Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1896 *September* 7.

MOHINI MOHAN ROY (PLAINTIFF) *v.* PROMODA NATH ROY AND OTHERS (DEFENDANTS).*

Limitation—Waste land subsequently made cultivable—Possession—Onus Probandi—Constructive possession.

The doctrine of constructive possession applies only in favour of a rightful owner, and must not (as a rule) be extended in favour of a wrong-doer, whose possession must be confined to land of which he is actually in possession.

In a suit for the possession of lands formerly uncultivable, but subsequently brought under cultivation, the District Judge had allowed the plea of limitation to prevail against the plaintiff upon a finding—based, not upon evidence of actual possession by the defendants, but upon an inference from part of the evidence,—that the defendants had been in constructive possession for over 12 years prior to the suit.

Held, that so far as the judgment and decree of the District Judge related to certain plots described as *patit* or uncultivable lands, they must be set aside, and the case remanded to the District Judge to determine (*a*) how far the presumption in favour of the plaintiff as to the continuance of the uncultivable state of the lands till within twelve years of suit applied; and (*b*) how far that presumption had been rebutted by evidence of actual possession on the part of the defendants.

APPEAL from the decree of the District Judge of Rajshahye.

Dr. *Rash Behari Ghose*, Babu *Lal Mohan Das*, and Babu *Saroda Prosunno Roy* for the appellant.

Babu *Srinath Das* and Babu *Saroda Churn Mitter* for the respondents.

The facts and arguments of the case appear in the judgment of the Court (MACPHERSON and BANERJEE, JJ.), which was as follows:—

This appeal arises out of a suit brought by the plaintiff-appellant for possession and mesne profits of certain land, on the allegation that the land is included in *mouzah* Lakhi Chumari appertaining to his *patni taluk* Birchapila; that it was formerly the bed of a *bhil* which has recently become fit for cultivation, and that the defendants are wrongfully holding possession of the same.

* Appeal from Appellate Decree No. 672 of 1895 against the decree of L. Palit, Esq., Officiating District Judge of Rajshahye, dated the 9th of January 1895, modifying the decree of Babu Nobin Chundra Ganguly, Subordinate Judge of that District, dated the 6th of March 1893.

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The defendants in their written statement denied the title of the plaintiff to set up the plea of limitation, and urged that a certain *khal* was the boundary between the plaintiff's village Lakshi Chumari and the defendants' village Majgeo Sripur.

The first Court found that part of the land in dispute appertained to the plaintiff's village, but it dismissed the suit as barred by limitation.

Upon appeal by the plaintiff, the lower Appellate Court ordered a fresh local enquiry, and upon the enquiry being completed the plaintiff confined his claim to those portions of the land lying on his side of the survey boundary between the two villages Lakshi Chumari and Majgeo Sripur which were described as *patit* land of different denominations in the defendants' *chitta* of 1282. The learned District Judge, however, found the claim barred by limitation, and he accordingly affirmed the first Court's decree.

In second appeal it is now contended for the plaintiff that the decision of the District Judge is wrong in law first, because, having regard to the nature of the land, he should have thrown the burden of proving possession entirely upon the defendants instead of holding, as he has done, "that the *onus* cannot be said to lie exclusively on one party or the other"; and, secondly, because he has erroneously extended the doctrine of constructive possession, which holds good only in the case of rightful owners, to the case of wrongdoers.

In support of the first contention, the cases of *Radha Gobind Roy* v. *Inglis* (1), and *Raj Kumar Roy* v. *Gobind Chunder Roy* (2) are relied upon. The true rule deducible from the first mentioned case and from certain other cases is that stated in the judgment of the majority of the Full Bench in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (3), in which the learned Judges, after observing "that as a general rule the plaintiff cannot, merely by proving possession at any period prior to twelve years before suit, shift the *onus* to the defendant," add, "the true rule appears to us to be this: that where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did, continue till within twelve years

(1) 7 C. L. R., 364. (2) I. L. R., 19 Calc., 660.
(3) I. L. R., 9 Calc., 744.

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before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also until the contrary is shown. This case appears to have been cited in the argument before the Privy Council in *Raj Kumar Roy* v. *Gobind Chunder Roy* (1), and there is nothing in their Lordships' judgment to shew that they disapprove the rule there laid down.

That being then the rule applicable to cases like this, we observe that if the lower Appellate Court had considered the case properly with reference to those plots of land falling within the plaintiff's *mouzah* which are entered in the *chitta* of 1282, corresponding to 1875, as *garlaik patit* or uncultivable waste, and also with reference to some of those entered as *patit* land of other denominations, the possession of the plaintiff might, in the absence of evidence to the contrary, have been presumed to have continued till within twelve years before the date of the suit, which was instituted in 1890, more especially when some of these plots were found by the amin deputed to hold the local enquiry to be still uncultivable. The learned District Judge has, however, omitted to consider the case with reference to that rule, and this omission constitutes an error of law in his decision. But it may be said that this error becomes immaterial when the learned District Judge has affirmatively found "that the defendants have been in possession since 1282 at least." No doubt, if that finding stands, the question of the burden of proof becomes immaterial, for the presumption which the rule laid down in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (2) raises in favour of the plaintiff, is a rebuttable one, and may be displaced by evidence of possession in favour of the defendant. This brings us to the consideration of the second contention mentioned above.

The learned District Judge's finding that the defendants have been in possession of the land in dispute since 1282 or 1875 is based, as regards the *patit* or waste lands of different denominations, not upon any evidence of actual possession, but upon evidence from which he infers that the defendants were in constructive possession. For this is what he says in his judgment: "If a plot leased to a tenant contains a portion which is at the time *patit*, and which is gradually brought under

(1) I. L. R., 19 Calc., 660. (2) I. L. R., 9 Calc., 744.

cultivation, then it seems to me that the tenant must be held to have been in possession of the whole plot from the beginning. The very fact of the measurement for the preparation of the *chitta*, the leasing out of land, &c., also constitutes possession."

Now acts of possession over a part of any immoveable property may no doubt in many cases be evidence of *de facto* possession of the whole, as has been explained by Baron Parke in *Jones* v. *Williams* (1) and by Lord Blackburn in *Lord Advocate* v. *Lord Blantyre* (2). But that rule operates with full force only in favour of the rightful owners; and it should be applied with caution and reservation, if at all, in favour of a wrongdoer; for this reason among others, that the right to the whole, which makes the possession of a part equivalent to the possession of the whole, and forms the connecting link between the whole and the part in the one case, is wanting in the other. In the case of a wrongdoer claiming to possess the whole by reason of possessing a part, it is often difficult to say, in the absence of the connecting link of title, how far the whole extends. The want of this connecting link may in some cases be supplied by others, such as close connection and interdependence between the part actually possessed and the whole of which it is claimed to be a part. But except in such special cases, the possession of a wrongdoer should be held to be confined to what he is actually in possession of, and not to extend constructively to anything beyond that; this rule, which is in one sense deducible from the principle that the ordinary presumption is that possession follows title, is especially necessary for the protection of the rightful owners in a country like Bengal, where extensive tracts of land lie waste and uninclosed, and in a case like the present where we find that the plots of waste land to which the wrongful possession of the defendants has been held constructively to extend, adjoin the plaintiff's property on one side at least. The view we take is amply supported by reason and authority—see Angell on Limitations, Sixth Edition, section 394, and *Siddon* v. *Smith* (3). The lower Appellate Court was therefore wrong in arriving at the conclusion that the defendants

(1) 2 M. L. W., 326 (331). (2) L. R., 4 Ap. Cas., 770 (791).
(3) 36 L. T. 168.

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were in possession of the lands in question from 1282 without adverting to the limitation pointed out above in the application of the doctrine of constructive possession, namely, that it does not, as a rule, apply to the case of a wrongdoer.

For the foregoing reasons we think the judgment and decree of the lower Appellate Court, so far as they relate to the plots described as *patit* land of different denominations in the *chitta* of 1282, must be set aside and the case remanded to that Court in order that it may determine, (1) how far the presumption referred to in the rule laid down in the case of *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (1) quoted above applies to this case, and (2) how far that presumption has been rebutted by evidence of actual possession adduced by the defendants, and then dispose of the appeal. Costs will abide the result.

H. W. *Case remanded.*

Before Mr. Justice Macpherson and Mr. Justice Hill.

1896 *July* 10.

BINDU BASINI CHOWDHRANI AND ANOTHER (DEFENDANTS) *v.* JAHNABI CHOWDHRANI (PLAINTIFF.)*

Injunction—Specific Relief Act (I of 1877), section 54—Threatened damage—Damage occurring after suit—Cause of action—Digging so as to endanger neighbour's land.

Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit. And where actual injury has occurred subsequently to the filing of the plaint, the plaint may be amended so as to show the nature and extent of such injury.

Pattisson v. *Gilford* (2) applied.

THE plaintiff and the defendants owned adjoining lands. Close to the boundary line the defendants dug a trench 110 feet long and 9 feet deep, the sides towards the bottom sloping in the direction of the plaintiff's land. The plaintiff sued for a perpetual injunction restraining them from continuing to dig, for the cost

* Appeal from Order No. 390 of 1895 from the order of Babu Baroda Prosono Shome, Additional Subordinate Judge of Mymensingh, dated the 25th October 1895, reversing the order of Babu Kali Krishna Chowdhry, Munsif of Atia, dated the 18th September 1894.

(1) I. L. R., 9 Calc., 744. (2) L. R., 18 Eq., 259.