboos *Srinath Das* and *Ramanath Bose*, for the respondents, contended that as the Judge had found as a fact that the land in dispute was an accretion to the holding of the plaintiff and as the correctness of this finding had not been questioned, the land being and accretion to the holding of the plaintiff, whatever the nature of that holding might be, belonged to the plaintiff under Regulation XI of 1825. As the plaintiff had not been ousted from the parent land to which the land in dispute had accreted, his title to the accretion could not be questioned. There was no question as to re-formation having taken place on the site of submerged land which originally belonged to the defendant, consequently *Lopez* v. *Maddan Thakoor* (1) did not apply. So long as the plaintiff held the parent estate he was entitled to hold any accretion which might attach to such estate.

Baboo *Mahesh Chandra Chowdhry* in reply.

The judgment of the Court was delivered by

JACKSON, J.—The plaintiff sued to recover possession of 95 bigas of land in a *diara*, which land he alleged to have been gradually formed by accretion, by the receding of the river Ganges, and as an accretion to his original holding of 9 bigas and 9 biswas of land in the same *diara*.

The defendants are partly persons now claiming to hold this

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land under lease from the zemindars, and partly the zemindars themselves.

It may be mentioned, although the argument does not turn upon that part of the allegations, that the plaintiff is himself a co-proprietor of the estate in which these lands are situated, and that the plaintiff, as well as the defendants, claim to hold in the way of individual occupation, parcels of lands being parts of that estate.

The plaintiff alleged that he held the lands after accretion, and that such holding had been recorded by an Ameen deputed by the settlement officer, and he also referred to certain disputes and litigation which had gone on between him and some of the defendants in respect of part of these very lands. He further stated that a second Ameen having been deputed by the settlement officer, he measured and recorded these lands as being held by the defendants; that he, the plaintiff, complained of these proceedings, but his complaint was disallowed by the Deputy Collector, and afterwards by the Collector; that since the recording just mentioned by the second Ameen, some of the defendants had been in possession of the lands, and paid the rents to the other defendants.

The defendants' case, generally speaking, was a denial of the *kasht* or holding of the plaintiff,—a denial that the plaintiff had any right to hold the land as an accretion to his original holding, and an assertion of the right of the defendants in occupation who were holding by permission of the landlord.

The Judge of Patna, Mr. Ainslie, before whom this case came on for trial, found that the ryots on the *diara* were not liable to be ousted at will; and, secondly, that the plaintiff was more than a tenant-at will: he also found that the land in question was an accretion to the plaintiff's original holding, and he held that, by clause 1, section 4, Regulation XI of 1825, the plaintiff was entitled to that accretion as part of his holding, and therefore considered that the plaintiff was entitled to recover the land.

This decision has been assailed wholly upon grounds of law. The vakeel for the appellant has not in his argument before us touched the findings of fact by the Judge, nor questioned the

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Judge's opinion upon the evidence. We must therfore assume the facts as found by the Judge, and apply the law to them.

It seems to me quite clear that the plaintiff's original holding being assumed, and the land being found to be an accretion to that holding, the plaintiff is entitled to such accretion by the distinct and positive terms of section 4, Regulation XI of 1825. Great stress has been laid upon a recent decision of the Privy Council in *Lopez* v. *Maddan Thakoor* (1). In that case, the Judicial Committee, overruling the decision of a Full Bench of this Court, determined broadly that a zemindar was not entitled to claim lands as an accretion to his estate, when such lands are capable of being identified as a re-formation of land belonging to another owner upon their original site. It appears to me that that case does not apply to the present circumstances. There is no contest here, to use the words of the Judicial Committee, "between surface and site." It is not the case here that the plaintiff is claiming to recover this land as an accretion to his holding, and the defendants are claiming it as a re-formation on their own holding upon the original site, but the defendants now in occupation claim it under a title made from the zemindar. It appears to me that, as between the ryot and the zemindar, if the tenant can show that the land in dispute is an accretion to his original holding, he is entitled to succeed. Then it is said that the original holding is a mere tenancy at will, and that consequently, as the plaintiff could not enforce a claim to be put in possession of such holding, he cannot, *a fortiori*, be entitled to recover possession of land which has accreted to his holding. Now it is not very clear (but it is not necessary to determine here) how a party, who is a joint owner of an estate, and in possession of land within the limits of that estate, can be called, in respect of such occupation, a tenant-at-will, under the proprietary body. But however that may be, and assuming for the moment that the plaintiff is a mere tenant-at-will, that will not entitle the zemindar to dissociate the accretion from the original grant, and to turn the plaintiff out of the accretion, while he still retains, as tenant, the original holding itself. If

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the zemindar desires to oust the plantiff from the accretion that he holds, he must do so by attacking the original holding. He has not attemped to proceed in that way, nor has there been any issue whether the zemindar would be entitled to oust the plaintiff from the holding or not. So long, therefore, as the plaintiff occupies his original holding, I conceive he is entitled to occupy the accretion, which under the law forms part of it, and therefore he is entitled to be restored to possession of it by decree of the Civil Court.

For these reasons I think the decision of the Court below is quite correct, and that the appeal ought to be dismissed with costs.

Appeal dismissed.

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June 8.

Before Mr. Justice Norman (Offg. Chief Justice), Mr. Justice L. S. Jackson, and Mr. Justice Macpherson.

BORO KHASIA (PLAINTIFF) *v.* JATA SIRDAR AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (Act VIII of 1859). *s.* 119.—*Jurisdiction—Special Appeal—Objections taken for the First Time.*

A Moonsiff entertained a petition by a defendant under section 119 of the Civil Procedure Code, and set aside his former judgment given *ex parte* in favor of the plaintiff, and dismissed the plaintiff's suit. The plaintiff, on appeal before the Judge did not raise the objection that the Moonsiff ought not to have entertained the petition of the defendant as it had not been presented in due time. It was held to be too late to raise the objection on special appeal.

The plaintiff in this case, in August 1867, sued the defendants for the possession of 11 hals of land with mesne profits. The defendants did not appear at the trial, and the Moonsiff passed a decree in favour of the plaintiff on the 24th December 1867.

In execution taken out by the plaintiff for costs adjudged in this *ex parte* decree, certain properties belonging to the defendants were brought to sale, it was alleged, in June 1869.

The defendants then appeared, and, by a petition dated the 23rd August 1869, applied to the Moonsiff under section 119

* Letters Patent Appeal, No. 20 of 1871, from a decree of Mr. Justice E. Jackson dated the 24 March 1871, passed in Special Appeal, No. 1844 of 1870, decided by Mr. Justice E. Jackson and Mr. Justice Mookerjee.