A114

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das & Ors. etc. etc. ... Respondents

AND
OTHER CONNECTED CIVIL APPEALS

COMPILATION OF CASES ON THE ISSUE OF TITLE

BY
DR. RAJEEV DHAVAN, SENIOR ADVOCATE

(PLEASE SEE INDEX INSIDE)

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

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NAIR SERVICE SOCIETY LTD.

v.

REV. FATHER K. C. ALEXANDER & ORS.

February 12, 1968

[M. HIDAYATULLAH, S. M. SIKRI AND K. S. HEGDE, JJ.]

Specific Relief Act, 1877 (1 *of* 1877), *ss.* 8 *and* 9—*Suit under s.* 8 *whether must be based on proof of title—Jus-tertii—Indian Evidence Act,* 1872 (1 *of* 1872), *s.* 110 *presumption under—The Limitation Act,* 1963 (36 *of* 1963) *Arts.* 64 *and* 65—*Travancore Limitation Regulation* (*VI of* 110 *M.E. s.* 32)—*Travancore Specific Relief Act XIII of* 1115, *ss.* 7 *and* 8—(*Travancore*) *Regulation IV of* 1091—*Effect of incurring penalty under Regulations on right to bring suit for recovery of possession of land —Code of Civil Procedure,* 1908 (*Act* 5 *of* 1908), *O. VI, r.* 17—*Amendment of pleadings—Effect of laches.*

After a case under the Travancore Land Conservancy Regulation IV of 1094 M.E. the plaintiff was evicted from 160 acres of Poramboke land. Thereafter in August 1938 the appellant Society applied for a Kuthakapattom lease of this area which was granted and the Society entered into possession in July 1939. The suit land was adjacent to the above land. In the map prepared by the Court Commissioner the suit land was marked as L(1) and the area of 160 acres aforesaid as L(2). In his suit which was filed in 1942 the plaintiff alleged that after entering into possession of L(2) the Society in October 1939 through its agents forcibly dispossessed him of L(1) as well. He asked for restoration of possession of L(1) and for related relief. The Society in its defence contended that the plaint lands were Government Reserve and that the plaintiff was dispossessed by Government from these lands when he was dispossessed of L(2). In 1948 the Society was granted Kuthakapattom lease in respect of a party of L(1) as well, and this portion was marked as L(1)(b), the rest of the suit land being marked as L(1)(a). The Society in its written statement did not aver that it was not in possession of L(1)(a). Subsequently, it attempted by argument to limit its defence to L(1)(b) on the basis of the 1948 base, But although the suit was pending in the trial court for 17 years no application for amendment of the pleadings to this effect was made. The trial court decreed the plaintiff's suit for L(1)(a). In the High Court the Society applied on the last day of the hearing of the appeal, for amendment of its written statement limiting its defence to portion L(1)(b), disclaiming all interest in portion L(1)(a). The High Court rejected the application as belated and decreed the suit against the Society in respect of L(1)(b) as well. The Society appealed, by certificate to this Court. The main contention urged on behalf of the Society based on the Travancore law corresponding to ss. 8 and 9 of the Indian Specific Relief Act, was that after the expiry of six months from the date of dispossession a suit for possession without proof of title was incompetent. On facts the Society's plea was that the plaintiff had been evicted by the Government from the suit lands at the same time as he was evicted from L(2).

HELD: (i) The High Court accepted the plaintiff's allegations as to his forcible dispossession from the suit land by the Society. On examination of the evidence there was no reason to depart from the finding of the High Court. [171 D-E]

(ii) It cannot be said that the distinction between ss. 8 and 9 of the Indian Specific Relief Act was based on the distinction that was at one

time drawn in Roman Law between the two kinds of Interdicts namely, *de vi cotidiana* and *de vi armata*. In the time of Justinian the two Interdicts *de vi* were fused and there was only one action representing both. The appeal to Roman Law was therefore of no assistance. [174 B-C]

(iii) The contention that while under s. 9 of the Specific Relief Act a suit based merely on prior possession must be filed within six months, while a suit under s. 8 based on proof of title may be filed within 12 years cannot be sustained. Section 8 of the Act does not limit the kinds of suit but only lays down that the procedure laid down by the Code of Civil Procedure must be followed. This is very different from saying that a suit based on possession alone is incompetent after the expiry of 6 months. Under s. 9 of the Code of Civil Procedure itself all suits of a civil nature are triable excepting suits of which their cognizance is either expressly or impliedly barred. There is no prohibition expressly barring a suit based on possession alone. [175 F-G]

Ram Harakh Rai v. *Scheodihal Joti*, (1893) 15 All. 384, considered.

Mustapha Sahib v. *Santha Pillai*, I.L.R. 23 Mad. 179, and *Kuttan Narayaman* v. *Thomman Mathai*, (1966) Kerala Law Times 1, applied.

The uniform view of the courts is that if s. 9 of the Specific Relief Act is ultilised the plaintiff need not prove title and the title of the defendant does not avail him. When, however, the period of 6 months has passed questions of title can be raised by the defendent and if he does so the plaintiff must establish a better title or fail. In other words the right is restricted to possession only in a suit under s. 9 of the Specific Relief Act but that does not bar a suit on prior possession within 12 years and title need not be proved unless the defendant can prove one. Articles 64 and 65 of the Indian Limitation Act as recently amended bring out this difference. Article 64 enables a suit within 12 years from dispossession for possession of immovable property based on possession and not on title, when the plaintiff while in possession of the property has been dispossessed. Article 65 is for possession of immovable property or any interest therein based on title. The amendment is not remedial but declaratory of the law. In the present case therefore, the plaintiff's suit was competent. [177 A-D]

(iv) The Society could not on the basis of possession claim a presumption of title in its favour relying on s. 110 of the Indian Evidence Act. This presumption can hardly arise when the facts are known. When the facts disclose no title, possession alone decides. In the present case neither party had title and therefore s. 110 of the Evidence Act was immaterial. [177 E-F]

(v) The plea of *jus tertii* on behalf of the appellant could not succeed. The plea is based on *Doe* v. *Barnard* [1849] Q.B. 945 which was departed from in *Sher* v. *Whitlock*, [1885] 1 Q.B 1 and was overruled *in Perry* v. *Clissold*, [1907] A.C. 73. The view taken in *Perry* v. *Clissold* that a person in possession of land has a perfectly good title against all the world but the rightful owner, has been consistently accepted in India and the amendment of the Indian Limitation Act has given approval to that proposition. Accordingly the Society was not entitled to plead in the present case that the title to the suit land lay in the State. Such a plea if allowed will always place the defendant in a position of dominance. He has only to evict the prior trespasser and sit pretty pleading that the title is in someone else. The law does not countenance the doctrine of 'findings keepings'. [179 H, 182 F-G]

Perry v. *Clissold*, [1907] A.C. 73, *Burling* v. *Read*, 11 Q. B. 904 and *Smith* v. *Oxenden*, 1 Ch. Ca 25, applied.

Dharani Khanta Lahiri v. *Garbar Ali Khan*, 25 M.L.J. 9 P. C. and *Mahabir Prasad* v. *Jamuna Singh*, 92 I.C. 31 P.C. distinguished.

(vi) The plaintiff's claim could not be refused on ground that he was an offender liable to penalty under Regulation IV of 1091 M.E. and other connected Regulation and rules. The Regulations were intended to regulate the relation of Government and persons but had no bearing upon the relations between persons claiming to be in possession. The penalty under the Regulations were a fine for wrongful occupation and in no sense a punishment for crime. The illegality of possession was not thus a criminal act and the regaining lost possession could not be described as an action to take advantage of one's own illegal action. In fact the plaintiff was not required to rely upon any illegality, which is the consideration which makes the courts deny their assistance a party. [183 C-D]

Holmas v. *Johnson*, (1775) 1 Cowpar 341, referred to.

(vii) The Society had failed to amend its pleadings in respect of suit land marked L(1)(b), and had made a request to the High Court to allow such amendment only at the eleventh hour. But on the facts and circumstances of the case it was desirable to allow the amendment in order to determine the effect of the 1948 lease on the rights of the parties in L(1)(b). Without amendment another suit based on the second Kuthakapattom was inevitable. There is good authority for the proposition that subsequent events may be taken note of if they tend to reduce litigation. This was not one of those cases in which there was likelihood of prolonged litigation after remand or in which a new case would begin. [Case remanded to trial court to try issue arising out of amendment in respect of L(1)(b)]. [187 D-E]

Case-law referred to.

(viii) The exact implications of the second Kuthakapattom after the amendment of pleadings as allowed were for the trial court to determine but it was clear that the second Kuthakapattom could not be regarded as retroactive from the date of the grant of the first Kuthakapattom. The document granting the 1948 lease did not mention that it was retrospective. A formal document which has no ambiguity cannot be varied by reference to other documents which are not intended to vary it. [187 G]

(ix) In respect of portion of the land L(1)(a) the appeal must be dismissed. [188 D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1632 of 1966..

Appeal from the judgment and decree dated December 23, 1965 of the Kerala High Court in Appeal Suit No. 406 of 1961.

M. K. Nambiar, N. A. Subramanian, K. Velayudhan Nair, T. K. Unnithan, Rameshwar Nath and *Mahinder Narain*, for the appellant.

S. V. Gupte, T. P. Paulose, B. Dutta, Annamma Alexander, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain*, for respondent No. 1.

The Judgment of the Court was delivered by

Hidayatullah, J. This is an appeal by certificate from the judgment of the High Court of Kerala, December 23, 1965, reversing the decree of the Sub-Court, Mavelikara. By the judgment and decree under appeal the suit of the first respondent, Rev. Father K. C. Alexander (shortly the plaintiff) was decreed in respect of the suit lands of which he had sought possession from the appellant, Nair Service Society Ltd. (shortly the Society or the first defendant) and some others who are shown as respondents 2 to 6. The facts in this appeal are as follows :

The plaintiff filed a suit in *forma pauperis* on October 13, 1942 against the Society, its Kariasthan (Manager) and four others for possession of 131.23 acres of land from Survey Nos. 780/1 and 780/2 of Rannipakuthy in the former State of Travancore and for mesne profits past and future with compensation for waste. The suit lands are shown as L(1) on a map Ex. L prepared by Commissioners in CMA 206 of 1110 M.E. and proved by P.W. 10. The two Survey Nos. are admittedly Government Poramboke lands. The plaintiff claimed to be in possession of these lands for over 70 years. In the year 1100 M.E. a Poramboke case for evicting him from an area shown as L(2) measuring 173.38 acres, but described in the present suit variously as 160, 161 and 165 acres, was started under the Travancore Land Conservancy Regulation IV of 1094 M.E. (L.C. case No. 112/1100 M.E.) by Pathanamathitta Taluk Cutchery. This land is conveniently described as 160 acres and has been so referred to by the High Court and the Sub-Court. The plaintiff was fined under the Regulations and was evicted from the 160 acres. The Society applied for Kuthakapattom lease of this area on August 11, 1938. The lease was granted but has not been produced in the case. It was for 165 acres and the Society was admittedly put in possession of it on July 24, 1939 or thereabouts. The lease was for 12 years. Plaintiff's case was that on 13/16 October, 1939 a number of persons acting on behalf of the Society trespassed upon and took possession of the suit lands (131.23 acres) in addition to the 160 acres. The plaintiff, therefore, claimed possession of the excess land from the Society, its Manager and defendants 3 to 6, who were acting on behalf of the Society. The plaintiff also claimed mesne profits and compensation for waste.

The Society contended that the plaint lands were Government Reserve and that the plaintiff was dispossessed by Government from these lands when he was dispossessed of the 160 acres. The suit land is in two parts. Ex. L. shows these two parts as L(1)(a) and L(1)(b). The Society had applied for another

Kuthakapattom lease in respect of L(1)(b) and obtained it during the pendency of the suit on March 10, 1948. In this Kuthakapattom, which is Ex. 1, the land is shown as 256.13 acres and the lease is made without limit of time. Simultaneously a demand was made from the Society for arrears of Pattom at the same rate as for the Kuthakapattom in respect of the whole land after setting off the amount already paid by the Society. The Society in its written statement did not aver that it was not in possession of L(1)(a) and resisted the suit in regard to the entire suit lands. Subsequently it attempted by argument to limit its defence to L(1)(b) which was additionally granted to it in the Kuthakapattom Ex. 1. Although the suit pended for 17 years in the Sub-Court no application for amendment was made. The Society asked for amendments several times, the last being on October 15, 1958. However, on the last day of hearing of the appeal in the High Court (December 14, 1965) the Society applied for an amendment of the written statement limiting its defence to portion L(1)(b) disclaiming all interest in portion L(1)(a) and attempted to plead the grant of the second Kuthakapattom in its favour on March 10, 1948. The High Court rejected this application by its judgment under appeal and awarded possession against the Society of the entire suit land. The Society in its case denied the right of the plaintiff to bring a suit for ejectment or its liability for compensation as claimed by the plaintiff. In the alternative, the Society claimed the value of improvements effected by it, in case the claim of the plaintiff was decreased against it. The other defendants remined *ex-parte* in the suit and did not appeal. They have now been shown as *proforma* respondents by the Society.

The suit went to trial on 13 issues. The main issues were (a) whether the plaintiff was in possession of lands L(1) for over 70 years and had improved these lands; (b) whether the first defendant was entitled to possession of any area in excess of the first Kuthakapattom for 12 years; and (c) whether the trespass was on 13/16 October, 1939 or whether the plaintiff was evicted on July 24, 1939 by the Government from the suit land in addition to the 160 acres in respect of which action was taken in the Land Conservancy case. Other issues arose from the rival claims for mesne profits and compensation to which reference has already been made. The suit was dismissed by the trial Judge against the Society but was decreed against defendants 3 to 6 in respect of land L(1)(a) with mesne profits and compensation for waste. The trial Judge held that the possession of the plaintiff dated back only to 1920-21 and that he was evicted from portion L(1)(b) as per plan AZ and that the Society was in possession from the time it entered into possession of 160

acres. The trial Judge held that as the land was Poramboke and the plaintiff has been ousted by Government he could not claim possession. The subsequent grant of Kuthakapattom (Ex. 1) was not considered relevant and the suit was decided on the basis of the facts existing on the date of the commencement of the suit. The trial Judge, however, held that if the plaintiff was entitled to recover possession he would also be entitled to mesne profits at the rate of Rs. 3,392/- from October 16, 1939. The defendants' improvements were estimated at Rs. 53,085/-. Possession of L(1)(a) was decreed with costs, mesne profits past and future, and compesation for waste against defendants 3 to 6.

The plaintiff filed an appeal in *forma pauperis*. The High Court reversed the decree of the trial Judge and decreed it against the Society and its Manager ordering possession of the entire suit lands with mesne profits past and future, and compensation for any waste. The High Court held that the Society had admitted its possession in respect of the entire suit land and that the grant of Kuthakapattom in respect of L(1)(a) to defendants 3 to 6 by the Government was immaterial. The High Court held that the evidence clearly established that the plaintiff was in possession of the plaint lands at least from 1924 to 1925 and that it made no difference whether the plaintiff was dispossessed on October 16, 1939 as stated in the plaint or July 24, 1939 as alleged by the Society. The main controversy, which was decided by the High Court, was whether the plaintiff could maintain a suit for possession (apart from a possessory suit under the Travancore laws analogous to s. 9 of the Indian Specific Relief Act) without proof of title basing himself mainly on his prior possession and whether the Society could defend itself pleading the title of the Government. On both these points the decision of the High Court was in favour of the plaintiff.

In this appeal the first contention of the Society is that it did not dispossess the plaintiff on October 16, 1939 but on July 24, 1939 when he was evicted from the 160 acres in respect of which Poramboke case was started against him. According to the Society, if the plaintiff's possession was terminated by the rightful owner and the Society got its possession from the rightful owner the suit for ejectment could not lie. It may be stated here that the plaintiff had applied for an amendment to implead Government but the amendment was disallowed by the trial Judge. In 1928 the plaintiff had filed O.S. 156/1103 against the Government for declaration of possession and injunction in respect of the 160 acres of land and L(1)(b), but the suit was

dismissed in default and a revision application against the order of dismissal was also dismissed by the High Court of Kerala. The suit had delayed the Poramboke case as a temporary injunction has been issued against Government. On the dismissal of that suit the first Kuthakapattom lease was granted to the Society. The next contention of the Society is that a suit in ejectment cannot lie wihout title and a prior trespasser cannot maintain the suit generally against the latter trespasser and more particularly in this case in respect of lands belonging to Government specially when the latter trespasser (even if it was one) had the authority of the true owner either given originally or subsequently but relating back to the date of the trespass. The Society also submits that as trespass on Government land was prohibited by law the plaintiff could not get the assistance of the court. The Society also contends more specifically that there is no true principle of law that possession confers a good title except against the owner or that possession is a conclusive title against all but the true owner. In its submission, if a possessory suit analogous to s. 9 of the Indian Specific Relief Act was not filed by the plaintiff's only remedy was to file a suit for ejectment pleading and proving his title to the suit land. A mere possessory suit after the expiry of 6 months was not possible. There are other branches of these main arguments to which reference need not be made here. They will appear when these arguments will be considered.

The first question to settle is when dispossession took place. According to the plaintiff he was dispossessed on October 16, 1939 and according to the Society plaintiff was dispossessed on July 24, 1939 when he was evicted from 160 acres. The trial Judge accepted the case of the Society and the High Court that of the plaintiff. The High Court, however, remarked that it did not mater when the plaintiff was first dispossessed. The difference in dates is insisted upon by the Society because if it can show that the plaintiff was dispossessed by the true owner, namely, the State, it can resist the suit pleading that it was in possession under the authority of the owner and that the possession of the plaintiff was already disturbed and a suit in ejectment did not lie against it. There are, however, several circumstances which indicate that the plaintiff's case that dispossession took place in October 1939, is true.

To begin with we are concerned with three areas. The Land Conservancy case concerned L(2) or 160 acres. The other two areas are L(1)(a) 55.47 acres and L(1)(b) 75.76 acres. These total to 291.23 acres. The suit was filed to obtain possession

of 131.23 acres, that is to say, 291.23 acres minus the 160 acres. The Society attempted to disclaim all interest in L(1)(a) and even attempted to deny that defendants 3-6 were in possession of it. This was not allowed for very good reasons. In the written statement no distinction was made between L(1)(a) and L(1)(b). Although amendments were allowed, no amendment of the written statement to withdraw L(1)(a) from dispute was asked for. The attempt consisted of oral arguments which the Court did not entertain. Even in the High Court the written statement was sought to be amended as late as December 14, 1965, the last day of the arguments. The application had two prayers. About the second of the two prayers we shall say something later but the amendment we are dealing with was not only belated but also an after thought. The High Court rightly points out that a defendant, who after trial of the suit for 16 years orally asks for the withdrawal of an admission in the written statement, cannot be allowed to do so. Therefore, the dispute covered the entire 131.23 acres and the Society was claiming to be in possession. The plaint had asserted that the defendants 2-6 were in possession and that defendant 2 was acting for the Society. In reply the Society claimed to be in possession. It, however, led evidence on its own behalf that L(1)(a) was not in its possession. That could not be considered in view of the admission in the pleadings. The contrary admission of the plaintiff that defendants 3-6 were in possession was cited before us as it was before the High Court. But the High Court has already given an adequate answer when it observes that the plaintiff only said he had heard this. Therefore, we are of opinion that the issue was joined between the plaintiff and the Society with respect to the entire suit land.

The alternative contention of the Society is that the plaintiff was dispossessed by the rightful owner, that is, the State. This contention was accepted by the trial Judge but rejected by the High Court. We shall now consider it. It is an admitted fact that eviction in the Land Conservancy case took place on 8-12-1114 M.E. corresponding to July 24, 1939. Since the order was to evict the plaintiff from 160 acres, it is fair to assume that he would be evicted from that area only. The *Mahazar* Ex. AG, proved by the village Munsiff who was personally present, establishes that eviction was from 160 acres. The High Court judgment mentions the names of several other witnesses who have also deposed in the same way. The High Court also points out that the rubber quotas from the rubber trees continued to be in the name of the plaintiff except in 160 acres in which the quotas were transferred to the name of Government. All this was very clear evidence. Further even if some more area was taken over

from the plaintiff, it would be small and not as much as 131.23 acres or even 75.76 acres. It is to be noticed that the Society applied on August 11, 1939 for grant of a Kuthakapattom only in respect of 165 acres and this was on the basis of possession. If the Society was in possession of 291.23 acres, it would not have omitted on August 11, 1939 to apply for the additional area as well. Another application was made for a second Kuthakapattom in respect of the additional land on the basis of possession but only after certain events happened. On September 29, a complaint (Ex. AO) was made by Phillippose Abraham (P.W. 8), the Manager of the plaintiff, that the land was trespassed upon by the Society's men who had harvested the paddy. On October 2, 1939 the second defendant made a counter complaint Ex. AS. This made a mention of 'land from which the 1st accused (plaintiff) was evicted'. It is, however, to be seen that in the Mahazar (Exs. AT, AT-1 and AT-2) the encroached area is shown as 160 acres. On October 13, 1939 one Krishna Nair made a complaint (Ex. AH) against plaintiff's men of beating and dacoity. On October 16, the servants of the plaintiff were arrested. Bail was delayed and was only granted on October 20, 1939. On October 24, 1939 the plaintiff complained of dispossession. The case of dacoity was virtually withdrawn and the accused were discharged. The High Court accepted the plea that the false charge of dacoity and the arrest were a prelude to dispossession and a ruse to get the servants of the plaintiff out of the way. On looking into the evidence we cannot say that this inference is wrong.

The Society, however draws attention to several circumstances from which it seeks to infer the contrary. We do not think that they are cogent enough to displace the other evidence. We may, however, refer to them. The Society first refers to plaintiff's application (Ex. 16) on July 28, 1939 that he was dispossessed of suit buildings and requesting that 160 acres be correctly demarcated. In other documents also the plaintiff complained of eviction from land in excess of 160 acres and dispossession from buildings. The Society submits that the evidence showed that there were no buildings in 160 acres and that only bamboo huts were to be found. The map Ex. L shows some buildings in L(2). It is more likely that as these buildings were close to the western boundary between L(2) and L(1), the plaintiff hoped that he would be able to save them as on admeasurement they would be found outside 160 acres. It may be mentioned that in addition to 160 acres, land 20 acres in extent was further encroached upon. This land is shown in plan Ex. BB and represents little extensions all round the 160 acres. If this area was taken into account and 160 acres admeasured then, there was a possibility of the buildings being saved. This is a more rational

explanation than the contention that as many as 131.23 acres were additionally taken in possession when the plaintiff was dispossessed from 160 acres. We have therefore, not departed from the finding of the High Court which we find to be sound.

Failing on the facts, the Society takes legal objections to the suit. According to the learned counsel for the Society the suit in ejectment, based on possession in the character of a trespasser was not maintainable. His contention is that a trespasser's only remedy is to file a suit under s. 32 of the Travancore Limitation Regulation (VI of 1100) as amended by Regulations IX of 1100 and 1 of 1101, but within 6 months. This section corresponds to s. 9 of the Indian Specific Relief Act. Now if dispossession was by Government the suit could not be filed because there was a bar to such a suit. If dispossession was by the Society a suit under s. 32 was competent. The question is whether after the expiry of 6 months a regular suit based on prior possession without proof of title was maintainable. This is the main contention on merits although it has many branches. We now proceed to consider it.

This aspect of the case was argued by Mr. Nambiar with great elaboration for a number of days. The argument had many facets and it is convenient to deal with some facets separately because they have no inter connection with others and some others together. The main argument is that a suit by a trespasser does not lie for ejectment of another trespasser after the period of 6 months prescribed by s. 32 of the Travancore Limitation Act (VI of 1100). The provisions of the Travancore Specific Relief Act (XIII of 1115) are in *pari materia* and also *ipsissima verba* with the Indian Specific Relief Act and are set out below*.

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* ACT XIII OF 1115.

"S. 7. *Recovery of specific immovable property.* A person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure."

"S. 8. *Suit by person dispossessed of immovable property.* If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may be suit recover possession thereof, notwithstanding any other title, that may be set up in such suit.

Nothing in this Section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against Our Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed."

It is convenient to refer to the Indian Act. According to Mr. Nambiar a contrast exists between ss. 8 and 9 of the Specific Relief Act. These Sections are reproduced below*. Mr. Nambiar submits that s. 8 refers to suits for possession other than those under s. 9, and while question of title is immaterial in suits under s. 9, under s. 8 a suit for ejectment must be on the basis of title. In other words, in a suit under s. 8 title must be proved by a plaintiff but under s. 9 he need not. Once the period of six months has been lost a suit brought within 12 years for obtaining possession by ejectment must be based on title and not bare prior possession alone.

In support of this argument Mr. Nambiar refers to Roman Law of Interdicts and urges that the same distinction also existed there and has been borrowed by us through the English practice. We may first clear this misconception. Possession in Roman Law was secured to a possessor by two forms of Interdicts—*Utipossidetis* for immovables and *utrubi* for *moveables*. But we are not concerned with these, but with actions to recover possession which were compendiously called *recuperandae possessionis causa*.

*ACT VI OF 1110.

"S. 32. *Right to sue for recovery of unlawfully dispossessed property by person so dispossessed or his representative.* If any person is dispossessed without his consent of any house, building or land otherwise than in due course of law, he or any person claiming through him may by suit instituted within the period prescribed in Article 2 of the First Schedule appended to this Regulation, recover possession thereof, notwithstanding any other title that may be set up in such suit.

Exception : Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

Bar to suit against Government under this section. No suit under this section shall be brought against our Government."

INDIAN SPECIFIC RELIEF ACT.

"S. 8. *Recovery of Specific immoveable property.* A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure."

"S. 9. *Suit by person dispossessed of immoveable property.* If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Central Government, or any State Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed."

There were two interdicts known as *deprecario* and *de vi*. Of the latter two of the branches were the Interdict *de vi cotidiana* by which possession was ordered "to be restored on an application made within the year where one had been ejected from land by force, provided there had not been *vi clam aut precario* from the ejector." The other *d evi armata* for ejection by armed force, was without restriction of time. Mr. Nambiar says that the same distinction exists between suits under ss. 9 and 8 of the Specific Relief Act. This is an ingenious way of explaining his point of view but it does not appear that these principles of Roman Law at all influenced law making. These principles were in vogue in early Roman Law. In the time of Justinian the two Interdicts *de vi* were fused and there was only one action representing both. Even the *clausa* about *vi clam aut precario* disappeared and the restriction to a year applied to both. The appeal to Roman Law does not, therefore, assist us.

We may now consider whether ss. 8 and 9 are to be distinguished on the lines suggested. In Mulla's Indian Contract and Specific Relief Acts there is a commentary which explains the words 'in the manner prescribed by the Code of Civil Procedure' by observing—

> "that is to say by a suit for ejectment on the basis of title : *Lachman* v. *Shambu Narain* (1911) 33 All. 174."

The question in that case in the words of the Full Bench was—

> "The sole question raised in this appeal is whether a plaintiff who sues for possession and for ejectment of the defendant on the basis of title and fails to prove his title is still entitled to a decree for possession under section 9 of the Specific Relief Act, 1877, if he can prove possession within six months anterior to the date of his dispossession."

In the course of decision the Full Bench dissented from the earlier view in *Ram Harakh Rai* v. *Sheodihal Joti*(1) and observed :

> "With great respect we are unable to agree with this view. Section 8 of the Act provides that a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure, that is to say, by a suit for ejectment on the basis of title. Section 9 gives a summary remedy to a person who has without his consent been dispossessed of immovable property, otherwise than in due course of law, for recovery of possession without establishing title,

(1) [1893] 15 All. 384.

provided that his suit is brought within six months of the date of dispossession. The second paragraph of the section provides that the person against whom a decree may be passed under the first paragraph may, notwithstanding such decree, sue to establish his title and to recover possession. The two sections give alternative remedies and are in our opinion mutually exclusive. If a suit is brought under section 9 for recovery of possession, no question of title can be raised or determined. The object of the section is clearly to discourage forcible dispossession and to enable the person dispossessed to recover possession by merely proving title, but that is not his only remedy. He may, if he so chooses, bring a suit for possession on the basis of his title. But we do not think that he can combine both remedies in the same suit and that he can get a decree for possession even if he fails to prove title. Such a combination would, to say the least of it, result in anomaly and inconvenience. In a suit under section 9 no question of title is to be determined, but that question may be tried in another suit instituted after the decree in that suit. If a claim for establishment of title can be combined with a claim under section 9, the court will have to grant a decree for possession or dispossession being proved, in spite of its finding that the plaintiff had no title and that title was in the defendant."

We agree as to a part of the reasoning but with respect we cannot subscribe to the view that after the period of 6 months is over a suit based on prior possession alone, is not possible. Section 8 of the Specific Relief Act does not limit the kinds of suit but only lays down that the procedure laid down by the Code of Civil Procedure must be followed. This is very different from saying that a suit based on possession alone is incompetent after the expiry of 6 months. Under s. 9 of the Code of Civil Procedure itself all suits of a civil nature are triable excepting suits of which their cognizance is either expressly or impliedly barred. No prohibition expressly barring a suit based on possession alone has been brought to our notice, hence the added attempt to show an implied prohibition by reason of s. 8 (s. 7 of the Travancore Act) of the Specific Relief Act. There is, however, good authority for the contrary proposition. In *Mustapha Sahib* v. *Santha Pillai*(1), Subramania, Ayyar J. observes :

> ". . . .that a party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before

(1) I.L.R. 23 Mad. 179 at 182.

the ouster even though that possession was without any title."

. . . . . .

"The rule in question is so firmly established as to render a lengthened discussion about it quite superfluous. *Asher* v. *Whitlock* (L.R. 1 Q.B. 1) and the rulings of the Judicial Committee in *Musammat Sundar* v. *mussammat Parbati* (16 I.A. 186) and *Ismail Ariff* v. *Mahomed Ghouse* (20 I.A. 99) not to mention numerous other decisions here and in England to the same effect, are clear authorities in support of the view stated above..... Section 9 of the Specific Relief Act cannot possibly be held to take away any remedy available with reference to the well-recognised doctrine expressed in Pollock and Wright on possession thus :— Possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the owner's title (p. 19)".

In the same case O'Farell J. points out that

"all the dictum of the Privy Council in *Wise* v. *Ameerunissa Khatoon* (7 I.A. 73) appears to amount to is this, that where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having good title, he can only do so under the provisions of section 9 of the Specific Relief Act and not otherwise."

It is not necessary to refer to the other authorities some of which are already referred to in the judgment under appeal and in the judgment of the same court reported in *Kuttan Narayaman* v. *Thomman Mathai*(1). The last cited case gives all the extracts from the leading judgments to which we would have liked to refer. We entirely agree with the statement of the law in the Madras case from which we have extracted the observations of the learned Judges. The other cases on the subject are collected by Sarkar on Evidence under s. 110.

The Limitation Act, before its recent amendment provided a period of twelve years as limitation to recover possession of immovable property when the plaintiff, while in possession of the property was dispossessed or had discontinued possession and the period was calculated from the date of dispossession or discontinuance. Mr. Nambiar argues that there cannot be two periods of limitation, namely, 6 months and 12 years for suits based on possession alone and that the longer period of limitation

(1) 1966 Kerala Law Times 1.

requires proof of title by the plaintiff. We do not agree. No doubt there are a few old cases in which this view was expressed but they have since been either overruled or dissented from. The uniform view of the courts is that if s. 9 of the Specific Relief Act is utilised the plaintiff need not prove title and the title of the defendant does not avail him. When, however, the period of 6 months has passed questions of title can be raised by the defendant and if he does so the plaintiff must establish a better title or fail. In other words, the right is only restricted to possession only in a suit under s. 9 of the Specific Relief Act but that does not bar a suit on prior possession within 12 years and title need not be proved unless the defendant can prove one. The present amended articles 64 and 65 bring out this difference. Article 64 enables a suit within 12 years from dispossession, for possession of immovable property based on possession and not on title, when the plaintiff while in possession of the property has been dispossessed. Article 65 is for possession of immovable property or any interest therein based on title. The amendment is not remedial but declaratory of the law. In our judgment the suit was competent.

Mr. Nambiar also relies in this connection upon s. 110 of the Indian Evidence Act and claims that in the case of the Society there is a presumption of title. In other words, he relies upon the principle that possession follows title, and that after the expiry of 6 months the plaintiff must prove title. That possession may *prima facie* raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides. In this case s. 110 of the Evidence Act is immaterial because neither party had title. It is for this reason that Mr. Nambiar places a greater emphasis on the plea that a suit on bare possession cannot be maintained after the expiry of 6 months and that the Society has a right to plead *jus tertii*. The first must be held to be unsubstantial and the second is equally unfounded.

The proposition of law on the subject has been summed up by Salmond on Torts (13th Edn.) at page 172 in the following words :

> "The mere *de facto* and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves, and is therefore sufficient to support an action of trespass against such persons. Just as a legal title to land without the possession of it is insufficient for this purpose, so conversely the possession of it without legal title is enough. In other words, no defendant in an action of trespass can plead

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> the *jus tertii*—the right of possession outstanding in some third person—as against the fact of possession in the plaintiff."

The maxim of law is *Adversus extraneous vitiosa possessio prodesse solet,** and if the plaintiff is in possession the *jus tertii* does not afford a defence. Salmond, however, goes on to say :

> "But usually the plaintiff in an action of ejectment is not in possession : he relies upon his right to possession, unaccompanied by actual possession. In such a case he must recover by the strength of his own title, without any regard to the weakness of the defendant's. The result, therefore, is that in action of ejectment the *jus tertii* is in practice a good defence. This is sometimes spoken of as the doctrine of *Doe* v. *Barnard* [1849] 13 Q.B. 945."

Salmond, however, makes two exceptions to this statement and the second he states thus :

> "Probably, if the defendant's possession is wrongful as against the plaintiff, the plaintiff may succeed though he cannot show a good title : *Doe d. Hughes* v. *Dyball* (1829) 3 C & P 610; *Davision* v. *Gent* (1857) 1 H & N 744. But possession is *prima facie* evidence is not displaced by proof of title. If such *prima facie* evidence is not displaced by proof of title in a third person the plaintiff with prior possession will recover. So in *Asher* v. *Whitlock* [(1865) L.R. 1 Q.B. 1] where a man inclosed waste land and died without having had 20 years' possession, the heir of his devisee was held entitled to recover it against a person who entered upon it without any title. This decision, although long, doubtful, may now be regarded as authoritative in consequence of its express recognition of the Judicial Committee in *Perry* v. *Clissold* [1907] A.C. 73."

Mr. Nambiar strongly relies upon the above exposition of the law and upon institutional comments by Wiren "The Plea of *jus tertii* in ejectment" (1925) 41 L.Q.R. 139, Hargreaves "Terminology and Title in Ejectment (1940) 56 L.Q.R. 376 and Holdsworth's article in 56 L.Q.R. 479.

In our judgment this involves an incorrect approach to our problem. To express our meaning we may begin by reading *Perry* v. *Clissold* to discover if the principle that possession is

* Prior possession is a good title of ownership against all who cannot show a better.

good against all but the true owner has in any way been departed from. *Perry* v. *Clissold* reaffirmed the principle by stating quite clearly :

> "It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title."

Therefore, the plaintiff who was peaceably in possession was entitled to remain in possession and only the State could evict him. The action of the Society was a violent invasion of his possession and in the law as it stands in India the plaintiff could maintain a possessory suit under the provisions of the Specific Relief Act in which title would be immaterial or a suit for possession within 12 years in which the question of title could be raised. As this was a suit of latter kind title could be examined. But whose title ? Admittedly neither side could establish title. The plaintiff at least pleaded the statute of Limitation and asserted that he had perfected his title by adverse possession. But as he did not join the State in his suit to get a declaration, he may be said to have not rested his case on an acquired title. His suit was thus limited to recovering possession from one who had trespassed against him. The enquiry, thus narrows to this : did the Society have any title in itself, was it acting under authority express or implied of the true owner or was it just pleading a title in a third party ? To the first two questions we find no difficulty in furnishing an answer. It is clearly in the negative. So the only question is whether the defendant could plead that the title was in the State ? Since in every such case between trespassers the title must be outstanding in a third party a defendant will be placed in a position of dominance. He has only to evict the prior trespasser and sit pretty pleading that the title is in someone else. As Erle, J. put it in *Burling* v. *Read* (11 Q.B. 904) 'parties might imagine that they acquired some right by merely intruding upon land in the night, running up a hut and occupying it before morning'. This will be subversive of the fundamental doctrine which was accepted always and was reaffirmed in *Perry v. Clissold*. The law does not therefore countenance the doctrine of 'findings keepings'.

Indeed *Asher* v. *Whitlock* [1885] 1 Q.B. 1 goes much further. It laid down as the head-note correctly summarizes :

A person in possession of land without other title has a devisable interest, and the heir of his devisee can maintain ejectment against a person who had entered upon the land cannot show title or possession in any one prior to the testator. No doubt as stated by Lord Macnagthen in *Perry v. Clissold, Doe* v. *Barnard* (supra) lays down the proposition that "if a person having only a possessory title to land be supplanted in the possession by another who has himself no better title, and afterwards brings an action to recover the land, he must fail in case he shows in the course of the proceedings that the title on which he seeks to recover was merely possessory". Lord Macnaghten observes further that it is difficult, if not impossible to reconcile *Asher* v. *Whitlock* with *Doe* v. *Barnard* and then concludes :

> "The judgment of Cockburn, C.J., is clear on the point. The rest of the Court concurred and it may be observed that one of the members of the court in *Asher* v. *Whitlock* (Lush, J.) had been counsel for the successful party in *Doe* v. *Barnard*. The conclusion at which the court arrived in *Doe* v. *Barnard* is hardly consistent with the views of such eminent authorities on real property law as Mr. Preston and Mr. Joshua Williams. It is opposed to the opinions of modern text-writers of such weight and authority as Professor Maitland and Holmes, J. of the Supreme Court of the United States (see articles by Professor Maitland in the Law Quarterly Review Vols. 1, 2 and 4; Holmes, Common Law p. 244; Professor J. B. Ames in 3 Harv. Law Rev. 324 n.")

The difference in the two cases and which made *Asher* v. *White* prevail was indicated in that case by Mellor, J. thus :

> "In *Doe* v. *Barnard* the plaintiff did not rely on her own possession merely, but showed a prior possession in her husband, with whom she was unconnected in point of title. Here the first possessor is connected in title with the plaintiff; for there can be no doubt that the testator's interest was devisable."

The effect of the two cases is that between two claimants, neither of whom has title in himself the plaintiff if dispossessed is entitled to recover possession subject of course to the law of limitation. If he proves that he was dispossessed within 12 years he can maintain his action.

It is because of this that Mr. Nambiar claimed entitled to plead *jus tertii*. His contention is that in action of ejectment (as opposed to an action of trespass) *jus tertii* is capable of

being pleaded. The old action of ejectment was used to try freehold titles but it was abolished in 1873. It was also used "for recovery of land by one who claimed not the right to seisin but the right to possession by virtue of some chattel interest such as a term of year." In such cases "the defence of *jus tertii* admits that the plaintiff had such a right of entry as would generally entitle him to succeed, but seeks to rebut that conclusion by setting up a better right in some third person" or that the plaintiff had no right of entry at all.

To summarize, the difference between *Asher* v. *Whitlock* and *Doe* v. *Barnard* is this : In *Doe* v. *Barnard* the principle settled was that it is quite open to the defendant to rebut the presumption that the prior possessor has title, *i.e.*, seisin. This he can do by showing that the title is in himself; if he cannot do this he can show that the title is in some third person. *Asher* v. *Whitlock* lays down that a person in possession of land has a good title against the world except the true owner and it is wrong in principle for any one without title or authority of the true owner to dispossess him and relying on his position as defendant in ejectment to remain in possession. As Loft in his Maxim No. 265 puts it *Possessio contra omnes velet praeter eur cui ius sit possessionis* (He that hath possession hath right against all but him that hath the *very* right): See *Smith* v. *Oxenden* 1 Ch. Ca 25. A defendant in such a case must show in himself or his predecessor a valid legal title, or probably a possession prior to the plaintiff's and thus be able to raise a presumption prior in time. It is to be noticed that Ames (Harvard Law Review Vol. III p. 313 at 37); Carson (Real Property Statutes 2nd Ed. p. 180); Halsbury (Laws of England, Vol. 24, 3rd Ed. p. 255 f.n.(o); Leake (Property in Land, 2nd Ed. p. 4, 40); Lightwood (Time Limit on Actions pp. 120-133); Maitland (supra), Newell (Action in Ejectment, American Ed. pp. 433-434); Pollock (Law of Torts, 15th Ed. p. 279); Salmond Law of Torts (supra); and William and Yates (Law of Ejectment, 2nd Ed., pp. 218, 250) hold that *Doe* v. *Barnard* does not represent true law. Winer (to whom I am indebted for much of the information) gives a list of other writers who adhere still to the view that *jus tertii* can be pleaded.

Mr. Nambiar pressed upon us the view that we should not accept *Perry* v. *Clissold*. It must be remembered that that case was argued twice before the Privy Council and on the second occasion Earl of Halsbury, L. C. Lords Macnaghten, Davey, Robertson, Atkinson, Sir Ford North and Sir Arthur Wilson heard the case. Lord Macnaghten's judgment is brief but quite clear. Mr. Nambiar relies upon two other cases of the Privy Council and a reference to them is necessary. In *Dharani Kanta Lahiri* v. *Garbar Ali Khan*, 25 M.L.J. 95 P.C. a suit

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in ejectment was filed. The plaintiffs failed to prove that the lands of which they complained dispossession were ever in their possession within 12 years before suit and that the lands were not the lands covered by a *sanad* which was produced by the defendants. The case is distinguishable. It is to be noticed that Lord Macnaghten was the President of the Board and the judgment of the Board, December 5, 1912, did not base the case on *Doe* v. *Barnard* or even refer to it. The second is *Mahabir Prasad* v. *Jamuna Singh*, 92 I.C. 31 P.C. In this case the Board observed as follows :—

> "Counsel for the appellant (defendant) admits that in the face of the ruling by the Board he could not impugn the reversionary right of the plaintiff's vendors, but he contends that the defendant is in possession and in order to eject him the plaintiff must show that there is no other reversionary heir in the same degree or nearer than his assignors whose title he (the defendant) can urge against the plaintiff's claim for ejectment. In other words, the action being one of ejectment the defendant is entitled to plead in defence the right of someone else equally entitled with the plaintiff's vendors."

After observing this the Board held that the defendant had failed to prove his point. The observation does not lead to the conclusion that a defendant can prove title in another unconnected with his own estate. The case is not an authority for the wider proposition.

The cases of the Judicial Committee are not binding on us but we approve of the dictum in *Perry* v. *Clissold*. No subsequent case has been brought to our notice departing from that view. No doubt a great controversy exists over the two cases of *Deo* v. *Barnard* and *Asher* v. *Whitlock* but it must be taken to be finally resolved by *Perry* v. *Clissold*. A similar view has been consistently taken in India and the amendment of the Indian Limitation Act has given approval to the proposition accepted in *Perry* v. *Clissold* and may be taken to be declaratory of the law in India. We hold that the suit was maintainable.

It is next submitted that the High Court should not have given its assistance to the plaintiff whose possession was unlawful to begin with especially when, by granting the decree, an illegality would be condoned and perpetuated. In support of this case the Society relies on the provisions of Regulation IV of 1091 and other connected Regulations and rules. It points out that under Regulation IV of 1091, it was unlawful for anyone to occupy Government land and a punishment of fine in addition

to eviction was prescribed, and all crops and other products were liable to confiscation. If eviction was resisted the Dewan could order the arrest and detention in jail of the offender. Section 18 barred Civil Courts from taking any action in respect of orders passed under the said Regulation except only when it was established that the land was not government land. The civil court, it is submitted, could not grant a decree for possession nor set up the possession of a person who was an offender under the Regulation.

In our opinion these submissions are not well-founded. The Regulations were intended to regulate the relation of Government and persons but had no bearing upon the relations between persons claiming to be in possession. Further the penalty was a fine for wrongful occupation and in no sense a punishment for crime. The illegality of the possession was thus not a criminal act and the regaining of lost possession cannot be described as an action to take advantage of one's own illegal action. In fact the plaintiff was not required to rely upon any illegality which is the consideration which makes courts deny their assistance to a party. The Society relied upon the oft-quoted observations of Lord Mansfield, C.J. in *Holman* v. *Johnson,* (1775) 1 Cowper 341 :

> "the objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this : *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpicausa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

These are general observations applicable to a case of illegality on which a party must rely to succeed. In a case in which a plaintiff must rely upon his own illegality the court may refuse him assistance. But there is the other proposition that if a plaintiff does not have to rely upon any such illegality, then although the possession had begun in trespass a suit can be maintained for restitution of possession. Otherwise the opposite

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party can make unjust enrichment although its own possession is worngful against the claimant. It is to be noticed that the law regards possession with such favour that even against the rightful owner a suit by a trespasser is well-founded if he brings the suit within 6 months of dispossession. We have also shown that there is ample authority for the proposition that even after the expiry of these 6 months a suit can be maintained within 12 years to recover possession of which a person is deprived by one who is not an owner or has no authority from him.

The Society next argues that since it has got a second Kuthakapattom we must relate it back to the original dispossession and treat it as a statutory order under the laws of Travancore. It refers us to the Travancore Survey and Boundaries Regulation of May 1942 (Rule 9), the Land Conservancy Regulation (as amended from time to time), the Puduval Rules and the Land Assignment Regulations and some other rules to show that the forest lands were property of Government and the plaintiff could not be said to be holding land under a grant from Government but the Society is. We think that this argument is of the same character as the argument about *jus tertii*. The case is between two persons neither of whom had any right to the suit lands and were trespassers one after the other. No question of implementing a statutory order arises. The grant of the second Kuthakapattom is not related back to the grant of the original grant and can only be considered if and when it is pleaded. It is therefore not necessary to consider this point at the moment when we are not in possession of the case of the plaintiff which he may set up in answer to this case.

This brings us to the question whether the High Court should have allowed the amendment sought in 1965. The suit was filed in 1942 and the second Kuthakapattom was granted in 1948. The last amendment was asked for in 1958. Before this the plaintiff had pointedly drawn attention to the fact that arguments based on the new Kuthakapattom were likely to be pressed. The trial Judge had ruled that arguments could not be shut out in advance. These circumstances have to be borne in mind in approaching the problem.

It is, however, plain that after the grant of Kuthakapattom in 1948 the possession of the Society became not only *de facto* but also *de jure* unless there was a flaw in the grant. It is equally plain that the Society could only resist the present suit by proving its title or the authority of the true owner, namely, the State. The former was not open to the Society before 1948 but the latter was after the grant. The Society contends that even if the facts were not pleaded the documents were before the Court and the parties knew of them and indeed the plaintiff had himself

caused some of them to be produced. It was the duty of the court to take note of them and *suo motu* to frame an issue. This point has hardly any force. The Society could take advantage of such evidence as was provided by the plaintiff but it had to put it in support of a plea. Issue No. 2 on which great reliance is placed was not concerned with an abstract proposition but what flowed from the pleas. Nor could the court frame an issue from documents which not the Society but the plaintiff had caused to be brought on file. The cases reported in *Ganoo & Anr.* v. *Shri Dev Sideshwar & Ors.*(1), *Shamu Patter* v. *Abdul Kadir Ravuthan and Ors.*(2) and *Kunju Kesavan* v. *M. M. Philip, I.C.S.,* and *Ors.*(3) do not help the Society. If the plea had been raised by the Society it would undoubtedly have been countered and one does not know what use the plaintiff would have made of the documents he had got marked. Therefore it cannot be said that the trial Judge was in error in not considering the documents.

This brings us to the general proposition whether the High Court should have allowed the amendment late as it was. The plaintiff is right that the application was made literally on the eve of the judgment. This argument is really based on delay and laches. The application has not been made for the first time in this Court when other considerations might have applied. It was made in the High Court after the argument based on the documents on record was urged. This argument was also urged in the court of trial. The contention of the Society was thus present on both the occasions and it would have been better if the Society was directed to amend the pleadings before the argument was heard. The omission, however, remained.

Now it is a fixed principle of law that a suit must be tried on the original cause of action and this principle governs not only the trial of suits but also appeals. Indeed the appeal being a continuation of the suit new pleas are not considered. If circumstances change they can form the subject of some other proceedings but need not ordinarily be considered in the appeal. To this proposition there are a few exceptions. Sometimes it happens that the original relief claimed becomes inappropriate, or the law changes affecting the rights of the parties. In such cases courts may allow an amendment pleading the changed circumstances. Sometimes also the changed circumstances shorten litigation and then to avoid circuity of action the courts allow an amendment. The practice of the courts is very adequately summarized in *Ram Ratan Sahu* v. *Mohant Sahu*(4). Mookerjee and Holmwood, JJ. have given the kind of changed circumstances which the courts usually take notice, with illustrations from decided cases. The

(1) 26 Bom. 360.
(2) 35 Mad. 607 P.C.
(3) [1964] 3 S.C.R. 634.
(4) [1907] 6 C.L.J. 74.

judgment in that case has been consistently followed in India. In *Raicharan Mandal* v. *Biswanath Mandal*(1) other cases are to be found in which subsequent events were noticed. The same view was taken by the Federal Court in *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chandhuri*(2) following the dictum of Hughes, C.J., in *Patterson* v. *State of Albama*(3). In *Surinder Kumar & Ors.* v. *Gian Chand & Ors.* (4) this Court also took subsequent events into account and approved of the case of the Federal Court. In view of these decisions it is hardly necessary to cite further authorities.

Mr. Gupte on behalf of the plaintiff has strenuously opposed the request for amendment. His objection is mainly based on the ground of delay and laches. He relies on *Gajadhar Mahlon* v. *Ambika Prasad Tiwari*(5), *R. Shanmuga Rajeshwara Sethupathie* v. *Chidambaram Chettiar*(6) and *Kanda v. Waghu*(7) in which the Judicial Committee declined amendment before it. These cases were different. In the first case the Judicial Committee held that it was within its discretion to allow amendment but did not feel compelled to exercise the discretion. In the second case the amendment was no doubt refused because it was asked for at the last moment but the real reason was that under it a relief of a wide and exceptional nature was granted. The point was so intricate that it required careful and timely pleading and a careful trial. In the last case the Judicial Committee relying on the leading case of *Ma Shwe Mya* v. *Maung Mo Huaung*(8) held that it was not open to allow an amendment of the plaint to cover a new issue which involved setting up a new case.

As against these cases, this Court in *L. J. Leach & Co.* v. *Jardine Skinner & Co.*(9) *Pungonda Hongonda Patil* v. *Kalgonda Shidgonda Patil*(10) and *A. K. Gupta and Sons* v. *Damodar Valley Corpn.*(11) allowed amendments when a fresh claim would have been time-barred. The cases of this Court cannot be said to be directly in point. They do furnish a guide that amendment is a discretionary matter and although amendment at a late stage is not to be granted as a matter of course, the court must hear in favour of doing full and complete justice in the case where the party against whom amendment is to be allowed can be compensated by costs or otherwise. Also the amendment must be one which does not open the case or take the opposite party by surprise.

(1) A.I.R. 1915 Cal. 103.
(2) [1940] F.C.R. 84 at 87.
(3) [1934] 294 U.S. 600 at 607.
(4) [1958] S.C.R. 548
(5) A.I.R. 1925 P.C. 169, 170.
(6) [1938] P.C. 123.
(7) L.R. 77 I.A. 15.
(8) 1921 L.R. 48 I.A. 214, 217.
(9) [1957] S.C.R. 438.
(10) [1957] S.C.R. 595.
(11) [1966] 1 S.C.R. 796.

In the present case the amendment sought was not outside the suit. In fact issue No. 2 could have easily covered it if a proper plea had been raised. The Society was perhaps under an impression that the fresh Kuthakapattom would be considered and the trial Judge had also said that the argument could not be shut out. Although it is not possible to say that parties went to trial in regards to the fresh Kuthakapattom, it cannot be gainsaid that the plaintiff had himself caused all the documents necessary for the plea to be brought on the record of the case. No doubt plaintiff tried to implead Government with a view to obtaining an injunction but as no notice under s. 80 of the Code of Civil Procedure was given this was an exercise in futility. But the Society was under no disability except its own inaction. If it had made a timely request it would have been granted.

Thus it is a question of the delay and laches on the part of Society. In so far as the court was concerned the amendment would not have unduly prolonged litigation; on the other hand, it would have cut it short. Without the amendment another suit based on the second Kuthakapattom is inevitable. As we have shown above there is good authority in support of the proposition that subsequent events may be taken note of if they tend to reduce litigation. This is not one of those cases in which there is a likelihood of prolonged litigation after remand or in which a new case will begin. The amendment will *prima facie* allow the Society to show to the court that in addition to possession it has also title. This will enable the court to do complete justice, if the plea is found good, without the parties having to go to another trial.

We are, therefore, of the opinion that we should allow the amendment. Of course, the plaintiff will be at liberty to controvert the new plea but he will not be allowed to raise new pleas of his own having no relation to the grant of the second Kuthakapattom. As this amendment is being allowed we do not consider it advisable to state at this stage what the implications of the new grant will be under the law applicable in 1948. We are, however, clear for reasons, already given, that the second Kuthakapattom cannot be regarded as retroactive from the date of the grant of the first Kuthakapattom. We wish to add that the document Ex. 1 does not mention that it was to be retrospective. Now a formal document which has no ambiguity cannot be varied by reference to other documents not intended to vary it. The only other documents are Ex. 6, the order conferring the second Kuthakapattom and Ex. 7 a demand by the Tahsildar of the *Pattom* calculated at the same rate from the date of the first Kuthakapattom. This follows from the Rules. Any person in unlawful possession may be compelled under the Rules to pay pattom and

this is what appears to have been ordered. There is also nothing to show that this was not the Tahsildar's own interpretation of the facts and the documents. We are therefore quite clear that the second Kuthakapattom must be read prospectively from the date of its grant, if it be held that it is valid.

There are only two other matters to consider. They are the question of mesne profits and improvements. The rate of mesne profits has already been decided and no argument was addressed to us about it. We say no more about it except that the rate will be applicable to the new state of facts in the case after the amendment. It is also not necessary to go into the question of improvements now because in answer to the pleas to be raised hereafter the question of improvements will have to be gone into *de novo* in the light of the findings reached. The argument of the parties that the Rules do not contemplate payment for improvements is neither here nor there. That applies between Government and a private party and not between two private parties. These matters will be left for determination in the proceedings hereafter to be taken.

In the result we dismiss the appeal as to portion L(1)(a) both in regard to possession and mesne profits and improvements. As regards L(1)(b) the amendment based on the second Kuthakapattom will be allowed and parties will go to trial on that amendment. The plaintiff will be entitled to raise his defence in reference to the second Kuthakapattom. The question of mesne profits and improvements in relation to L(1)(b) will be reconsidered in the light of the finding regarding the second Kuthakapattom but the rate of mesne profits as already determined shall not be altered. The plaintiff will, of course, be entitled to mesne profits till the date of the grant of the second Kuthakapattom.

There is no doubt that the Society was wrongly advised and allowed the question of amendment to be delayed. At the same time by not allowing the amendment the plaintiff forces the issue regarding possession of L(1)(b). In our judgment the Society must pay the costs thrown away, that is to say, that it must bear the costs incurred in the High Court and the court of first instance by the plaintiff in addition to costs on its own account. In so far as the costs of this Court are concerned parties will bear the costs as the case is being sent to the trial court for further trial.

G.C. *Appeal allowed in part and case remanded.*

no instance of alienation till before the impugned deed of gift and the will, it should be presumed that there was a family custom of inalienability of the estate. More or less, a similar contention was made before the Privy Council in *Protap Chandra Deo case*[11] that the absence of any instance of a will purporting to dispose of the estate, was itself sufficient evidence of the custom of inalienability of the estate. The said contention was overruled by the Privy Council. There must be some positive evidence of such a custom. Mere absence of any instance of alienation will not be any evidence of custom. Moreover, as noticed already, the correspondence which are being relied upon as the evidence of the alleged family custom of inalienability are far from being such evidence, for the only question that formed the subject matter of all this correspondence related to the propriety of the quantum of *jiwai*. Accordingly, we hold that the appellants have failed to prove that there was any family custom of inalienability of the estate. No other point has been urged in this appeal by either party.

24. For the reasons aforesaid, the judgment and decree of the High Court are affirmed and this appeal is dismissed. There will, however, be no order as to costs in this Court.

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(BEFORE B. C. RAY AND K. JAGANNATHA SHETTY, JJ.)

M. S. JAGADAMBAL .. Appellant ;

Versus

SOUTHERN INDIAN EDUCATION TRUST AND OTHERS .. Respondents.

Civil Appeal No. 235 of 1974†.
decided on November 2, 1987

Limitation Act, 1963 — Section 27 and Article 65 — Adverse possession — Seasonally submerged land — Suit for recovery of on the basis of title — Limitation — Computation of — Title holder's possession of, when affected by adverse possession — On facts held, the suit within limitation — Jurisprudence — Possession — Specific Relief Act, 1963, Section 6

Held :

The possession of such land continues with the title holder unless and until someone else acquires title by adverse possession. There would be no continuance of adverse possession when the land remains submerged

†From the Judgment and Order dated August 2, 1971 of the Madras High Court in O.S.A. No. 37 of 1963

and when it is put out of use and enjoyment. In such a case the party having title could claim constructive possession provided the title had not been extinguished by adverse possession before the last submergence. There is no difference in principle between seasonal submersion and one which continues for a length of time. Similarly, the entire land might not be seasonally submerged, but it makes little difference in the position of law. As a general rule possession of part is in law possession of the whole, if the whole is otherwise vacant. (Paras 18 and 19)

The finding of the Single Judge of the High Court that the plaintiff was in possession of the land in question within 12 years prior to the filing of the suit, is restored. (Paras 7 and 20)

Basanta Kumar Roy v. Secretary of State for India, 1917 ILR 44 Cal 858, applied

Leigh v. Jack, 1879 LR 5 Exch D 264 and Secretary of State for India v. Krishnamoni Gupta, 1902 ILR 29 Cal 518 : LR 29 IA 104, referred to

Southern India Education Trust v. M. S. Jagadambai, AIR 1972 Mad 162 : (1972) 1 Mad LJ 379, reversed

Constitution of India — Article 136 — Remand — Consideration of defendant's plea of adverse possession — Remand for, when not called for — Neither issue framed by trial court, nor evidence produced by defendants in respect of the plea of adverse possession, nor contentions raised by the defendants that they were misled in their approach to the case or that they were denied opportunity to put forward their evidence — In the circumstances held, it would not be proper for the Supreme Court to remand the case to enable the defendants to make good their lapse — Limitation Act, 1963, Section 27 and Article 65 (Para 12)

Practice and procedure — Oral testimony — Appreciation of, by appellate court — A finding of fact based on proper evidence should not be reversed — Civil Procedure Code, 1908, Section 96

So far as the appreciation of oral testimony by the appellate court is concerned there are two viewpoints. One view is that the court of appeal has undoubted duty to review the recorded evidence and to draw its own inference and conclusion. The other view is that the court of appeal must attach due weight to the opinion of the trial judge who had the advantage of seeing the witnesses and noticing their look and manner. The rule of practice which has almost the force of law is that the appellate court does not reverse a finding of fact rested on proper appreciation of the oral evidence. (Para 13)

In the instant case, the trial judge on a consideration of every material on record reached the conclusion that the plaintiff was in possession of the property and it was only in 1954 she was dispossessed. This conclusion was also based on the credibility of the witnesses examined by the parties. The Division Bench erred in reversing that finding without

due regard to the probability of the case and the considerations which weighed with the trial judge. (Para 14)

Sarju Pershad v. Raja Jwaleshwari Pratap Narain Singh, 1950 SCR 781 : AIR 1951 SC 120, applied

Appeal allowed R-M/8338/S

Advocates who appeared in this case :

S. Padmanabhan, Senior Advocate (A. T. M. Sampath, Advocate, with him), for the Appellant ;

M. Abdul Khader, Senior Advocate (Mrs R. Ramachandran, Advocate, with him), for Respondent 1 ;

S. Balakrishnan, Advocate, for Respondents 3, 4 and 5.

The Judgment of the Court was delivered by

JAGANNATHA SHETTY, J.—This appeal by special leave has been preferred against the judgment dated August 2, 1971 passed by the High Court of Madras in O.S.A. 37 of 1963.

2. The facts briefly stated are : Under Ex. P-2 dated May 24, 1929 Nagappa Naicker purchased from Manicka Naickar and his sons nanja lands in old Survey Nos. 187 and 188 (R.S. No. 3859) an extent of about 3/8 cawnie, roughly about 9 grounds for Rs 275. It was recited in the document that the property was not fetching any income, that irrigation from the tank had failed and that as the property was a pit which required Rs 2000 to fill, it was sold for meeting certain family expenses. The boundary of the property was given as north of Government Maclean's Garden, west of the fields of Thanappa Naicker and Srinivasa Naicker, south of the field of Srinivasa Naicker, and last of the road, Ramanatha Mudaliar's vacant land and Masilamani Gramani's house. It may be noted that the re-survey number was given as 3859.

3. On May 14, 1941 Nagappa died. Jagdambal appellant is the widow of Nagappa. She instituted the suit C.S. No. 52/1960 which was tried on the original side of the Madras High Court. The suit was for recovery of the land purchased under Ex. P-2 by her husband and for mesne profits with other connected reliefs. She alleged that the property was in possession and enjoyment of Nagappa during his lifetime and subsequently in her possession and enjoyment. It was her case that neighbouring land owner South India Education Trust ('SIET') trespassed and encroached upon the suit property taking advantage of her helpless condition as a widow. The SIET is defendant 5 in the suit.

4. We may now trace the title of the adjoining plot of land owned by the SIET One Kuppuswami Naicker was the owner in

possession of land measuring 35 grounds 1989 sq. ft. This entire land was sold to Rani of Vuyyur for Rs 10,000 under Ex. P-6 dated July 30, 1940. In the schedule, the property sold was described as R.S. No. 3859/1, 3859/2 and part of 3859/3. The property was also described as bounded on the west partly by Nagappa Naicker's land and partly by Mount Road and Duraiswami Gramani's house. According to the sale deed the property sold was only 35 grounds 1989 sq. ft. and it was marked yellow in the plan attached thereto. Under Ex. P-7 dated December 24, 1953 Rani of Vuyyur sold the property she purchased under Ex. P-6 to SIET. The property was described as bearing R.S. No. 3859/1, 3859/2 and 3859/3 part and 3872 in Teynampet measuring about 38 grounds. In the schedule to Ex. P-7 the property was described as lying east of Nagappa Naicker's land and Mount Road. It will be seen that though the Rani Vuyyur purchased 35 grounds 1989 sq ft. the extent mentioned in Ex. P-7 was about 38 grounds. On February 11, 1954 the SIET exchanged its land under Ex. P-8 with the property belonging to the defendants 1 to 4 in the suit. Ex. P-8 recited that the SIET was conveying an extent of 43 grounds 1324 sq ft. comprised in R.S. Nos. 3859/1, 3859/2 and 3859/3 and 3872 Mount Road Madras. Here again the land has been described as bounded on the west by Nagappa Naicker's land and Mound Road. The curious thing to be noted is about the extent of land exchanged. 38 grounds purchased by the SIET under Ex. P-7 has become 43 grounds 1324 sq. ft. in the Exchange Deed Ex. P-8.

5. The suit was resisted by all the defendants. They contended that the plaintiff has no title to the suit property and the suit was barred by time. They denied the trespass or encroachment alleged by the plaintiff. They set up title in themselves. They particularly contended that the plaintiff was not in possession at any time within 12 years next before the suit.

6. The plaintiff examined in all seven witnesses as against six witnesses by the defendants.

7. The learned Single Judge after considering the material on record held that Nagappa during lifetime and the plaintiff after Nagappa's death had been in possession and enjoyment of the suit property. The title was also held in her favour. On the question of trespass by the defendants, learned judge with reference to documents and pleadings observed that the defendants trespassed the suit property after the measurement and demarcation of the land by the Tehsildar in January 1954. That means, learned Judge held that the plaintiff was in possession within 12 years prior to the date of filing the suit. Accordingly the suit was decreed with a direction to the defendants

to vacate the suit land marked as R.S. No. 3859/4 and deliver vacant possession to the plaintiff.

8. Being aggrieved by the judgment of learned judge, the SIET preferred an appeal before the Division Bench of the High Court. The Division Bench affirmed the finding as to the plaintiff's title to the property. It was held that the plaintiff has satisfactorily established the title to the suit property. On the question of possession, however, it was observed that the evidence adduced by the plaintiff was vague and unacceptable. The plaintiff has not proved her possession of the suit property at any time within 12 years prior to the suit. At the same time, it was also observed that the defendants have not perfected title by adverse possession. So stating the Division Bench allowed the appeal and dismissed the suit.

9. Hence this appeal by the plaintiff.

10. Mr Padmanabhan learned counsel for the appellant urged two contentions before us. The first contention related to the jurisdiction of the appellate court to reverse the finding of the fact properly recorded by the trial judge. The second contention rested on the undisputed nature of the suit property and the legal presumption of possession in favour of the title holder.

11. Mr Abdul Khader and S. Balakrishnan, learned counsels for respondents, urged in support of the judgment of the Division Bench. In the alternate they contended that it is a fit case for remand to consider the question of adverse possession raised by the SIET in the pleading.

12. We are not persuaded by the alternate contention urged by learned counsel for the respondents. The trial court did not frame an issue as to the defendants perfecting title to the suit property by adverse possession. The defendants did not produce any evidence in support of the plea of adverse possession. It is not the case of the defendants that they were misled in their approach to the case. It is also not their case that they were denied opportunity to put forward their evidence. It is, therefore, not proper for us at this stage to remand the case to enable the defendants to make good their lapse.

13. We find considerable justification for the criticism of Mr Padmanabhan about the manner in which the Division Bench considered the oral evidence in the case. So far as the appreciation of oral testimony by the appellate court is concerned there are two viewpoints. One view is that the court of appeal has undoubted duty to review the recorded evidence and to draw its own inference and conclusion. The other view is that the court of appeal must attach due weight to the opinion of the trial judge who had the advantage

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of seeing the witnesses and noticing their look and manner. The rule of practice which has almost the force of law is that the appellate court does not reverse a finding of fact rested on proper appreciation of the oral evidence. That was the view taken in *Sarju Pershad* v. *Raja Jwaleshwari Pratap Narain Singh*[1] where this Court observed :

> The question for our consideration is undoubtedly one of fact, the decision of which depends upon the appreciation of the oral evidence adduced in the case. In such cases, the appellate court has got to bear in mind that it has not the advantage which the trial judge had in having the witnesses before him and of observing the manner in which they deposed in court. This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the trial judge. The rule is — and it is nothing more than a rule of practice — that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lies, the appellate court should not interfere with the finding of the trial judge on a question of fact.

14. In the instant case, it may be noted that the trial judge on a consideration of every material on record reached the conclusion that the plaintiff was in possession of the property and it was only in 1954 she was dispossessed. This conclusion was also based on the credibility of the witnesses examined by the parties. The Division Bench reversed that finding without due regard to the probability of the case and the considerations which weighed with the trial judge. The Division Bench appears to have missed the important features which have not been properly explained by the defendants.

15. First, about the western boundary of the property purchased by the defendants. In all the sale deeds forming links in the defendant's title Ex. P-6 of 1940, Ex. P-7 of 1953 and Ex. P-8 of 1954, the western boundary has been shown as the property belonging to Nagappa. What was that property belonging to Nagappa which formed the western boundary ? It was certainly not the land bearing R.S. No. 3862 and 3863 although counsel for the respondents made an attempt before us to show that the said land formed the western boundary. But there is nothing on record to lend credence to this belated submission. It was never the case of the parties that the plaintiff had no other property apart from R.S. Nos. 3862 and 3863.

1. 1950 SCR 781, 783-84 : AIR 1951 SC 120

16. Second, the SIET purchased under Ex. P-7 the land measuring 38 grounds. Within a couple of months thereafter the SIET conveyed under the deed of exchange Ex. P-8, 43 grounds 1324 sq. ft. If one prefers to go yet further back, the Rani of Vuyyur purchased only 35 grounds 1989 sq. ft. It was the same property which was the subject matter of sale under Ex. P-7 and later the subject matter of exchange under Ex. P-8. One fails to understand how that waxing could be possible without an attempt to grab the adjacent property.

17. Thirdly, the plaintiff has come forward with specific case that her land was encroached by the defendants in the early part of January-February 1954. That has been denied in the written statement filed by the Secretary of the SIET. The Secretary was examined as DW 3. He was a star witness in support of the defendant's case. The sale deed Ex. P-7 was in his name. The exchange deed Ex. P-8 was executed by him along with treasurer of the SIET. DW 3 in his evidence has given a go-by to his pleading. He stated that he did not examine the title deeds of his property. He did not know anything about the contents of the title deeds except in a general way. He did not take any responsibility for any portion of the sale deed in favour of the SIET. He said that the exchange deed was given to him by the Chairman of the SIET and he did not actually draft it. He also stated that he could not explain how the property which was 38 grounds at the time of purchase under Ex. P-7 came to be described as 43 grounds in Ex. P-8, although he later said that Ex. P-8 was written after measurement and demarcation of the property. We do not know whether he feigned his ignorance, or, whether he was trying to be ingenious. We could only conclude that he was fair enough and ingenuous. He stated before the court that he did not investigate the title and could not take personal responsibility for the statement he made in the written statement to the effect that the plaintiff was not in possession of the property. This was the final blow to the defendant's case which the Division Bench has failed to appreciate.

18. The force of the second contention, urged for the appellant cannot also be gainsaid. We have already stated that the suit property was admittedly located in a low-lying area with a deep pit where water stagnated making it incapable of use and enjoyment. The sale deed Ex. P-2 by which the property was purchased by Nagappa described the property as a pit. It has come from the evidence that the land was 8 feet below the road level. It was called "pallam". There would be water in the "pallam" during the rainy season making it a pond (see the evidence of PW 1). It was also admitted before the trial judge that the suit property was low-lying where water did stagnate. The learned judge, however, found it unnecessary to draw legal presumption of possession because on other material he found the de

facto possession with the plaintiff till 1954. The law with regard to possession of such land is clear. The possession continues with the title holder unless and until the defendant acquires title by adverse possession. There would be no continuance of adverse possession when the land remains submerged and when it is put out of use and enjoyment. In such a case the party having title could claim constructive possession provided the title had not been extinguished by adverse possession before the last submergence. There is no difference in principle between seasonal submersion and one which continues for a length of time. This view has been applied by the Privy Council in *Basanta Kumar Roy* v. *Secretary of State for India*[2] where Lord Sumner observed :

> The Limitation Act of 1877 does not define the term "dispossession", but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession : constructively it continues, until he is dispossessed ; and, upon the cessation of the dispossession before the lapse of the statutory period, consructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment" (per Cotton, L.J. in *Leigh* v. *Jack*[3]). It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on de facto use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession, and revives as it ceases.
>
> In the case of *Secretary of State for India* v. *Krishnamoni Gupta*[4], their Lordships' Board applied this view to a case, where a river shifting its course first in one direction and then in the opposite direction, first exposed certain submerged lands, of which the Government took possession, and then after a few years flooded them again. No rational distinction can be drawn between that case and the present one, where the re-flooding was seasonal and occurred for several months in each year. It was held that when the land was re-submerged the possession of the Government determined, and that, while it remained submerged, no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner.

19. These principles, in our opinion, are equally applicable to

2. 1917 ILR 44 Cal 858, 871-2
3. 1879 LR 5 Exch D 264, 274
4. 1902 ILR 29 Cal 518 : LR 29 IA 104

the present case. The plaintiff has proved title to the property. The defendants have not acquired title by adverse possession. The property as described in the sale deed Ex. P-2 was a vacant land fetching no income. It was caled "pallam" or pond that was seasonally submerged. The entire land might not be seasonally submerged, but it makes little difference in the position of law. "As a general rule possession of part is in law possession of the whole, if the whole is otherwise vacant"[5].

20. In view of the foregoing discussion, we allow the appeal with cost, set aside the judgment of the Division Bench and restore that of the learned Single Judge.

1988 (Supp) Supreme Court Cases 152

(BEFORE A. P. SEN AND B. C. RAY, JJ.)

NANHAU RAM AND ANOTHER .. Appellants ;

Versus

STATE OF MADHYA PRADESH .. Respondent.

Criminal Appeal No. 760 of 1980†,
decided on February 24, 1988

Penal Code, 1860 — Sections 302, 395, 396 and 397 — Conviction under — Appreciation of evidence — Death due to gun-fire — In view of depositions of eye witnesses, medical report, dying declaration, the deposition of the witnesses to the dying declaration and FIR conviction upheld — Evidence Act, 1872, Section 32 (Paras 9 to 11)

Evidence Act, 1872 — Section 45 — Medical evidence — Conflict with other evidence — Death due to gun-fire — Medical opinion ruling out survival for over half an hour — Direct testimony of actual survival for that period and making of dying declaration, held, could not be wiped out by such medical opinion — Penal Code, 1860, Sections 302, 395, 396, 397 — Evidence Act, 1872, Section 32 (Para 10)

Connected references : Surendra Malik : Supreme Court Criminal Digest, Volume V, §§[16525] to [16528] and [16530-A]

Criminal Procedure Code, 1973 — Section 161 — Investigation — Delay in examining witness — When presence of the witness at the time and scene of occurrence and his scribing the dying declaration are not in doubt, held, lapse on the part of the investigating officer in recording

5. Sarkar on Evidence, Vol. 2, 13th edn., p. 110

†From the Judgment and Order dated February 16, 1979 of the Madhya Pradesh High Court in Criminal Appeal No. 68[illegible] of 1977

J. C.* 1917 *Feb.* 1.

KUMAR BASANTA ROY AND OTHERS . . APPELLANTS;

AND

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Limitation — Diluviated Lands — Dispossession — Adverse Possession —Lands annually submerged—Indian Limitation Act (XV. of 1877), s. 3; Sched. II., arts. 142, 144.

The annual cultivation of such parts of diluviated lands as emerge during part of the year is not a dispossession of the owner of the lands within s. 142 of Sched. II. of the Indian Limitation Act, 1877.

Quaere, where there are circumstances to link together the various parts so as to make the possession amount to a constructive possession of the whole.

Mohini Mohan Roy v. *Promoda Nath Roy* (1896) I. L. R. 24 Calc. 256, 259, referred to.

The constructive possession of lands while diluviated being in the true owner, there cannot be continuous adverse possession, within art. 144 of that schedule, of land while it is diluviated during part of every year.

Secretary of State for India in Council v. *Krishnamoni Gupta* (1902) L. R. 29 Ind. Ap. 104 applied.

Where the Government after taking possession of re-formed lands has released them to persons claiming to be entitled, those persons do not derive their liability to be sued from or through the Government, within the meaning of s. 3 of that Act, and upon a claim to possession they consequently cannot rely under art. 144 upon the period during which the Government had possession.

APPEAL from a judgment and decree of the High Court (July 12, 1909) reversing a decree of the Subordinate Judge of Nuddia (June 30, 1906).

The appellants on September 6, 1904, instituted a suit for a declaration of their title to, and for partition and possession of, certain lands which had been re-formed after diluviation. They claimed that the lands were re-formations of mauzas Durlabhpur,

* *Present:* LORD PARKER OF WADDINGTON, LORD SUMNER, SIR JOHN EDGE, and SIR LAWRENCE JENKINS.

Jirat, and Hatikanda, that a 10-anna share in those mauzas appertained to lot Mahomed Aminpur (mahal No. 3989) and a 6-anna share to lot Gobindpur (mahal No. 100), and that a moiety in Mahomed Aminpur was held by their father, and on his death in 1883 passed to them, being under the management of the Court of Wards until January, 1894. The defendants were the owners of mahal No. 100 (the present respondents Nos. 2 to 8, and hereinafter referred to as the principal respondents), the raiyats in occupation, the Secretary of State for India (who took no part in the appeal), and, as formal defendants, the plaintiffs, co-sharers in Mahomed Aminpur.

By their written statement the principal respondents denied the title of the appellants and pleaded that the suit was barred by limitation. The Secretary of State for India pleaded that he was not in possession and that there was no cause of action against him.

The facts appear from the judgment of their Lordships.

The Subordinate Judge held that the title of the appellants was clearly proved. He rejected the plea of limitation on the ground that, the plaintiffs being minors and under the Court of Wards, Sched. II., art. 120, of the Limitation Act, 1877, applied. He made a decree against the principal respondents and the Secretary of State for India.

The principal defendants appealed to the High Court, which reversed the decree. The learned judges (Chitty and Carnduff JJ.) doubted whether it was established that any part of the lands in suit formed part of Mahomed Aminpur; they did not, however, determine that question as they were of opinion that the suit was barred by limitation. After pointing out that art. 120 had no application, they said: "A suit for possession of immovable property must fall either within art. 142 or art. 144. Here, as the plaintiffs make no allegation of ever having been in possession, or having been dispossessed, it must be governed by art. 144, which fixes the period of twelve years commencing from the time when the possession of the defendant becomes adverse to the plaintiff. It was first argued for the plaintiffs that from 1888 to 1894 the possession of the Government was the possession of the Court of Wards, and through them the possession of the plaintiffs. We are aware of no authority for the proposition that the Government and the Court of Wards are in any sense identical, or that the Court of Wards

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KUMAR BASANTA ROY v. SECRETARY OF STATE FOR INDIA.

can be regarded in any sense as merely a department of Government. The Court of Wards is a statutory body, and in this province, no doubt, the Board of Revenue is the Court of Wards, but that is not enough to make the possession of Government the possession of the plaintiffs by the Court of Wards. . . . . It was next urged that the possession of the Government did not in fact commence until 1894, when the char was first settled for five years. This, however, is contrary to the evidence. . . . . There can be no doubt whatever that from 1889 at least portions of the land were under cultivation by the utbandi tenants of the Government. It is certain that the Government took possession at once on the re-formation, and their possession must be taken as dating at the latest from 1889." After rejecting the contention that the principal defendants' possession after 1902 was as co-sharers with the plaintiffs, on the ground that the plaintiffs had not proved that the mauzas were held jointly, they said "it was next urged that the re-formation of the char in suit was gradual, and that portions of it may have appeared above water within twelve years of the suit. If that were so, the burden of proving which portions of the land were of this description would lie upon the plaintiffs—see *Koomar Runjit Singh* v. *Schoene Kilburn & Co.* (1)—and hardly any attempt was made on their behalf to distinguish any portions of the char on that ground." They concluded as follows: "It is clearly established that the plaintiffs never held possession, actual or constructive, of any portion of the char in dispute since 1888; that at least from 1889 the Government was in possession, adversely to the plaintiffs, until 1902, when they released the whole char to the principal defendants, and that from 1902 that adverse possession was continued by the principal defendants. The suit was not instituted until a date more than twelve years after that adverse possession had commenced, nor was it instituted within three years from the date when the youngest plaintiff attained his majority. It was accordingly barred by limitation."

1916. Nov. 20, 21, 22. *Sir R. Finlay, K.C.*, and *Kenworthy Brown*, for the appellants. The evidence establishes the title of the appellants to the lands in suit. That title was not barred by

(1) (1879) 4 Calc. L. R. 390.

limitation. The suit is one to which art. 144 and not art. 142 of the Limitation Act, 1877, applies. The onus was consequently upon the principal defendants to prove that they had had continuous adverse possession for twelve years before the suit: *Radha Gobind Roy* v. *Inglis* (1); *Secretary of State for India* v. *Chelikani Rama Rao.* (2) The High Court relied on the decision in *Koomar Runjit Singh* v. *Schoene Kilburn & Co.* (3) That case, however, followed the rule laid down by the Board in *Maharajah Koowur Nitrasur Singh* v. *Nund Loll Singh* (4); but, as is pointed out in *Rao Karan Singh* v. *Bakar Ali Khan* (5), the law was altered by the Limitation Act, 1871; that Act introduced by art. 145 the principle of adverse possession, the previously existing law depending exclusively upon proof of a dispossession within twelve years. The last cited case shows that the Government possession was not adverse to the appellants; further, it could not be so seeing that the Government and the appellants were in the position of guardian and wards: *Thomas* v. *Thomas* (6); Smith's Leading Cases, 11th ed., vol. 2, p. 661. Moreover, until 1894 the lands were not capable of continuous possession. During the period of seasonal diluviation the constructive possession during a part of each year was in the appellants: *Secretary of State for India* v. *Krishnamoni Gupta.* (7) But in any event the principal defendants, having claimed the lands from Government, did not derive their liability to be sued from or through Government, and were not entitled under the definition of "defendant" in s. 3 of the Limitation Act, 1877, to rely upon any period of adverse possession in the Government. Further, the principal defendants being co-sharers with the appellants could not set up adverse possession against them: *Trustees and Agency Co.* v. *Short.* (8) [Reference was also made to *Dixon* v. *Gayfere* (9), *Asher* v. *Whitlock* (10), *Rajcoomar Roy* v. *Gobind Chunder Roy* (11), *Innasimuthu Udayan* v. *Upakarath Udayan* (12), and *Jogendra Nath Rai* v. *Baladeo Das.* (13)]

(1) (1880) 7 Calc. L. R. 364.
(2) (1916) L. R. 43 Ind. Ap. 192.
(3) 4 Calc. L. R. 390.
(4) (1860) 8 Moo. Ind. Ap. 199.
(5) (1882) L. R. 9 Ind. Ap. 90.
(6) (1855) 2 K. & J. 79.
(7) L. R. 29 Ind. Ap. 104.
(8) (1888) 13 App. Cas. 793.
(9) (1853) 17 Beav. 421, 430.
(10) (1865) L. R. 1 Q. B. 1, 4.
(11) (1891) L. R. 19 Ind. Ap. 140.
(12) (1899) L. R. 26 Ind. Ap. 210.
(13) (1907) I. L. R. 35 Calc. 961.

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De Gruyther, K.C., and *O'Gorman*, for the principal respondents (Nos. 2 to 8). The evidence does not establish that the lands ever formed part of the appellants' property. In any case, art. 142 applies, and the onus was consequently upon the appellants to prove that they had been dispossessed within twelve years: *Muhammad Amanulla Khan* v. *Badan Singh* (1); *Mohima Chunder Mozumdar* v. *Mohesh Chunder Neogi*. (2) There was no evidence of any dispossession within twelve years of the suit. On the contrary, during the diluviation the constructive possession remained in the appellants, but there was a dispossession by the utbandi cultivation from 1891. Further, the Government took possession under Bengal Regulation XI. of 1825 in its own right, and by s. 28 of the Limitation Act, 1877, the claim of the appellants against the Government became extinguished by twelve years' adverse possession. These respondents obtained a good title from the Government by the release in 1902. The possession of the Government was adverse to the appellants although the latter were under the Court of Wards; there is a distinction between the Collector acting for the Board of Revenue and the Court of Wards: *Chowdhry Sheoraj Singh* v. *Collector of Muradabad*. (3)

1917. Feb. 1. The judgment of their Lordships was delivered by

LORD SUMNER. This suit was brought by members of a family called the Kumars of Dighapatia against certain persons, called collectively the Kundu Babus of Mahiari, to recover khas possession, jointly with their co-sharer maliks, of a 10-anna share in portions of mauzas Durlabhpur, Jirat, and Hatikanda. Wasilat was also claimed. Some years ago the Ganges overflowed these lands. They have now re-formed in situ.

The plaintiffs held one moiety of the zamindari lot Mahomed Aminpur, the other moiety being held by various persons, who were joined as subordinate defendants. To this mahal, bearing taujih No. 3989 of the Hooghly Collectorate, this 10-anna share was said to have belonged for at least a century. The 6-anna share was the property of the principal defendants in right of their zamindari, namely, lot Gobindpur bearing taujih No. 100. The trial

(1) (1889) L. R. 16 Ind. Ap. 148.
(2) (1888) L. R. 16 Ind. Ap. 23.
(3) (1870) 1 N. W. P. Rep. 379.

judge found for the plaintiffs' title. The High Court criticized this decision as having been arrived at "without any real discussion or consideration of the documentary evidence," but did not expressly dissent from it. They allowed the appeal on another ground. Having examined the documentary evidence in question with some care, their Lordships conclude that the decision of the trial judge in this regard was right.

The plaintiffs put in an extract from the quinquennial register of pargana Mahomed Aminpur for A.D. 1816, which showed that a 10-anna share in each of the three mauzas then belonged to taluq Mahomed Aminpur. An extract from the mahalwari register, apparently for A.D. 1880, showed these mauzas still belonging to Mahomed Aminpur, though not under the same taujih number, and stated the maliks, as recorded in the general register, to be certain persons of whom one was Purna Chandra Roy, the plaintiffs' predecessor in title. It further remarked that part or all of the land of these mauzas was ijmali, without naming either the co-sharers or the proportions of the shares. No doubt these entries are in some respects inconclusive. For several years, from 1888 onwards until 1894, when the guardianship of the Court ended, the plaintiffs were minors, whose property was in the charge of the Court of Wards, and they produced documents showing that year after year each of these mauzas was administered on their behalf, and that rents and profits collected in respect of them were credited to the account of the plaintiffs. Amdanis of money on account of rent, taujih accounts, and extracts from the jamma-wasil-baki accounts and karcha accounts were forthcoming in regular sequence, in which the plaintiffs were stated to be proprietors and their share to be a 10-anna share in taujih No. 3989. To these proofs of enjoyment no real answer was made, and their Lordships see no reason to question the finding of the trial judge in favour of the plaintiffs' title.

The identity of the lands in suit held by the principal defendants with those originally washed away, to which the plaintiffs made title, was accepted by the trial judge, doubted but not decided by the High Court, and strenuously contested before their Lordships. Before the trial an ameen was appointed to survey the locus in quo and set it out on a map. The limits of the ground in dispute were

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agreed and shown on this map. Portions of each of the three mauzas fell beyond them. At the instance of the principal defendants the ameen also prepared a map purporting to show the natural features "as contained in the release map of 1886." In his report he stated that the latter features depended on the position of a palm tree, which was taken as the datum because it was said to be the only thing that had survived from 1886, and to be identical with a palm tree shown on a copy map produced by the defendants and alleged to be a map of things as they were in that year. No proof of the identity of this palm tree was forthcoming; no thak map was produced; no release of 1886 or any evidence of it was put in. It is plain that the ameen thought that this map of the supposed features of 1886 was not worth much, and their Lordships think so too.

The respondents' argument rested on three points: first, that since 1886 they had been, as they said, in possession of certain portions of a char known as char Raninuggur No. 1, that by superimposing the ameen's 1886 map on his survey of 1906 it would be seen that part of the area disputed in this action, though claimed as part of char Raninuggur No. 2, really fell within char Raninuggur No. 1, and that there had been a confusion of mauza Jirat, which lay in the north of the disputed area, with an area called char Jirat, which lay outside of it and to the south, some miles away. Their Lordships' Board has had occasion before now (*Rajcoomar Roy's Case* (1)) to deprecate the practice of "propounding riddles of this kind," and to point out how rarely they succeed. It may be doubted if such efforts are worth the labour they involve. After the best consideration that they could give, their Lordships are clear on one point only, namely, that this case was not made at all at the trial, and is not made out now. The trial judge records that "it is admitted on both sides that the lands in suit are reformations on their old sites of diluviated lands of mauzas Durlabhpur, Jirat, and Hatikanda." On that admission he proceeded, and by that admission, in their Lordships' opinion, the respondents must be bound. In the result the plaintiffs have made out their case alike as to title and parcels.

There remains the question on which alone the High Court

(1) L. R. 19 Ind. Ap. 140, 146.

proceeded, the question of limitation. This involves some account of the history of the re-formed land. At the date of the Government survey of 1869 and 1870 the three mauzas lay to the west of the Bhaghirathi. Shortly after that date the river began to traverse bodily to the south-west, in a direction at right angles to the axis of its course at that part of the stream, and steadily moved for some miles across country till in 1906 only portions of Jirat and Hatikanda and no part of the Durlabhpur were any longer to the west of the river. The total area submerged no doubt extended far beyond the bounds of these mauzas. As the river passed on chars began to form. Char Raninuggur No. 1 was the first; char Raninuggur No. 2, somewhere within which the present re-formations fall, began to appear as an island char in 1888. The plaint in the present suit was filed on September 6, 1904. It is common ground that the period of limitation applicable is twelve years, the contest being whether art. 142 of Sched. II. of Act XV. of 1877 is the article applicable or art. 144. The critical time is the time prior to September 6, 1892.

A great body of evidence was called, of which the trial judge says that the witnesses "have sworn hard without any regard to truth." Neither side has ever thought it worth while to quote what they said to their Lordships. If the appellants are right, the question is whether the respondents had adverse possession before September, 1892; if the respondents are right, the question is whether before that time the appellants had not been dispossessed. A good deal has been said about the burden of proof in either case, but, as their Lordships find the evidence sufficient to establish a clear conclusion of fact, it cannot matter now by which party it was given. Their Lordships accordingly pass by the question who would have suffered if the facts had turned out otherwise or had not been proved at all, and proceed to examine them.

The best evidence of the history of the char lands in question is to be found in the Collectorate reports of the settlements of 1894, 1899, and 1902. An island char in or about this spot was thrown up in 1888, but was unfit for assessment, and apparently for cultivation, till 1890. At first the surrounding water was unfordable on all sides, but further accretions soon attached it on the north to char Raninuggur No. 1. In 1889 it was first treated as an accretion

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to char Raninuggur No. 1 and Jirat, which had been released to Suksagar zamindars as re-formations in situ of their mauzas, and then shortly afterwards came to be considered as an accretion to the part of char Raninuggur No. 1 which was a Government estate. It was not regularly surveyed till 1894, but, beginning in the year 1891–1892, it was under direct management on the utbandi system on yearly settlements. The area then producing a rent was about 350 bighas; in the following year it was slightly more. On the survey in 1894 the area of this char was found to be 2060 bighas, of which 583 were by this time under cultivation. The residue was uncultivated jungle, and the whole of it was every year completely under water from the beginning of June to the end of October. Naturally the land was then very poor, and there was no resident raiyat in the mahal.

The char had so far increased by 1894 that a raiyatwari settlement was then made with the utbandi raiyats for a term of five years. On the expiration of this term it was again surveyed, and its area was found to have increased to over 3000 bighas, and 86½ acres of it were released to the proprietor of estate No. 399, as being land which was a re-formation in situ of his mauza Sardanga. It would seem that a further portion of it had been previously released to the owner of mauza Baliadunga. The cultivable lands were then settled again for an undefined term.

In 1902 the principal defendants petitioned the Collector of Nuddia for the release to them of the lands in question, alleging that they were re-formations in situ of lands belonging to their estate, lot Gobindpur, taujih No. 100, and ten months later the officiating Collector granted the petition. In his judgment the petitioners had proved their title and the identity of the re-formed lands, and the Government could not legitimately resist their claim. Accordingly possession was delivered in due form, by planting a bamboo on the estate, by proclamation, and by beat of drum.

The report of 1899 in terms speaks of these re-formed lands as being the "property" of the Government resumed in 1888, which at most means that in time the Government's actual possession, such as it was, might be expected to ripen into ownership. The report of 1902 speaks of possession, direct management, and settle-

ment. The order of 1903, while avoiding the term "property," because it recognized the property of the petitioners, recited that the Government took possession of char Raninuggur No. 2 in 1888, the year in which it came into existence as a char. These documents, however, were reciting what had happened some years before, and presumably after some change of Collectors in the meantime, and it is very noticeable that in the khasras of the char the column headed "Name of proprietor and landlord" appears to have been left blank until 1899, when it is filled in for the first time with the name of the Empress of India.

The Limitation Act of 1877 does not define the term "dispossession," but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively it continues, until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, where the land is not capable of use and enjoyment": per Cotton L.J. in *Leigh* v. *Jack*. (1) It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on de facto use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one the new owner's possession of course continues until there is fresh dispossession, and revives as it ceases.

In the case of *Secretary of State for India* v. *Krishnamoni Gupta* (2) their Lordships' Board applied this view to a case where a river shifting its course first in one direction and then in the opposite direction first exposed certain submerged lands, of which the Government took possession, and then after a few years flooded them again. No rational distinction can be drawn between that case and the present one, where the re-flooding was seasonal and occurred for several months in each year. It was held that when the land was re-submerged the possession of the Government determined, and that, while it remained submerged, no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner.

(1) (1879) 5 Ex. D. 264, 274. (2) L. R. 29 Ind. Ap. 104.

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Again, to apply the test suggested by Bramwell L.J. in *Leigh* v. *Jack* (1), "to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it," and therefore it is necessary to look at the position in which the former owner stands towards the land as well as to the acts done by the alleged dispossessor. "It is impossible," says Lord Halsbury in *Marshall* v. *Taylor* (2), "to speak with exact precision about the degree of possession or dispossession that will do, unless you have regard, as Cotton L.J. said in *Leigh* v. *Jack* (3), to the nature of the property." An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely acts which prima facie are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character, or have some other object. In the present case beyond the temporary utbandi cultivation itself there is nothing down to 1892 to show an exclusion of the plaintiffs by the Revenue authorities.

Their Lordships are of opinion that, whatever may have been the case later on, there had not been down to September, 1892, any dispossession of the plaintiffs within the meaning of art. 142. The evidence of possession by the Government consists in the direct management under which bandobastdars cultivated at annual rents. Two Collectors' orders, dated in 1889, are referred to, but not exhibited, under which the land was first of all "treated" as an accretion to one property and almost immediately afterwards "considered" as an accretion to another; but, beyond the utbandi cultivation, nothing was done. Whether the land cultivated was the same each year or not does not appear; at any rate, it was annually submerged, and there are no circumstances to link together various portions of ground so as to make the possession of a part, as it emerged, amount constructively to possession of the whole: *Mohini Mohan Roy* v. *Promoda Nath Roy*. (4) The lands in question in this suit form only a part of char Raninuggur No. 2. It cannot

(1) 5 Ex. D. 273.
(2) [1895] 1 Ch. 641, 645.
(3) 5 Ex. D. 274.
(4) I. L. R. 24 Calc. 256, 259.

be shown that they formed part of the land cultivated, or of the char which had emerged up to 1892. It is quite possible that most if not all, of the land cultivated between 1891 and 1893 may have belonged to the land which was shortly afterwards released to the Baliadunga and Sardanga zamindars. It is clear that in those early years there was considerable uncertainty as to the course the re-formation was taking, and the fact must have been well known that the char might turn out to be a re-formation in situ of the land, which had only diluviated within the previous twenty years.

If, as their Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, art. 144 is the article applicable, and not art. 142. It is not easy to see in the circumstances of a case such as this how conduct insufficient to evidence dispossession of the plaintiffs can be used to evidence adverse possession available to the defendants; but, be that as it may, in their Lordships' opinion the defendants' contention resting on art. 144 fails on another ground. The period of time requisite to bring the defendants under the protection of art. 144 cannot be made out, unless to the period during which the defendants have been in possession there is tacked, out of the prior period when it is contended that the Revenue authorities had possession, a number of years going back to 1892. The definition section, s. 3, shows that in the present case this cannot be done. The defendants do not derive their liability to be sued "from or through" the Revenue authorities in any sense of the words. They advanced a claim of their own adversely to the Revenue authorities which was rested on prior title and possession, and sought to put an end to conduct on the part of those authorities which, they asserted, was inconsistent with and an invasion of their own superior title. On investigation the Revenue authorities recognized and submitted to this adverse claim and withdrew from any enjoyment or occupation. If the defendants could make good now the claim which they made then, well and good; but they would succeed not by reason of, but independently of, the Limitation Act. Upon this ground they fail as far as art. 144 is concerned.

In this view of the case it is not necessary to decide two points much discussed before their Lordships: first, that the defendants'

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possession could not, as such, be deemed to be adverse to their co-sharers or available to deprive the plaintiffs of their rights; and, second, that the possession of the Revenue authorities could not be availed of against the plaintiffs by reason of their being at the time minors under the guardianship of the Court of Wards. In differing from the High Court upon the determination of the appeal their Lordships do not wish to be taken as expressing any opinion adverse to their view on this second point.

In the result their Lordships will humbly advise His Majesty that the appeal should be allowed with costs, the judgment of the High Court should be set aside with costs, and the decision of the Subordinate Judge should be restored. As the first defendant on the record, the Secretary of State for India in Council, lodged no case and did not appear before their Lordships to support or resist the appeal, their Lordships do not advise that the terms of any order as to costs should affect him.

Solicitors for appellants: *Watkins & Hunter.*
Solicitors for respondents Nos. 2 to 8: *T. L. Wilson & Co.*

the provisions of Order 39 Rules 1 and 2 CPC and has committed a serious error in deciding the scope of Section 53-A of the Transfer of Property Act, 1882 and Order 2 Rule 2 CPC. As noticed above the Civil Judge while granting ad interim injunction very categorically observed in the order that respective rights of the parties shall be decided at the time of final disposal of the suit. The very fact that Plaintiff 2 is in possession of the property as a tenant under Plaintiff 1 and possession of Plaintiff 2 was not denied, the interim protection was given to Plaintiff 2 against the threatened action of the defendants to evict her without following the due process of law. In our considered opinion, the order[1] passed by the learned Single Judge cannot be sustained in law.

8. For the aforesaid reasons, we allow this appeal and set aside the order[1] passed by the High Court in the aforesaid appeal arising out of the order of injunction. However, before parting with the order we are of the view that since the suit is pending for a long time the trial court shall hear and dispose of the suit within a period of four months from the date of receipt of copy of this order. It goes without saying that the trial court shall not be influenced by any of the observation made in the order passed by the appellate court as also by this Court and the suit shall be decided on its own merits.

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(BEFORE DR B.S. CHAUHAN AND F.M. IBRAHIM KALIFULLA, JJ.)

STATE OF ANDHRA PRADESH AND OTHERS .. Appellants;

Versus

STAR BONE MILL AND FERTILISER COMPANY .. Respondent.

Civil Appeal No. 6690 of 2004†, decided on February 21, 2013

A. Property Law — Transfer of Property Act, 1882 — Ss. 54, 55(1)(a) to 55(1)(c) & 55(2) and 7 & 8 — Buyer's claim to paramount ownership and title in respect of property purchased — Seller having different title from title that was professed to be sold i.e. seller concerned owned only leasehold title, but professed to sell paramount title — Seller concerned (one *A*) held the leasehold under the Government as lessor — Effect — Held, such sale deed was invalid and inoperative — Suit for declaration of paramount title to said property by buyer against Government, held, could not be decreed — Doctrines and Maxims — *Nemo dat qui non habet* (no one gives what he has not got) — *Nemo plus juris tribuit quam ipse habet* (no one can bestow or grant a greater right, or a better title than he has himself) — Specific Relief Act, 1963, S. 34

B. Evidence Act, 1872 — S. 17 — Admission by transferee as to non-holding of title by transferor — Letter written by buyer, *S* who had purportedly been sold the paramount title by registered sale deed by *A*,

† From the Judgment and Order dated 22-3-2004 of the High Court of Judicature of Andhra Pradesh at Hyderabad in City Civil Court Appeal No. 72 of 1989

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stating that *S* had been cheated by its seller, *A*, as *A* had professed to sell paramount title which *A* did not hold — Held, this was a clear admission by *S* that *A* did not have paramount title — Hence, as no person can grant a better title than he himself holds, *S* could not come to hold paramount title by virtue of the said sale deed — Property Law — *Nemo dat quod non habet* — Admission by purported transferee of title that purported transferor did not hold that title — Held, will bind such purported transferee — Transfer of Property Act, 1882 — Ss. 7, 8 and 54 — Civil Procedure Code, 1908, Or. 12 R. 6 (Paras 6, 16 and 17)

Held :

No person can grant a title better than he himself possesses. In the instant case, unless it is shown that *A* (i.e. seller) had valid paramount title, the respondent-plaintiff (i.e. buyer) could not claim any relief whatsoever from court. The courts below failed to appreciate that the sale deed dated 11-11-1959 was invalid and inoperative, as the documents on record established that the seller *A* was merely a lessee of the Government. The documents show that the Government was the absolute owner of the suit land since at least 1920. Hence, the judgments of the courts below decreeing the suit filed by the respondent-plaintiff for declaration of paramount title are hereby set aside and the suit is dismissed. (Paras 17, 24, 16 and 25)

State of A.P. v. *Star Bone Mill & Fertiliser Co.*, City Civil Court Appeal No. 72 of 1989, decided on 22-3-2004 (AP), *reversed*

C. Property Law — Ownership and Title — Proof — Presumption of title in favour of possessor under S. 110, Evidence Act, 1872 — Rebuttability of — Held, presumption of title as a result of possession arises only where the facts disclose that no title vests in any party — Further held, where possession of plaintiff is not prima facie wrongful, and his title is not proved, it certainly does not mean that because a man has title over some land, he is necessarily in possession of it — It in fact means that, if at any time a man with title was in possession of said property, the law allows the presumption that such possession was in continuation of the title vested in him — Thus, all that S. 110 provides for is that where apparent title is with the plaintiffs, then in order to displace said claim of apparent title and to establish good title in himself, it is incumbent upon defendant to establish by satisfactory evidence the circumstances that favour defendant's version — Presumption of possession and/or continuity thereof, both forward and backward, can be raised under S. 110, Evidence Act, 1872

— In present case, plaintiff *S* was in possession of property in dispute as transferee (as sub-lessee) of a lessee (*A*) of the Government — *S* claiming paramount title by filing suit for declaration of paramount title against Government — One *R* shown as pattadar in revenue record of that land — No explanation by plaintiff *S* as to who *R* was and how plaintiff was concerned with it — Documents showing that the Government was absolute owner of disputed land — On such facts, judgments of courts below decreeing plaintiff's suit for paramount title, held, not justified and, therefore, set aside — Evidence Act, 1872 — Ss. 110 and 114 — Specific Relief Act, 1963 — Ss. 34, 5 and 6 — Criminal Procedure Code, 1973 — S. 145 — Penal Code, 1860, Ss. 154 and 158

Held :

The principle enshrined in Section 110 of the Evidence Act, 1872 is based on public policy with the object of preventing persons from committing breach of the peace by taking the law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of Section 6 of the Specific Relief Act, 1963, Section 145 CrPC, and Sections 154 and 158 IPC, were enacted. All the aforesaid provisions have the same object. The said presumption is read under Section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of wastelands, or where nothing is known about possession one way or another. Presumption of title as a result of possession can arise only where facts disclose that no title vests in any party. Possession of the plaintiff is not prima facie wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It in fact means that, if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass/encroachment, etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under Section 110 of the Evidence Act. (Para 21)

The trial court recorded a finding to the effect that the name of one *R* was shown as pattadar in respect of the land in dispute and the respondent-plaintiff *S* is in possession. The respondent-plaintiff could not furnish any explanation herein as to who was this *R* and how the respondent-plaintiff was concerned with it. The courts below have erred in ignoring the revenue record, particularly, the documents showing that the Government was the absolute owner of the suit land since at least 1920. (Paras 16 and 23)

Gurunath Manohar Pavaskar v. *Nagesh Siddappa Navalgund*, (2007) 13 SCC 565; *Nair Service Society Ltd.* v. *K.C. Alexander*, AIR 1968 SC 1165; *Chief Conservator of Forests* v. *Collector*, (2003) 3 SCC 472, *relied on*

D. **Property Law — Ownership and Title — Proof — Revenue record — Nature and value of — Held, it is not a document of title — It merely shows possession of a person — Evidence Act, 1872, S. 35 (Paras 21 and 24)**

Gurunath Manohar Pavaskar v. *Nagesh Siddappa Navalgund*, (2007) 13 SCC 565, *relied on*

E. **Evidence Act, 1872 — S. 90 — Presumption under, as to documents 30 yrs old — Reckoning of period of 30 yrs mentioned in S. 90 — Mode of — Held, said period must be reckoned backward from the date of offering of the document, and not any subsequent date i.e. the date of decision of suit or appeal — In present case, suit filed in 1974 on basis of registered sale deed dt. 11-11-1959 — High Court considering said sale deed in the light of S. 90 and reckoning period of 30 yrs as to said deed from 1959 till the date of its impugned decision passed in appeal i.e. 22-3-2004, treating the appeal as a continuation of the suit — Held, such a view by High Court was impermissible and perverse — Hence, not acceptable (Paras 14 and 15)**

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F. **Property Law — Ownership and Title — Estoppel or acquiescence — Ownership of property — Acceptance of municipal/agricultural tax by State in respect of property or grant of loan by bank upon hypothecation/ mortgage of the property — Effect of — Held, mere acceptance of municipal tax or agricultural tax by a person, cannot stop the State from challenging ownership of the land, as there cannot be estoppel against the statute — Nor can such a presumption arise in case of grant of loan by a bank upon it hypothecating the property — Evidence Act, 1872, S. 115 otherwise — Transfer of Property Act, 1882 — Ss. 7, 8 and 54 — *Nemo dat quod non habet*** **(Para 22)**

Appeal allowed W-D/51461/CV

Advocates who appeared in this case :
Amarendra Sharan, Senior Advocate (C.K. Sucharita and Ms Rumi Chanda, Advocates) for the Appellants;
D. Rama Krishna Reddy and Ms Asha Gopalan Nair, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2007) 13 SCC 565, *Gurunath Manohar Pavaskar* v. *Nagesh Siddappa Navalgund* 326*c*
2. City Civil Court Appeal No. 72 of 1989, decided on 22-3-2004 (AP), *State of A.P.* v. *Star Bone Mill & Fertiliser Co.* **(reversed)** 322*e*, 324*d*, 325*d*
3. (2003) 3 SCC 472, *Chief Conservator of Forests* v. *Collector* 326*e*
4. AIR 1968 SC 1165, *Nair Service Society Ltd.* v. *K.C. Alexander* 326*c*

The Judgment of the Court was delivered by

DR B.S. CHAUHAN, J.— This appeal has been preferred against the impugned judgment and order dated 22-3-2004, passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in *State of A.P.* v. *Star Bone Mill & Fertiliser Co.*[1], by way of which the civil suit filed by the respondent against the appellants, claiming title over the suit land in dispute, has been upheld.

2. The facts and circumstances giving rise to this appeal are: one Shri M.A. Samad, Assistant Engineer, City Improvement Board, Hyderabad, along with his associate, converted the land in dispute measuring 3.525 acres i.e. 17,061 sq yd, in favour of the Forest Department in 1920. The suit land was given on lease on 21-5-1943 to M/s A. Allauddin & Sons for a fixed time period, incorporating the terms and conditions that the lessee would not be entitled to extend the existing building in any way, or to erect any structure on the land leased. The lessee was also prohibited from transferring the suit land by any means.

3. The said M/s A. Allauddin & Sons, a proprietary concern, sent a letter dated 29-9-1945 in response to the eviction notice, informing the appellants that it was not possible for it to remove the factory established on the suit land, and thus, the said lessee asked the appellants to put up the said property for rent. The said firm, then sent a letter dated 1-5-1951, offering rent of

1 City Civil Court Appeal No. 72 of 1989, decided on 22-3-2004 (AP)

Rs 600 per annum. The appellants vide letter dated 20-12-1954, informed M/s A. Allauddin & Sons to vacate the site within a period of one month, or else be evicted in accordance with law, and in that case it would also be liable to pay damages. In spite of receiving such a letter, the said lessee/tenant remained in possession of the suit premises, and continued to pay rent, as is evident from the letter dated 15-8-1956.

4. The appellants, however, vide letter dated 21-2-1958, asked the said lessee/tenant M/s A. Allauddin & Sons, yet again, to vacate the suit land. Instead of vacating the suit land, M/s A. Allauddin & Sons executed a lease deed dated 24-2-1958, and got it registered on 6-4-1958, in favour of Syed Jehangir Ahmed and others (partners of the respondent firm, M/s Star Bone Mill and Fertiliser Co.), for a period of two years. During the subsistence of the said sublease, the partners of the firm M/s A. Allauddin & Sons, executed a sale deed on 11-11-1959 in favour of the respondent, for a consideration of Rs 45,000. The said sale deed was also registered, and possession was handed over to the respondent.

5. The respondent herein filed a petition in 1964 before the Minister for Agriculture & Forest, seeking permanent lease of the suit premises in his favour. On 26-4-1967, an order was passed by the Ministry of Agriculture & Forest in respect of recovery of arrears of rent as regards the said land. The respondent vide letter dated 7-5-1969, offered higher rent to the appellants for the suit land.

6. On 22-5-1970, the respondent wrote a letter to the Chief Minister of Andhra Pradesh (Ext. B-39), stating that he had been cheated by M/s A. Allauddin & Sons, as it had executed a sale deed in his favour, even though it had no title, and a very high rate of rent was fixed by the department, which should be reduced and till the matter is finally decided, a rent of Rs 569 per month should be accepted. The said application/petition was rejected by the Assistant Secretary to the Government, Food & Agriculture Department, vide letter dated 18-12-1970. Aggrieved, the respondent filed Writ Petition No. 187 of 1971 wherein an interim order dated 12-1-1971 was passed, to the effect that the recovery of rent for the period prior to 26-4-1969 would be made at the rate of Rs 568 per month instead of Rs 1279 per month. Subsequent to 26-4-1969, rent would be recovered at the rate of Rs 1279 per month. In case arrears are not paid by the respondent, he would be vacated from the suit land.

7. In view of the interim order of the High Court, the appellants issued a demand notice for a sum of Rs 45,484.62p. However, vide order dated 19-10-1971, the High Court directed the respondent to deposit a sum of Rs 30,000, in eight monthly instalments. The said writ petition was disposed of vide order dated 18-2-1972, asking the respondent to approach the appropriate forum to establish his rights over the suit land, or to make a representation to the State Government for this purpose.

8. The appellants served notice dated 8-4-1974, upon the respondent under Section 7 of the Land Encroachment Act, and the respondent submitted

a reply to the said show-cause notice on 24-6-1974. The matter was adjudicated and decided on 21-8-1974, under Section 6 of the Land Encroachment Act, and the respondent was directed to vacate the suit land. The respondent filed Writ Petition No. 5222 of 1974 before the High Court, however, the same was dismissed, after giving liberty to the respondent to approach the civil court. Thus, the respondent filed Original Suit No. 582 of 1974 for declaration of title and for injunction, restraining the appellants from evicting the said respondent-plaintiff from the property in dispute.

9. The appellants contested the suit by filing a written statement, and on the basis of the pleadings therein, a large number of issues were framed, including whether M/s A. Allauddin & Sons was actually the owner and possessor of the suit land; and whether it could transfer the suit land to the respondent-plaintiff, vide registered sale deed dated 11-11-1959. The City Civil Court, vide judgment and decree dated 25-4-1989 decreed the suit, holding that the Government was not the owner of the suit land, and that the respondent-plaintiff had a better title over it. Thus, he was entitled for declaration of title, and injunction as sought by him.

10. Aggrieved, the appellants preferred City Civil Court Appeal No. 72 of 1989 before the High Court, challenging the said judgment and decree dated 25-4-1989, which was dismissed vide judgment and decree dated 22-3-2004[1], affirming the judgment and decree of the trial court. Hence, this appeal.

11. Shri Amarendra Sharan, learned Senior Counsel appearing on behalf of the appellants, has submitted that the courts below misdirected themselves and did not determine the issue as regards, whether the vendor of the respondent-plaintiff had any title over the suit property. The same is necessary to determine the validity of the sale deed in favour of the respondent-plaintiff. The issue before the trial court was not whether the Government was the owner of the said land or not. No such issue was framed either. Moreover, such an issue could not be framed in view of the admission made by the respondent-plaintiff itself, as it had been paying rent regularly to the Government, and the same was admitted by it, by way of filing an application before the Government stating, that M/s A. Allauddin & Sons had cheated it by executing a sale deed in its favour, without any authority/title. It thus, requested the Government to execute a lease deed/rent deed in its favour. It was not its case, that in its earlier two writ petitions filed by it, it had acquired title over the land validly, or that M/s A. Allauddin & Sons, etc. had any title over the said suit land. The lease deed executed by the Government in favour of M/s A. Allauddin & Sons, dated 21-5-1943 must be considered in light of the provisions of Section 90 of the Evidence Act, 1872 (hereinafter referred to as "the Evidence Act"), and not the sale deed dated 11-11-1959, as the suit was filed in 1974, just after a period of 15 years of sale, and not 30 years. The courts below have erred in applying the provisions

1 *State of A.P.* v. *Star Bone Mill & Fertiliser Co.*, City Civil Court Appeal No. 72 of 1989, decided on 22-3-2004 (AP)

of Section 90 of the Evidence Act. The findings of fact recorded by the courts below are perverse, being based on no evidence and have been recorded by a misapplication of the law. Thus, the appeal deserves to be allowed.

12. On the contrary, Shri D. Rama Krishna Reddy, learned counsel appearing on behalf of the respondent, has opposed the appeal, contending that the findings of fact recorded by the courts below, do not warrant interference by this Court. It is evident from the revenue records that possession is prima facie evidence of ownership, and that the same is by itself, a limited title, which is good except to the true owner. The admission and receipt of tax constitutes admission of ownership, and the entries in the revenue record must hence, be presumed to be correct. In the revenue record, one Raja Ram has been shown to be the owner of the land, the Forest Department cannot claim any title or interest therein. The said appeal lacks merit, and is liable to be dismissed.

13. We have considered the rival submissions made by the learned counsel for the parties and perused the records.

14. Admittedly, the High Court erred in holding that the sale deed dated 11-11-1959, must be considered in the light of the provisions of Section 90 of the Evidence Act, instead of the period mentioned therein, thereby treating the appeal as a continuation of the suit. Therefore, the period of 30 years mentioned therein, has been calculated from 1959, till the date of the decision of the appeal i.e. 22-3-2004[1]. This view itself is impermissible and perverse, and cannot be accepted. The courts below have not given any reason, whatsoever, for the said lease deed to be treated as having been executed on 21-5-1943, under Section 90 of the Evidence Act and, thus, for believing that the land belonging to the Forest Department, which had in turn, given it to M/s A. Allauddin & Sons on lease.

15. Section 90 of the Evidence Act is based on the legal maxims: *nemo dat qui non habet* (no one gives what he has not got); and *nemo plus juris tribuit quam ipse habet* (no one can bestow or grant a greater right, or a better title than he has himself). This section does away with the strict rules, as regards the requirement of proof, which are enforced in the case of private documents, by giving rise to a presumption of genuineness, in respect of certain documents that have reached a certain age. The period is to be reckoned backward from the date of the offering of the document, and not any subsequent date i.e. the date of decision of suit or appeal. Thus, the said section deals with the admissibility of ancient documents, dispensing with proof as would be required, in the usual course of events in a usual manner.

16. There has been a clear admission by the respondent-plaintiff in its letter dated 22-5-1970 (Ext. B-39), to the effect that it had been cheated by M/s A. Allauddin & Sons, who had no title over the suit land, and sale deed dated 11-11-1959, had thus been executed in favour of the respondent-plaintiff by way of misrepresentation. The said application was

1 *State of A.P.* v. *Star Bone Mill & Fertiliser Co.*, City Civil Court Appeal No. 72 of 1989, decided on 22-3-2004 (AP)

rejected vide order dated 18-12-1970. While filing the writ petition, the respondent-plaintiff did not raise the issue of title of the Forest Department, in fact, the dispute was limited only to the extent of the amount of rent, and its case remained the same even in the second writ petition, when it was evicted under the Encroachment Act. The trial court framed various issues, and without giving any weightage to the documents filed by the appellant-defendant, decided the case in favour of the respondent-plaintiff, with total disregard to any legal requirements. The courts below have erred in ignoring the revenue record, particularly, the documents showing that the Government was the absolute owner of the suit land since at least 1920.

17. No person can claim a title better than he himself possesses. In the instant case, unless it is shown that M/s A. Allauddin & Sons had valid title, the respondent-plaintiff could not claim any relief whatsoever from court.

18. In *Gurunath Manohar Pavaskar* v. *Nagesh Siddappa Navalgund*[2] this Court held as under: (SCC p. 568, para 12)

> "*12.* A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Evidence Act."

19. In *Nair Service Society Ltd.* v. *K.C. Alexander*[3], dealing with the provisions of Section 110 of the Evidence Act, this Court held as under: (AIR p. 1173, para 15)

> "*15.* ... possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides."

20. In *Chief Conservator of Forests* v. *Collector*[4], this Court held that: (SCC p. 484, para 20)

> "*20.* ... presumption, which is rebuttable, is attracted when the possession is prima facie lawful and when the contesting party has no title."

21. The principle enshrined in Section 110 of the Evidence Act is based on public policy with the object of preventing persons from committing breach of peace by taking law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of Section 6 of the Specific Relief Act, 1963, Section 145 of the Code of Criminal Procedure, 1973, and Sections 154 and 158 of the Penal Code, 1860, were enacted. All the aforesaid provisions have the same object. The said presumption is read under Section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases

2 (2007) 13 SCC 565 : AIR 2008 SC 901
3 AIR 1968 SC 1165
4 (2003) 3 SCC 472 : AIR 2003 SC 1805

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where proof of actual possession cannot reasonably be expected, for instance, in the case of wastelands, or where nothing is known about possession one way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. Possession of the plaintiff is not prima facie wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It in fact means, that if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass/encroachment, etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under Section 110 of the Evidence Act.

22. The courts below have failed to appreciate that mere acceptance of municipal tax or agricultural tax by a person, cannot stop the State from challenging ownership of the land, as there may not be estoppel against the statute. Nor can such a presumption arise in case of grant of loan by a bank upon it hypothecating the property.

23. The trial court has recorded a finding to the effect that the name of one Raja Ram was shown as pattadar in respect of the land in dispute and the respondent-plaintiff is in possession. Therefore, the burden of proof was shifted on the Government to establish that the suit land belonged to it. The learned counsel for the respondent-plaintiff could not furnish any explanation before us as to who was this Raja Ram, pattadar and how the respondent-plaintiff was concerned with it. Moreover, in absence of his impleadment by the respondent-plaintiff such a finding could not have been recorded.

24. The courts below erred in holding that revenue records confer title for the reason that they merely show possession of a person. The courts below further failed to appreciate that the sale deed dated 11-11-1959 was invalid and inoperative, as the documents on record established that the vendor was merely a lessee of the Government.

25. In view of the above, we are of the considered opinion that findings of fact recorded by the courts below are perverse and liable to be set aside. The appeal succeeds and is allowed. The judgments of the courts below are hereby set aside. The suit filed by the respondent-plaintiff is dismissed.

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(2007) 13 Supreme Court Cases 565

(BEFORE S.B. SINHA AND H.S. BEDI, JJ.)

GURUNATH MANOHAR PAVASKAR AND OTHERS .. Appellants;

Versus

NAGESH SIDDAPPA NAVALGUND AND OTHERS .. Respondents.

Civil Appeal No. 5794 of 2007†, decided on December 11, 2007

A. Specific Relief Act, 1963 — Ss. 36, 38 and 39 — Permanent mandatory injunction and prohibitory injunction — Title to the land should first be proved by plaintiff seeking injunction — Suit filed by respondent-plaintiffs for direction for demolition of structure and removal of signboard raised by appellant-defendants on the suit land by encroaching thereon and for restoration of vacant possession and for injunction against defendants' interference with peaceful enjoyment of the property — Burden of proof on plaintiffs to prove that the suit land belonged to them — Suit cannot be decreed on the basis of revenue records alone but should be decided on appreciation of evidence keeping in view correct legal principles — Court erred in issuing permanent injunction in mandatory form without deciding title to the land

B. Evidence Act, 1872 — Ss. 83, 35, 101 and 110 — Revenue records — Survey map — Not a document of title — Only raises a presumption — Burden to prove title to the land on plaintiff

Held:

It is one thing to say that there does not exist any ambiguity as regards description of the suit land in the plaint with reference to the boundaries as mentioned therein, but it is another thing to say that the land in suit belongs to the respondents. It was for the plaintiffs to prove that the land in suit formed part of his own land. It was not for the defendants to do so. It was, therefore, not necessary for them to file an application for appointment of a Commissioner nor was it necessary for them to adduce any independent evidence to establish that the report of the Advocate Commissioner was not correct. The suit could not have been, therefore, decreed inter alia on the basis of survey map alone. In a case of this nature, even Section 83 of the Evidence Act would not have any application. (Para 10)

Furthermore, the High Court committed an error in also throwing the burden of proof upon the appellant-defendants without taking into consideration the provisions of Section 101 of the Evidence Act. A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Evidence Act. The courts below, were, therefore, required to appreciate the evidence keeping in view the correct legal principles in mind. (Paras 11 and 12)

Narain Prasad Aggarwal v. *State of M.P.*, (2007) 11 SCC 736 : (2007) 8 Scale 250, *relied on*

† Arising out of SLP (C) No. 20584 of 2005. From the Judgment and Order dated 4-7-2005 of the High Court of Karnataka at Bangalore in RSA No. 135 of 2003

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The courts below not only passed a decree for prohibitory injunction but also passed a decree for mandatory injunction. The High Court opined that the trial court could exercise discretion in this behalf. It is again one thing to say that the courts could pass an interlocutory order in the nature of mandatory injunction in exercise of its jurisdiction under Section 151 CPC on the premise that a party against whom an order of injunction was passed, acted in breach thereof; so as to relegate the parties to the same position as if the order of injunction has not been violated, but, it is another thing to say that the courts shall exercise the same power while granting a decree of permanent injunction in mandatory form without deciding the question of title and/or leaving the same open. How, in the event the structures are demolished, it would be possible for the appellants to work out their remedies in accordance with law in regard to the title of the property has not been spelt out by the High Court. (Para 13)

Therefore, the interest of justice would be subserved if the impugned judgments are set aside and the matter is remitted to the learned trial Judge for consideration of the matter afresh. (Para 14)

Appeal allowed R-M/A/37082/S

Advocates who appeared in this case :
S.N. Bhat, Advocate, for the Appellants;
Ms Kiran Suri and Rajesh Mahale, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2007) 11 SCC 736 : (2007) 8 Scale 250, *Narain Prasad Aggarwal* v. *State of M.P.* 568*e*

The Judgment of the Court was delivered by

S.B. SINHA, J.— Leave granted.

2. The defendants before the trial court are the appellants herein.

3. The respondent-plaintiffs filed a suit against the appellants praying inter alia for the following reliefs:

> "(*a*) That the encroached portion of the suit property by erection of structure measuring 369 1/9 sq yd be directed to be demolished at the cost and risk of Defendants 1 to 5 and consequently the defendants be further directed to maintain the rules of set back in respect of their remaining construction enabling the plaintiffs to use and enjoy the free light and air to their property and similarly Defendant 6 be directed to remove the signboard and the firm from the encroached area of the suit property. Further, the defendants be directed to give the respective vacant possession of the suit land to the plaintiffs.
>
> (*aa*) A decree of permanent injunction against the defendants, their agents, their relative or anybody on their behalf to interfere with the plaintiffs' peaceful possession and enjoyment of suit property...."

4. The respondents contended that they are owners of a portion of Survey No. 1008/1 bearing CTS Nos. 4823/A-17 and 4823/A-18 measuring 662 2/9 and 533 3/9 sq yd respectively and the appellants who are the owners of the abutting land bearing CTS No. 4823/A-1 had encroached upon a portion of CTS Nos. 4823/A-17 and 4823/A-18 measuring 249 1/9 and 120 sq yd respectively. The plaintiffs purchased the said plots by a deed of sale dated

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7-11-1984, whereas the date of purchase made by the defendants dated 17-8-1992.

5. The learned trial Judge having regard to the pleadings of the parties framed issues; Issue 3 whereof reads as under:

> "*3.* Whether Defendants 1 to 5 prove that the vendor of the plaintiff by way of fabrication of false documents had sold the suit schedule property to these plaintiffs, thus, the plaintiffs are not the owners of the suit schedule property?"

It was answered stating:

> "My answers to the above issues are as follows:
>
> * * *
>
> Issue 3 does not arise."

6. During the pendency of the said suit, an application for injunction was filed. Allegedly, the appellants raised constructions upon the suit land in violation of the said order of injunction. The learned trial Judge in regard to the title of the plaintiffs over the suit land held:

> "... According to the learned counsel for the plaintiff since CTS No. 4823/A-1 is completely acquired by Municipal Corporation, Belgaum for Malmaruti Extension Scheme then the property of Defendants 1 to 6 is not in existence in the name of the defendants. But according to me since Defendants 1 to 5 also have purchased the property through a registered sale deed and also their vendors have also purchased the said property through a registered sale deed and as such it cannot be said that the property of the defendants is not in existence. But at the same time the say of the defendant cannot be taken into believed (sic) that CTS Nos. 4823/A-17 and 4823/A-18 are not in existence. When in the survey map as well as in other documents these properties are clearly demarcated and identified then according to me, these properties have been clearly demarcated in relevant records...."

7. The High Court affirmed the said findings stating:

> "It is also clear from the perusal of the judgment and decree passed by the courts below that both the courts below have rightly decided on the basis that it is unnecessary to give any decision on the title of the property as the suit is for permanent and mandatory injunction and the trial court has rightly observed that it is always open to the defendants to work out their remedy in accordance with law, regarding their title to the property CTS No. 4823/A-1 and no finding could be given on title in the present case and when there is no finding on the title of the property in the present case, it is clear that it is always open to the defendants to work out their remedy, in accordance with law. It is clear from the perusal of the material on record that Defendant 6 who also suffered decree of injunction and permanent injunction though had filed first appeal before the lower appellate court has not chosen to challenge the judgment and decree passed by first appellate court in RA No. 252 of 2001...."

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8. Indisputably, an Advocate Commissioner was appointed. He filed a report. An objection thereto was also filed. He, however, could not be cross-examined. His report, therefore, could not have been taken into consideration although the same formed part of the record.

9. The High Court although took into consideration the fact that the plaintiffs did not seek for any declaration of title, as noticed hereinbefore, opined that the question of title can be gone into in an appropriate suit. All the courts relied on Ext. P-35 which was allegedly produced by the appellants but were made use of by the respondents, wherein it had been shown that Chalta No. 63 was allotted in respect of CTS No. 4823/A-1, Chalta No. 62-A was allotted in respect of CTS No. 4823/A-17 and Chalta No. 62-B was allotted in respect of CTS No. 4823/A-18.

10. It is one thing to say that there does not exist any ambiguity as regards description of the suit land in the plaint with reference to the boundaries as mentioned therein, but it is another thing to say that the land in suit belongs to the respondents. It was for the plaintiffs to prove that the land in suit formed part of CTS Nos. 4823/A-17 and 4823/A-18. It was not for the defendants to do so. It was, therefore, not necessary for them to file an application for appointment of a Commissioner nor was it necessary for them to adduce any independent evidence to establish that the report of the Advocate Commissioner was not correct. The suit could not have been, therefore, decreed inter alia on the basis of Ext. P-35 alone. In a case of this nature, even Section 83 of the Evidence Act would not have any application.

11. Furthermore, the High Court committed an error in also throwing the burden of proof upon the appellant-defendants without taking into consideration the provisions of Section 101 of the Evidence Act. In *Narain Prasad Aggarwal* v. *State of M.P.*[1] this Court opined: (SCC p. 746, para 19)

> "*19.* Record-of-right is not a document of title. Entries made therein in terms of Section 35 of the Evidence Act although are admissible as a relevant piece of evidence and although the same may also carry a presumption of correctness, but it is beyond any doubt or dispute that such a presumption is rebuttable."

12. A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Evidence Act. The courts below, were, therefore, required to appreciate the evidence keeping in view the correct legal principles in mind.

13. The courts below appeared to have taken note of the entries made in the revenue records wherein the name of Municipal Corporation, Belgaum appeared in respect of CTS No. 4823/A-1. We have, however, noticed that the learned trial Judge proceeded on the basis that the said property may be belonging to the appellant-defendants. The courts below not only passed a decree for prohibitory injunction but also passed a decree for mandatory

1 (2007) 11 SCC 736 : (2007) 8 Scale 250

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injunction. The High Court opined that the trial court could exercise discretion in this behalf. It is again one thing to say that the courts could pass an interlocutory order in the nature of mandatory injunction in exercise of its jurisdiction under Section 151 of the Code of Civil Procedure on the premise that a party against whom an order of injunction was passed, acted in breach thereof; so as to relegate the parties to the same position as if the order of injunction has not been violated, but, it is another thing to say that the courts shall exercise the same power while granting a decree of permanent injunction in mandatory form without deciding the question of title and/or leaving the same open. How, in the event the structures are demolished, it would be possible for the appellants to work out their remedies in accordance with law in regard to the title of the property has not been spelt out by the High Court.

14. We, therefore, are of the opinion that the interest of justice would be subserved if the impugned judgments are set aside and the matter is remitted to the learned trial Judge for consideration of the matter afresh. The plaintiffs may, if they so desire, file an application for amendment of plaint praying inter alia for declaration of his title as also for damages as against the respondents for illegal occupation of the land. It would also be open to the parties to adduce additional evidence(s). The learned trial Judge may also appoint a Commissioner for the purpose of measurement of the suit land, whether an Advocate Commissioner or an officer of the Revenue Department.

15. Before us, additional documents have been filed by the appellants showing some subsequent events. It would be open to the defendants to file an application for adduction of additional evidence before the trial Judge which may be considered on its own merits.

16. The appeal is allowed with the aforementioned observations. We would request the trial court to consider the desirability of disposing of the matter as expeditiously as possible and preferably within a period of six months from the date of communication of this order. Costs of this appeal shall be the cost in the suit.

(2007) 13 Supreme Court Cases 569

(BEFORE DR. ARIJIT PASAYAT AND P.P. NAOLEKAR, JJ.)

STATE OF UTTAR PRADESH .. Appellant;

Versus

ABDUL KARIM AND OTHERS .. Respondents.

Criminal Appeal No. 364 of 2002†, decided on July 26, 2007

Penal Code, 1860 — Ss. 302/34 — Benefit of doubt — Identification of accused — Discrepancy in evidence — Deceased assaulted in a field resulting in his death — Deceased's widow claimed to have seen the assailants while they were escaping after the assault from a distance of

† From the Judgment and Order dated 15-5-2000 of the High Court of Judicature at Allahabad in Criminal Appeal No. 1019 of 1980

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High Court upheld the decision of the courts below that the principles of natural justice having been violated such order of dismissal is vitiated.

14. These appeals stand dismissed.

Civil Appeals Nos. 2946, 3269, 3273 of 2001 and 2602 of 2000

15. These appeals arise out of civil suits decreeing the claim of the respondents that the disciplinary authority should not have terminated their services for unauthorised absence, which claim has been upheld by the trial court or the first appellate court or both and the High Court has not interfered with the same.

16. These appeals are covered by the decisions in *Harihar Gopal case*[2] and *Ram Singh case*[14]. Hence, these appeals are allowed and the order of the High Court and decisions of courts below stand set aside restoring that of the disciplinary authority.

Civil Appeals Nos. 3274 and 3275 of 2001

17. These appeals be delinked and posted separately.

(2003) 3 Supreme Court Cases 472

(BEFORE SYED SHAH MOHAMMED QUADRI AND ASHOK BHAN, JJ.)

CHIEF CONSERVATOR OF FORESTS,
GOVT. OF A.P. .. Appellant;

Versus

COLLECTOR AND OTHERS .. Respondents.

Civil Appeals No. 8580 of 1994† with No. 9097 of 1995,
decided on February 18, 2003

A. **Constitution of India — Arts. 226 and 300 — Maintainability — Misdescription/misjoinder/non-joinder — Officer of Govt. cannot maintain petition in the name of his post — State Govt. has to be a party in such cases — Civil Procedure Code, 1908, S. 79**

B. **Constitution of India — Arts. 300 and 226 & 136 — Civil Procedure Code, 1908 — S. 79 and Or. 1 Rr. 9, 10 & Or. 27 R. 1 — Suit or proceedings by or against Government — State concerned is necessary party in a dispute relating to property of the State and must be impleaded in the suit or proceeding — Suit filed or proceedings initiated by any individual officer of the Govt. in the name of the post he is holding which is not a juristic person, would not be maintainable by reason of misjoinder or non-joinder of necessary party — Writ petition/appeal preferred in the name of Chief Conservator of Forests, held, not maintainable**

C. **Civil Procedure Code, 1908 — Or. 1 Rr. 9, 10 — Misjoinder or non-joinder and misdescription or misnomer of party — Distinction**

D. **Constitution of India — Art. 131 — Disputes between government departments cannot be contested in court — States/Union of India must evolve a mechanism for resolving interdepartmental controversies — Constitution of committees suggested which should consist of Chief Secretary, Secretaries of the departments concerned, Secretary of Law and**

† From the Judgment and Order dated 24-1-1989 of the Andhra Pradesh High Court in WP No. 3414 of 1982

Secretary of Finance (where financial commitments are involved) whose decision should be binding on all departments concerned

E. Evidence Act, 1872 — S. 110 — Presumption of ownership of the possessor — Burden to rebut the presumption lies on the person who denies such ownership — Presumption that the land in question was ancestral land and private home farm — Plaintiffs claiming to be pattedars of the land in question proving long and peaceful enjoyment of the land — Held on facts, though there was no proof of conferment of patta and acquisition of title, a presumption of ownership arose in favour of the plaintiff and in absence of any evidence on behalf of the Govt. rebutting the presumption, claim of plaintiff must be upheld

The lands in question in Jatprole Jagir, Kollapur taluk, Mahboobnagar district were situated in the erstwhile Nizam State of Hyderabad. After accession of the Nizam State of Hyderabad with the Union of India and coming into force of the A.P. (Abolition of Jagirs) Regulations, 1358 Fasli, all jagirs, including Jatprole Jagir, stood abolished from that date and their administration stood vested in the State. Respondents 3 and 4 are LRs of the last Jagirdar of the said jagir. Notification under Section 29 of the A.P. (Telangana Area) Forest Act, 1355 Fasli was issued enumerating 14 villages of Kollapur taluk, named as Kollapur range, but Villages Asadpur and Malachinthapalli did not figure in the notification and according to the pattedars, the forest lands in question in those villages continued to remain in their possession. The pattedars filed an application under Section 87 of the A.P. (Telangana Area) Land Revenue Act, 1317 Fasli to rectify an alleged mistake that the name of the khatedar was not shown against the said survey numbers which were shown as "*mahasura*" (protected). The notification was made after enquiry. Under the Forest Act, a person who transports forest produce is required to obtain transit permit. Though in the past, the pattedars were transporting forest produce on obtaining transit permits, it was, however, denied to them on their application made on 14-10-1966. The Tahsildar of those villages recommended granting of transit permits showing the lands as patta lands. It was for the first time that the Chief Conservator of Forests expressed that the lands in question were forest lands and doubted they were patta lands of the pattedars. The Tahsildar replied that the lands in question were patta lands and assessed to land revenue; there was nothing on record to show that they were taken over along with the jagir and other forest area under the supervision of the Government. In view of the dispute between the two departments of the Government with regard to the title to the lands in question, the Government of Andhra Pradesh issued orders on 17-8-1979 directing the Commissioner of Survey, Settlement and Land Records to make an enquiry under Section 166-B of the Land Revenue Act and to pass a speaking order after hearing the parties concerned. Accordingly, the Commissioner conducted an enquiry and opined that the order of the Collector, passed under Section 87 of the Land Revenue Act, was correct and did not call for any interference therewith. The Government apparently accepted that order of the Commissioner as no further steps were taken by it to correct or set aside that order. However, the doubt in the mind of the Chief Conservator of Forests still persisted and he filed a writ petition in the High Court challenging the order of the Commissioner of Survey, Settlement and Land Records. As during pendency of the enquiry the pattedars had filed a suit in the Court of Subordinate Judge for a declaration of title, recovery of compensation for the lands in question and rendition of accounts, the trial court on consideration of the evidence on record,

decreed the suit with costs, insofar as the reliefs of declaration of title and rendition of accounts but declined the relief of award of compensation/damages. Aggrieved by the judgment and decree of the Subordinate Judge, the Land Acquisition Officer and the Govt. of A.P. represented by the Collector filed an appeal before the High Court. The writ petition and the appeal were heard together and dismissed by the High Court by a common judgment. Hence the appeals before the Supreme Court. The respondent pattedars raised a preliminary objection as to the maintainability of the writ petition filed by the Chief Conservator of Forests as well as the appeal arising therefrom on the ground that no individual officer of the Government under the scheme of the Constitution or the Code of Civil Procedure can file a suit or initiate any proceeding in the name of the post he is holding, which is not a juristic person.

Dismissing the appeals with costs, the Supreme Court

Held :

It was not only inappropriate but also illegal for the Chief Conservator of Forests, though he might have done so in all good faith, to have questioned the order of the Commissioner of Survey, Settlement and Land Records before the High Court. The Chief Conservator of Forests as the petitioner can neither be treated as the State of Andhra Pradesh nor can it be a case of misdescription of the State of Andhra Pradesh. The fact is that the State of Andhra Pradesh was not the petitioner. Therefore, the writ petition was not maintainable in law. The High Court, had it deemed fit so to do, would have added the State of Andhra Pradesh as a party; however, it proceeded, erroneously, as if the State of Andhra Pradesh was the petitioner which, as a matter of fact, was not the case and could not have been treated as such. As the writ petition itself was not maintainable, it follows as a corollary that the appeal by the Chief Conservator of Forests is also not maintainable. It is not possible to accept the contention that merely because the officer concerned had obtained the permission of the Government to file an appeal, which was not placed before the Supreme Court, the writ petition and the appeal should be treated as an appeal by the Government of Andhra Pradesh. The permission granted to the authority concerned might be a permission to file an appeal which cannot reasonably be construed as authorisation to file the appeal in his own name, contrary to law. It could only be a permission to file the appeal in the name of the State of Andhra Pradesh in accordance with the provisions of the Constitution and CPC. (Para 16)

The State is the necessary party and should be impleaded as provided in Article 300 of the Constitution and Section 79 CPC viz. in the name of the State/Union of India, as the case may be, lest the suit will be bad for non-joinder of the necessary party. Every post in the hierarchy of the posts in the government set-up, from the lowest to the highest, is not recognised as a juristic person nor can the State be treated as represented when a suit/proceeding is in the name of such offices/posts or the officers holding such posts. Therefore, in the absence of the State in the array of parties, the cause will be defeated for non-joinder of a necessary party to the lis, in any court or tribunal. This principle does not apply to a case where an official of the Government acts as a statutory authority and sues or pursues further proceeding in its name because in that event it will not be a suit or proceeding for or on behalf of a State/Union of India but by the statutory authority as such. (Para 13)

A legal entity — a natural person or an artificial person — can sue or be sued in his/its own name in a court of law or a tribunal. It is not merely a procedural formality but is essentially a matter of substance and considerable

significance. That is why there are special provisions in the Constitution and the Code of Civil Procedure as to how the Central Government or the Government of a State may sue or be sued. So also there are special provisions in regard to other juristic persons specifying as to how they can sue or be sued. In giving description of a party it will be useful to remember the distinction between misdescription or misnomer of a party and misjoinder or non-joinder of a party suing or being sued. In the case of misdescription of a party, the court may at any stage of the suit/proceedings permit correction of the cause-title so that the party before the court is correctly described; however, a misdescription of a party will not be fatal to the maintainability of the suit/proceedings. Though Rule 9 of Order 1 CPC mandates that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, it is important to notice that the proviso thereto clarifies that nothing in that Rule shall apply to non-joinder of a necessary party. Therefore, care must be taken to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise, the suit or the proceedings will have to fail. Rule 10 of Order 1 CPC provides remedy when a suit is filed in the name of the wrong plaintiff and empowers the court to strike out any party improperly joined or to implead a necessary party at any stage of the proceedings. (Para 12)

Under the scheme of the Constitution, Article 131 confers original jurisdiction on the Supreme Court in regard to a dispute between two States of the Union of India or between one or more States and the Union of India. It was not contemplated by the framers of the Constitution or CPC that two departments of a State or the Union of India will fight a litigation in a court of law. It is neither appropriate nor permissible for two departments of a State or the Union of India to fight litigation in a court of law. Indeed, such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various departments of the Government are its limbs and, therefore, they must act in coordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The States/Union of India must evolve a mechanism to set at rest all interdepartmental controversies at the level of the Government and such matters should not be carried to a court of law for resolution of the controversy. The facts of the present case make out a strong case that there is a felt need of setting up of committees by the State Government also to resolve the controversy arising between various departments of the State or the State and any of its undertakings. It would be appropriate for the State Governments to set up a committee consisting of the Chief Secretary of the State, the Secretaries of the departments concerned, the Secretary of Law and where financial commitments are involved, the Secretary of Finance. The decision taken by such a committee shall be binding on all the departments concerned and shall be the stand of the Government. (Paras 14 and 15)

Oil and Natural Gas Commission v. *CCE*, 1992 Supp (2) SCC 432; *Oil and Natural Gas Commission* v. *CCE*, 1995 Supp (4) SCC 541, *relied on*

As regards the appeal which arose out of the field by the pattedars, the pattedars had proved their possession of the lands in question from 1312 Fasli (1902 AD) as pattedars. There is long and peaceful enjoyment of the lands in question but no proof of conferment of patta on the late Raja and the facts

relating to acquisition of title are not known. The appellant State could not prove its title to the lands. Villages Asadpur and Malachinthapalli did not figure in the notification issued under Section 29 of the A.P. (Telangana Area) Forests Act. Even otherwise also, the notification does not show anything more than the fact that the Government has formed a protected forest area. That by itself does not extinguish the rights of the private owners of the land nor does it show that the lands in question vest in the State. A plain reading of the statutory order passed by the Commissioner of Survey, Settlement and Land Records under Section 166-B of the Land Revenue Act on 5-12-1981 places the matter beyond doubt that the suit lands were patta lands of the pattedars. On these facts, the presumption under Section 110 of the Evidence Act applies and the appellants have to prove that the pattedars are not the owners. The appellants placed no evidence on record to rebut the presumption. Consequently, the pattedars' title to the land in question has to be upheld. Therefore, the High Court has committed no error in confirming the said order of the Commissioner of Survey, Settlement and Land Records and the judgment and decree of the trial court.

(Paras 22 and 23)

Section 110 of the Evidence Act embodies the principle that possession of a property furnishes prima facie proof of ownership of the possessor and casts burden of proof on the party who denies his ownership. The presumption, which is rebuttable, is attracted when the possession is prima facie lawful and when the contesting party has no title. (Para 20)

Nair Service Society Ltd. v. *K.C. Alexander*, AIR 1968 SC 1165 : 1968 Ker LT 182, *relied on*

Inasmuch as no cross-appeal was filed by the said respondent pattedars in regard to the denial of relief of the compensation, the interim order passed by this Court on 1-12-1994 directing payment of one-half of the compensation shall stand vacated. (Para 24)

R-M/AZ/27573/C

Advocates who appeared in this case :

Ms K. Amareswari, P.P. Rao and Harish N. Salve, Senior Advocates (T.V. Ratnam, K. Subba Rao, G. Venu Babu, G. Prabhakar, Ms T. Anamika, P.S. Narasimha, G. Balaji, P. Sridhar, Anang Bhattacharya, V.G. Pragasam and P. Sridhar, Advocates, with them) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. 1995 Supp (4) SCC 541, *Oil and Natural Gas Commission* v. *CCE* 482*a-b*
2. 1992 Supp (2) SCC 432, *Oil and Natural Gas Commission* v. *CCE* 482*a-b*
3. AIR 1968 SC 1165 : 1968 Ker LT 182, *Nair Service Society Ltd.* v. *K.C. Alexander* 484*d-e*

The Judgment of the Court was delivered by

SYED SHAH MOHAMMED QUADRI, J.— These two appeals are from the common judgment of a Division Bench of the High Court of Andhra Pradesh in Writ Petition (C) No. 3414 of 1982 and Appeal Suit No. 2291 of 1986 dated 24-1-1989.

2. The appeals arise on the same facts and one set of the parties is common. The subject-matter of litigation is an extent of acres 2423.37 in Jatprole Jagir, Kollapur taluk, Mahboobnagar district in the erstwhile Nizam's State of Hyderabad. After the accession of the Nizam's State of Hyderabad with the Union of India, the Andhra Pradesh (Abolition of Jagirs) Regulations, 1358 Fasli (hereinafter referred to as "the Regulations") came

into force on 20-9-1949. Under these Regulations, all jagirs, including Jatprole Jagir, stood abolished from that date and their administration stood vested in the State. Raja S.V. Jagannadha Rao was the last Jagirdar. Respondents 3 and 4 are his legal representatives (hereinafter referred to as "the pattedars"). It is the case of the pattedars that when the State took over the jagir, the Forest Department of the State took under its control the forest land, measuring acres 1,20,824. However, the lands comprised in Survey No. 11 of Asadpur village measuring acres 1523 and Survey No. 168 of Malachinthapalli village measuring acres 9000 continued to remain in the possession of the Raja as his patta lands. Soon thereafter, Notification No. 282 under Section 29 of the Andhra Pradesh (Telangana Area) Forest Act, 1355 Fasli (for short "the Forest Act") was issued on 4-12-1950. The notification enumerated fourteen villages comprising an extent of 93,030 acres of Kollapur taluk, Mahboobnagar district, which was named as Kollapur range. It appears that a notification under Section 30 of the Forest Act was also issued but that notification is not on record. In the year 1953, resurvey of the erstwhile jagir was conducted. The lands in question, namely, Survey No. 40 (old) was assigned Survey No. 11 and Survey No. 241 (old) was assigned Survey No. 168; however, the finalisation of the survey was done in 1962. The pattedars filed an application under Section 87 of the Andhra Pradesh (Telangana Area) Land Revenue Act, 1317 Fasli (for short "the Land Revenue Act") to rectify the mistake noted in the settlement record pursuant to the said resurvey. The mistake was alleged to be that the name of the khatedar was not shown against the said survey numbers which were shown as "mahasura" (protected). The District Collector, after conducting the necessary enquiry and on a joint inspection in which the Land Record Assistant and the Forest Range Officer participated and in which working plan was produced showing the area as the patta of the late Jagirdar, passed an order on 25-4-1966 directing rectification of the settlement record. Based on the said order, the Director of Settlement rectified the records and issued a supplementary *setwar* on 11-5-1966.

3. Under the Forest Act, a person who transports forest produce is required to obtain transit permit. Though in the past, the pattedars were transporting forest produce on obtaining transit permits, it was, however, denied to them on their application made on 14-10-1966. It is worth noticing that the Tahsildar of those villages recommended granting of transit permits showing the lands as patta lands. It was for the first time that the Forest Department appeared to have taken the plea that the lands in question were forest lands and the Chief Conservator of Forests (Appellant 1 in Civil Appeal No. 8580 of 1994) expressed that the lands in question were forest lands and doubted they were patta lands of the pattedars. The doubt expressed by the Chief Conservator of Forests in regard to the nature of the said lands led to a further probe into the matter as to whether the lands comprised in the aforementioned survey numbers were treated as part of the jagir at the time of taking over the jagir or whether they were treated as patta lands of the Raja. In view of the queries made by the Chief Conservator of Forests, the Collector, Mahboobnagar district formulated as many as five questions and directed the Tahsildar to furnish replies thereto. On 2-5-1972,

the Tahsildar replied that the lands in question were patta lands and assessed to land revenue; there was nothing on record to show that they were taken over along with the jagir and other forest area under the supervision of the Government. Letter No. D.Dis.J/2706/72 dated 21-10-1972 from the RDO addressed to the Collector discloses that from the accounts maintained for the period prior to the resurvey in the year 1953, rectification of the record and issuance of supplementary *setwar*, it was proved that the lands in question were the personal property of the late Raja. Further, on 16-1-1974, a letter was addressed by the Director of Settlement to the Chief Conservator of Forests that the lands in question were in possession of the respondents prior to the abolition of jagirs and that the matter did not require any further examination as the rectification of record was made under Section 87 of the Land Revenue Act. There is a reference to the report of the RDO dated 31-10-1975, which was made on inspection and after making local enquiries, stating that the lands were in possession of the pattedars as private patta land. While so, the Government of Andhra Pradesh proposed to acquire the lands in question which were likely to be submerged upon completion of the Srisailam Project. Two notifications were issued under Section 4 of the Land Acquisition Act, 1894. The first was issued on 31-1-1975 proposing to acquire 410 acres out of the land in Survey No. 11 in Asadpur village and the second was issued on 4-11-1976 proposing to acquire an extent of 45 acres and 20 guntas of land in Survey No. 168 in Malachinthapalli village for Srisailam Project. However, the Government of Andhra Pradesh issued orders cancelling the said notifications issued under Section 4 of the Land Acquisition Act, 1894 and withdrawing from the acquisition, on the ground that the said lands were government lands, on 16-2-1978. The said order was assailed by the pattedars in Writ Petition (C) No. 2084 of 1978 before the High Court of Andhra Pradesh. The High Court quashed the recital in the impugned order of the Government that the said lands belonged to the Government but in other respects maintained the same by partly allowing the writ petition on 21-2-1979. This gave rise to filing of a declaratory suit by the pattedars and ordering further enquiry into the matter by the Government of Andhra Pradesh.

4. In view of the dispute between the two departments of the Government with regard to the title to the lands in question, the Government of Andhra Pradesh issued orders on 17-8-1979 directing the Commissioner of Survey, Settlement and Land Records to make an enquiry under Section 166-B of the Land Revenue Act and to pass a speaking order after hearing the parties concerned. While the enquiry was pending, the pattedars filed the suit (OS No. 73 of 1979, which was renumbered as OS No. 7 of 1984) in the Court of the learned Subordinate Judge, Wanaparthy, Mahboobnagar district, for a declaration of title, recovery of compensation for the lands in question and for rendition of accounts. Pursuant to the said order of the Government, the Commissioner conducted an enquiry, heard both the parties and opined that the order of the Collector, passed under Section 87 of the Land Revenue Act, was correct and did not call for any interference therewith. That order was passed by the Commissioner on 5-12-1981. The Government apparently accepted that order of the Commissioner as no further steps were taken by it

to correct or set aside that order. However, the doubt in the mind of the Chief Conservator of Forests still persisted and he filed Writ Petition (C) No. 3414 of 1982 in the High Court of Andhra Pradesh challenging the order of the Commissioner of Survey, Settlement and Land Records dated 5-12-1981.

5. The trial court, after conducting trial and on consideration of the evidence on record, decreed the suit with costs, insofar as the reliefs of declaration of title and rendition of accounts but declined the relief of award of compensation/damages by judgment and decree dated 25-3-1985. Aggrieved by the judgment and decree of the learned Subordinate Judge, the defendants — the Land Acquisition Officer, Mahboobnagar district and the Government of Andhra Pradesh represented by the Collector, Mahboobnagar — filed Appeal No. 2291 of 1986, before the High Court of Andhra Pradesh. The aforementioned Writ Petition (C) No. 3414 of 1982 and Appeal No. 2291 of 1986 were heard together and dismissed by a Division Bench of the High Court by a common judgment on 24-1-1989, which is the subject-matter of challenge in the appeals before us.

6. Mr P.P. Rao, learned Senior Counsel appearing for the respondent pattedars in Civil Appeal No. 8580 of 1994 and Mr Harish N. Salve, learned Senior Counsel appearing for the respondent pattedars in Civil Appeal No. 9097 of 1995, raised a preliminary objection as to the maintainability of the writ petition filed by the Chief Conservator of Forests as well as the appeal arising therefrom. Article 300 of the Constitution of India, it is contended, provides that the Government of a State may sue or be sued in the name of the State; Section 79 of the Code of Civil Procedure, 1908 directs that the State shall be the authority to be named as plaintiff or defendant in a suit by or against the Government and Section 80 thereof directs notice to the Secretary to that State or the Collector of the district before the institution of the suit; and Rule 1 of Order 27 lays down as to who should sign the pleadings. No individual officer of the Government under the scheme of the Constitution or the Code of Civil Procedure can file a suit or initiate any proceeding in the name of the post he is holding, which is not a juristic person. Ms K. Amareswari, learned Senior Counsel appearing for the appellants, has argued that before filing the appeal, the Chief Conservator of Forests had obtained orders and, therefore, the writ petition and the appeal should be deemed to be filed by the Government of Andhra Pradesh; not naming the Government of Andhra Pradesh in the writ petition as the petitioner or in the appeal as the appellant is only a procedural matter and, therefore, it is not fatal to the maintainability of the writ petition and the appeal.

7. To appreciate the contention of the learned Senior Counsel, it will be useful to refer to the relevant provisions of the Constitution of India (for short "the Constitution") and the Code of Civil Procedure, 1908 (for short "CPC"). Article 300 of the Constitution falls in Chapter III, which deals with property, contract, rights, liabilities, obligations and suits. Article 300 reads as follows:

> "300. *Suits and proceedings.*—(1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any

provisions which may be made by an Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution—

(*a*) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(*b*) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings."

8. From a perusal of the provision, extracted above, it is evident that the Government of India as also the Government of a State may sue or be sued by the name of the Union of India or by the name of the State respectively, subject, of course, to any provisions which may be made by an Act of Parliament or of the legislature of such State by virtue of powers conferred by the Constitution.

9. Section 79 CPC deals with suits by or against the Government. It reads thus:

"79. *Suits by or against Government.*—In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be—

(*a*) in the case of a suit by or against the Central Government, the Union of India, and

(*b*) in the case of a suit by or against a State Government, the State."

10. A plain reading of Section 79 shows that in a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, in the case of the Central Government, the Union of India and in the case of the State Government, the State, which is suing or is being sued.

11. Rule 1 of Order 27, as mentioned above, deals with suits by or against the Government or by officers in their official capacity. Rule 1 of Order 27 CPC says that in any suit by or against the Government, the plaint or the written statement shall be signed by such person as the Government may by general or special order appoint in that behalf and shall be verified by any person whom the Government may so appoint.

12. It needs to be noted here that a legal entity — a natural person or an artificial person — can sue or be sued in his/its own name in a court of law or a tribunal. It is not merely a procedural formality but is essentially a matter of substance and considerable significance. That is why there are special provisions in the Constitution and the Code of Civil Procedure as to how the Central Government or the Government of a State may sue or be sued. So also there are special provisions in regard to other juristic persons specifying as to how they can sue or be sued. In giving description of a party it will be useful to remember the distinction between misdescription or misnomer of a party and misjoinder or non-joinder of a party suing or being sued. In the

case of misdescription of a party, the court may at any stage of the suit/proceedings permit correction of the cause-title so that the party before the court is correctly described; however, a misdescription of a party will not be fatal to the maintainability of the suit/proceedings. Though Rule 9 of Order 1 CPC mandates that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, it is important to notice that the proviso thereto clarifies that nothing in that Rule shall apply to non-joinder of a necessary party. Therefore, care must be taken to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise, the suit or the proceedings will have to fail. Rule 10 of Order 1 CPC provides remedy when a suit is filed in the name of the wrong plaintiff and empowers the court to strike out any party improperly joined or to implead a necessary party at any stage of the proceedings.

13. The question that needs to be addressed is, whether the Chief Conservator of Forests as the appellant-petitioner in the writ petition/appeal is a mere misdescription for the State of Andhra Pradesh or whether it is a case of non-joinder of the State of Andhra Pradesh — a necessary party. In a lis dealing with the property of a State, there can be no dispute that the State is the necessary party and should be impleaded as provided in Article 300 of the Constitution and Section 79 CPC viz. in the name of the State/Union of India, as the case may be, lest the suit will be bad for non-joinder of the necessary party. Every post in the hierarchy of the posts in the government set-up, from the lowest to the highest, is not recognised as a juristic person nor can the State be treated as represented when a suit/proceeding is in the name of such offices/posts or the officers holding such posts, therefore, in the absence of the State in the array of parties, the cause will be defeated for non-joinder of a necessary party to the lis, in any court or tribunal. We make it clear that this principle does not apply to a case where an official of the Government acts as a statutory authority and sues or pursues further proceeding in its name because in that event, it will not be a suit or proceeding for or on behalf of a State/Union of India but by the statutory authority as such.

14. Under the scheme of the Constitution, Article 131 confers original jurisdiction on the Supreme Court in regard to a dispute between two States of the Union of India or between one or more States and the Union of India. It was not contemplated by the framers of the Constitution or CPC that two departments of a State or the Union of India will fight a litigation in a court of law. It is neither appropriate nor permissible for two departments of a State or the Union of India to fight litigation in a court of law. Indeed, such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various departments of the Government are its limbs and, therefore, they must act in coordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The States/Union of

India must evolve a mechanism to set at rest all interdepartmental controversies at the level of the Government and such matters should not be carried to a court of law for resolution of the controversy. In the case of disputes between public sector undertakings and the Union of India, this Court in *Oil and Natural Gas Commission* v. *CCE*[1] called upon the Cabinet Secretary to handle such matters. In *Oil and Natural Gas Commission* v. *CCE*[2] this Court directed the Central Government to set up a committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of the Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to court or to a tribunal without the matter having been first examined by the Committee and its clearance for litigation. The Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior officers only should be nominated so that the Committee would function with status, control and discipline.

15. The facts of this appeal, noticed above, make out a strong case that there is a felt need of setting up of similar committees by the State Government also to resolve the controversy arising between various departments of the State or the State and any of its undertakings. It would be appropriate for the State Governments to set up a committee consisting of the Chief Secretary of the State, the Secretaries of the departments concerned, the Secretary of Law and where financial commitments are involved, the Secretary of Finance. The decision taken by such a committee shall be binding on all the departments concerned and shall be the stand of the Government.

16. Now, reverting to the facts of the case on hand, we are of the view that after the said statutory order of the Commissioner of Survey, Settlement and Land Records, the matter should have rested there. We have, therefore, no hesitation in coming to the conclusion that it was not only inappropriate but also illegal for the Chief Conservator of Forests, though he might have done so in all good faith, to have questioned the order of the Commissioner of Survey, Settlement and Land Records before the High Court of Andhra Pradesh in Writ Petition (C) No. 3414 of 1982. The Chief Conservator of Forests as the petitioner can neither be treated as the State of Andhra Pradesh nor can it be a case of misdescription of the State of Andhra Pradesh. The fact is that the State of Andhra Pradesh was not the petitioner. Therefore, the writ petition was not maintainable in law. The High Court, had it deemed fit so to do, would have added the State of Andhra Pradesh as a party; however, it proceeded, in our view erroneously, as if the State of Andhra Pradesh was the petitioner which, as a matter of fact, was not the case and could not have been treated as such. As the writ petition itself was not maintainable, it follows as a corollary that the appeal by the Chief Conservator of Forests is

1 1992 Supp (2) SCC 432
2 1995 Supp (4) SCC 541

also not maintainable. We are unable to accept the contention of Ms Amareswari that merely because the officer concerned had obtained the permission of the Government to file an appeal, which is not placed before us, the writ petition and the appeal should be treated as an appeal by the Government of Andhra Pradesh. The permission granted to the authority concerned might be a permission to file an appeal which cannot reasonably be construed as authorisation to file the appeal in his own name, contrary to law. It could only be a permission to file the appeal in the name of the State of Andhra Pradesh in accordance with the provisions of the Constitution and CPC. We may also record that in spite of the pattedars taking objection to that effect at the earliest, no steps were taken to substitute or implead the State of Andhra Pradesh in the writ petition in the High Court or in the appeal in this Court.

17. Now, we shall deal with Civil Appeal No. 9097 of 1995, which arises out of the suit filed by the respondents herein. The respondent-plaintiffs claimed in the suit that the land measuring 748.24 acres out of Survey No. 11 of Asadpur village and land measuring 45.20 acres out of Survey No. 168 of Malachinthapalli village in Kollapur taluk, Mahboobnagar district be declared as the patta lands of the plaintiffs and they be awarded compensation for the said lands, which was submerged in the Srisailam Project. The said lands were claimed to be ancestral patta lands and constituted private home-farm land of Plaintiff 1 and his father and were being enjoyed as grazing land for their cattle and for cattle-breeding farm. The plaintiffs had been paying land revenue in respect of those lands since the abolition of jagirs in 1949. The appellants denied that the suit land was patta land and home-farm land of the pattedars. It was pleaded that they were forest lands of the State. To establish their claim, the pattedars produced two witnesses. The first witness was one of the pattedars and the second was the Tahsildar of Jagir Jatprole for the period November 1937 to September 1949. They also filed supplementary *setwar*, Exhibit A-1. During the period 1954 to 1958, permission was granted to the pattedars by the Government for cutting forest wood; permission letters were filed as Exhibits A-2 to A-9. These documents show the exercise of right as owner over the suit lands. Exhibit A-10 was filed to prove that in the village map, the suit lands were shown as patta lands. In support of the plea for payment of the land revenue after the abolition of jagirs from 1951 to 1974, Exhibits A-11 to A-26 were filed. Those receipts related to Asadpur village. Exhibits A-27 to A-44 are receipts for payment of land revenue in respect of the land in Malachinthapalli village. To prove that prior to the abolition of jagirs, the suit lands were under the control of the last Jagirdar, Exhibits A-46 to A-50 were filed which relate to the period 1312 Fasli to 1328 Fasli and show the expenditure incurred by the last Jagirdar in respect of the suit lands. The pahani patrika for the period 1972-73 and 1983-84 were also filed as Exhibits A-53 to A-55 but they may not be really relevant because they relate to the period after the dispute had arisen between the parties. As against this evidence, not an iota of evidence was placed on record by the Government to establish that the lands were taken over at the time of abolition of the jagirs

or that they form part of the forest area and/or otherwise vested in the Government. The trial court as well as the Division Bench of the High Court believed the oral and documentary evidence to decree the suit of the pattedars for declaration of title and for rendition of accounts. However, the relief of compensation was declined.

18. Mr Salve has heavily relied upon the presumption in Section 110 of the Evidence Act to support the judgment and order under challenge. He submits that in view of the long uninterrupted possession of the pattedars' title to the land in their favour has to be presumed and it would be for the appellant State to prove that they are not the owners of the land. Ms Amareswari has contended that, on the facts, the presumption is not attracted.

19. Section 110 of the Evidence Act reads thus:

> "110. *Burden of proof as to ownership.*—When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

20. It embodies the principle that possession of a property furnishes prima facie proof of ownership of the possessor and casts burden of proof on the party who denies his ownership. The presumption, which is rebuttable, is attracted when the possession is prima facie lawful and when the contesting party has no title.

21. This Court in *Nair Service Society Ltd.* v. *K.C. Alexander*[3] observed: (AIR p.1173, para 15)

> "That possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides."

22. The pattedars proved their possession of the lands in question from 1312 Fasli (1902 AD) as pattedars. There is long and peaceful enjoyment of the lands in question but no proof of conferment of patta on the late Raja and the facts relating to acquisition of title are not known. The appellant State could not prove its title to the lands. On these facts, the presumption under Section 110 of the Evidence Act applies and the appellants have to prove that the pattedars are not the owners. The appellants placed no evidence on record to rebut the presumption. Consequently, the pattedars' title to the land in question has to be upheld.

23. We have gone through the judgment of the trial court as also of the High Court. We have perused the notification issued under Section 29 of the Forest Act. It shows that as many as fourteen villages are enumerated therein. Villages Asadpur and Malachinthapalli do not figure in the notification. Even otherwise also, the notification does not show anything more than the fact that the Government has formed a protected forest area. That by itself does not extinguish the rights of the private owners of the land nor does it show that the lands in question vest in the State. A plain reading of the statutory order passed by the Commissioner of Survey, Settlement and Land Records

3 AIR 1968 SC 1165 : 1968 Ker LT 182

under Section 166-B of the Land Revenue Act on 5-12-1981 places the matter beyond doubt that the suit lands were patta lands of the pattedars. For all these reasons, in our view, the High Court has committed no error in confirming the said order of the Commissioner of Survey, Settlement and Land Records and the judgment and decree of the trial court.

24. Inasmuch as no cross-appeal was filed by the said respondent pattedars in regard to the denial of relief of the compensation, the interim order passed by this Court on 1-12-1994 directing payment of one-half of the compensation shall stand vacated.

25. In the result, the appeals are dismissed with costs.

(2003) 3 Supreme Court Cases 485

(BEFORE SHIVARAJ V. PATIL AND ARIJIT PASAYAT, JJ.)

DR CHANCHAL GOYAL (MRS) .. Appellant;

Versus

STATE OF RAJASTHAN .. Respondent.

Civil Appeal No. 7744 of 1997†, decided on February 18, 2003

A. **Service Law — Appointment — Consultation with and recommendation of other bodies — Concurrence of PSC — Presumption of — Legality — State Government appointing the appellant as Lady Doctor on temporary basis for a period of six months or till the availability of the candidate selected by PSC — Rules providing that temporary appointment would not be continued beyond one year without referring to PSC for their concurrence and would be terminated immediately on denial of such concurrence — Without referring the appellant's case to PSC, Government continuing her in service by successive extension orders — Such extension orders, held, could not lead to a presumption of the grant of concurrence by PSC — Evidence Act, 1872, Ss. 114 and 4 — Rajasthan Municipal Service Rules, 1963, Rr. 26 and 27(1) & (2) — Rajasthan Municipalities Act, 1959 (38 of 1959), S. 308 — Municipalities**

B. **Precedents — Generally — Binding nature of precedent — Extent of — A decision, held, is an authority for what it decides and not for what could be inferred from its conclusion — Constitution of India, Art. 141**

C. **Service Law — Regularisation — Ad hoc appointee — Such appointee, unless his initial recruitment is regularised through a prescribed agency, held, cannot be granted regularisation — That there was a selection even for the ad hoc selection, held, inconsequential — Rajasthan Municipal Service Rules, 1963, Rr. 31 and 29**

D. **Service Law — Termination of service — Temporary or ad hoc — Appellant appointed for a specified period (six months in this case) or till the availability of the candidate selected by PSC — Subsequently, PSC making selection and drawing up a select list — Thereafter, the appellant's services terminated — In such circumstances, non-joining of the candidate selected**

† From the Judgment and Order dated 11-4-1997 of the Rajasthan High Court in CSA No. 161 of 1994

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(1979) 4 Supreme Court Cases 274

(BEFORE R. S. SARKARIA, P. N. SHINGHAL AND O. CHINNAPPA REDDY, JJ.)

SUPDT. AND REMEMBRANCER OF LEGAL AFFAIRS, WEST BENGAL .. Appellant;

Versus

ANIL KUMAR BHUNJA AND OTHERS .. Respondents.

Criminal Appeal No. 98 of 1973†, decided on August 23, 1979

Arms Act, 1959 — Sections 29(b) and 30 and 5 — Delivery of arms into "possession of another person" — Determination of, held, is a mixed question of fact and law — "Possession" implies element of control over the material — Holder of a licence for repairing and dealing in firearms handing over arms to a mechanic having no such licence for repairs at a place different from the premises of the licensee specified in the licence — Firearms seized from the premises of the mechanic when he was actually working on a revolver and at that time licensees not found to be present and personally supervising the repair work — On facts, before handing over the arms to the mechanic, the licensees having done nothing to ascertain that the mechanic was legally authorised to retain those arms, commission of offence under Section 29(b) by the licensees, held, prima facie established — Trial to proceed accordingly

Held:

The question whether a particular person is or continues to be in possession of an arm (in the context of the Act) is, to a substantial extent, one of fact. This question, often resolves into the issue whether that person is or continues to be, at the material time, in physical possession or effective control of that arm. This issue, in turn, is a mixed issue of fact and law, depending on proof of specific facts or definite circumstances by the prosecution. (Para 25)

In the present case, by handing over the firearms to the mechanic to be repaired at his independent workshop, the licensees had divested themselves, for the time being, not only of physical possession but also of effective control over those firearms. There is nothing to show that before handing over those firearms to the mechanic for repairs, the licensees had done anything to ascertain that the mechanic was legally authorised to retain those arms even for the limited purpose of repairing them. Thus, prima facie, the materials before the Magistrate showed that the licensees had delivered the firearms in question into the possession of the mechanic without previously ascertaining that he was legally authorised to have the same in his possession, and as such, the respondents appear to have committed an offence under Section 29(b) of the Act. (Para 21)

Gunwantlal v. *State of M. P.*, (1972) 2 SCC 194: 1972 SCC (Cri) 678: (1973) 1 SCR 508, *applied*

Manzur Husain v. *Emperor*, AIR 1928 All 55(1): 29 Cri LJ 97: 26 AIJ 162; *Sadh Ram* v. *State*, AIR 1953 HP 121; *Emperor* v. *Harpal Rai*, ILR 24 All 454; *A. Malcolm* v. *Emperor*, AIR 1933 Cal 218; *Emperor* v. *Kova Hansji*, 14 Bom LR 964; *Parmeshwar Singh* v. *Emperor*, AIR 1933 Pat 600; *Sullivan* v. *Earl of Caithness*, (1976) 1 QB 966; *Woodage* v. *Moss*, (1974) 1 All ER 584; *Murli* v. *Crown*, AIR 1929 All 720 and *Tola Ram* v. *Crown*, ILR 16 All 276, *referred to*

†Appeal by Special Leave from the Judgment and Order dated August 16, 1972 of the Calcutta High Court in Criminal Revision No. 85 of 1972.

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Words and Phrases — "Possession" — Meaning and test for determination of — Arms Act, 1959, Section 29(b)

Held:

Word 'possession' is not purely a legal concept but a polymorphous term which may have different meanings in different contexts. "Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. Therefore, the test for determining "whether a person is in possession of anything is whether he is in general control of it". (Paras 13 and 15)

Criminal Procedure Code, 1973 — Sections 228 and 227 — Magistrate has only to consider generally the materials placed before him by investigating officer in considering the sufficiency of ground for proceeding against the accused

Held :

Where a case is at the stage of framing charges and the prosecution evidence has not yet commenced, the Magistrate has to consider the question of sufficiency of ground for proceeding against the accused on a general consideration of materials placed before him by the investigating police officer. The truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charge against the accused in respect of the commission of that offence. (Para 18)

State of Bihar v. *Ramesh Singh*, (1977) 4 SCC 39 : 1977 SCC (Cri) 533 : (1978) 1 SCR 257, *followed*

Criminal Procedure Code, 1973 — Section 465 — Trial of a summons case as a warrant case is a mere irregularity and not illegality and does not vitiate the trial unless there is prejudice (Para 30)

Criminal Trial — Sentence — Commutation of — Consideration for — Validity of Magistrate's action under Section 228, CrPC, 1973, decided after eight years of protracted proceedings — Even after such a long period the accused can be put on trial — However, this is a circumstance to be taken into consideration by the trial Court in fixing the nature and quantum of sentence, in the event of the accused being found guilty — Criminal Procedure Code, 1973, Section 228 (Para 30)

Arms Act, 1959 — Generally — New Act has in several aspects modified or changed the old law relating to regulation of arms in Act 11 of 1878 — Great caution and discernment necessary in applying cases decided under the old Act (Para 29)

R-M/4516/CR

Advocates who appeared in this case :

M. M. Kshatriya, G. S. Chatterjee and *D. N. Mukherjee*, Advocates, for the Appellant;
A. K. Gupta, Advocate, for Respondents 1 and 3;
H. K. Puri, Advocate, for Respondents 2 and 4.

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The Judgment of the Court was delivered by

Sarkaria, J.—Whether the giving of firearms by a person holding a licence for repairing and dealing in firearms for repairs to a mechanic who holds no such licence, but does the repair job at his workshop at a place different from the factory or place of business of the license-holder, amounts to "delivery of those arms into the possession of another person" within the contemplation of Section 29(b) of the Arms Act, 1959 (for short, called the 'Act'), is the principal question that falls to be answered in this appeal by special leave directed against a judgment, dated August 16, 1972, of the High Court of Calcutta. It arises in these circumstances:

1a. On or about April 17, 1971, the Calcutta Police while investigating a case, went to premises No. 4, Ram Kanai Adhikari Lane in Calcutta, and, on the ground floor of the building, they discovered a workshop run by Mrityunjoy Dutta, who was then working on a revolver. In the said premises, the police found several other guns, revolvers and rifles. All these firearms were seized by the police.

2. Mrityunjoy Dutta claimed to have received one of the guns so seized from one Matiar Rahaman gun-licensee and the rest from respondents 1 to 4 for repairs. Mrityunjoy Dutta had no valid licence to keep or repair these firearms under the Act. Respondents 1 to 4, however, were holding licences under the Act to run the business of repairing and dealing in firearms.

3. On April 17, 1970, the police charge-sheeted Mrityunjoy Dutta, Matiar Rahaman and respondents 1 to 4 to stand their trial in the Court of the Presidency Magistrate, in respect of offences under Sections 25(1)(a) and 27 of the Act.

4. The trial Magistrate, while considering the question of framing charges, held that there were materials to make out a prima facie case under Section 25(1)(c) of the Act against Mrityunjoy Dutta and under Section 29(b) of the Act against Matiar Rahaman, and charged them accordingly. So far as respondents 1 to 4 are concerned, the Magistrate took the view that the giving of the arms to the accused Dutta, by respondents 1 to 4 for the limited purpose of repairs, did not amount to delivery of possession of those arms within the meaning of Section 29(b) of the Arms Act (Act 4 of 1959), and in the result, he discharged the respondents by an order dated November 17, 1971.

5. Aggrieved, the State of West Bengal filed a Criminal Revision against the Magistrate's order before the High Court, contending that delivery of the arms into the possession of a person who did not have a valid licence for repairs of firearms, is not only a contravention of the provisions of Section 5 of the Act, but also amounts to delivery of firearms by the respondents into the possession of Mrityunjoy Dutta and, as such, the respondents were prima facie liable for an offence under Section 29(b) of the Act.

6. The Division Bench of the High Court, who heard the revision, dismissed it with the reasoning, that respondents 1 to 4, could not be said to have delivered the firearms concerned into the possession of Mrityunjoy Dutta within the meaning of Section 29(b) of the Act, because the respondents who

possessed valid licences for repairs as well as for sale of firearms, had given only **temporary** custody of those arms to Mrityunjoy Dutta for the limited purpose of carrying the repair job, while the effective control over those arms all the time remained with the respondent. In its view, there is no delivery of possession of the firearms so long as control over the arms and authority to use those arms is not transferred to the custodian.

7. Hence, this appeal.

8. The whole case pivots around the interpretation and application of the term "possession", used in Section 29(b) of the Act.

9. Learned Counsel for the appellant-State contends that the question whether a person is in possession of an arm or had transferred and delivered it to another, is largely one of fact. It is submitted that in the instant case, there were three stark facts which more than any other, unmistakably showed that the respondents had given possession of these firearms to Mrityunjoy Dutta: (a) Mrityunjoy Dutta was not a servant or employee of the respondents, but was running his **own** business of repairing firearms. (b) The firearms were handed over to Mrityunjoy Dutta to be repaired at his own residence-cum-workshop which was not the respondent's licensed place of business, and was in the exclusive control and occupation of Dutta. (c) Mrityunjoy Dutta had no licence for repairing or keeping firearms and the respondents were either aware of this fact or did not ascertain it before delivering the firearms to him. It is maintained that "possession" within the purview of Section 29(b) means immediate possession, and consequently, delivery of even temporary possession and control to an unauthorised person falls within the mischief of the section. It is further urged that the delivery of firearms for repairs to the unlicensed mechanic for repairs, to be carried out at a place other than the factory or place of business specified in the licence of the owners, will amount to an offence under Section 30, read with Section 5 of the Act, also.

10. As against this, Mr. Anil Kumar Gupta has addressed lengthy arguments to support the judgments of the courts below. The sum and substance of his arguments is that the mechanic, Dutta, was only in temporary custody of these arms for the limited purpose of repairing them, as an agent, of the owners, who being licensees in Form IX entitled to repair and keep these firearms, they throughout remained in their lawful possession and control. It is maintained that the delivery of possession contemplated by Section 29(b) is something more than entrusting the arms to an agent for the limited purpose of repairs. In support of this contention, Mr. Gupta has cited several decisions. Particular reliance has been placed on **Manzur Husain** v. **Emperor**[1]; **Sadh Ram** v. **State**[2]; **Emperor** v. **Harpal Rai**[3]; **A. Malcolm** v. **Emperor**[4]; **Emperor** v. **Koya Hansji**[5]; **Parmeshwar Singh** v. **Emperor**[6]; **Gunwantlal** v. **State of M. P.**[7] and **Sullivan** v. **Earl of Caithness**[8]. Reference was also made to Halsbury's Laws of England, Vol. 25, Third Ed., page 874, and Salmond's Jurisprudence, 11th Ed.

1. AIR 1928 All 55(1): 29 Cr LJ 97: 26 ALJ 162
2. AIR 1953 HP 121
3. ILR 24 All 454
4. AIR 1933 Cal 218
5. 14 Bom LR 964
6. AIR 1933 Pat 600
7. (1973) 1 SCR 508: (1972) 2 SCC 194: 1972 SCC (Cri) 678
8. (1976) 1 QB 966

11. It was next contended that even if the term "possession" in Section 29(b) is susceptible of two interpretations, the one favourable to the accused be adopted. In this connection reference has been made to **Woodage v. Moss**[9].

12. The last submission of Mr. Gupta is that since these criminal proceedings have been brooding over the head of the respondents for the last eight years, this Court should not, even if it reverses the opinion of the courts below, direct the Magistrate to frame charges against the respondents and to proceed with the trial. It is emphasised that in any event the offence disclosed against the respondents was purely technical.

13. "Possession" is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of "possession" uniformally applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of "possession". Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Ed., 1966) caused by the fact that possession is not purely a legal concept. "Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It **involves power of control and intent to control.** (See Dias and Hughes, ibid.)

14. According to Pollock and Wright,

> when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that "possession" is not a purely legal concept but also a matter of fact, Salmond (12th Ed., page 52) describes "possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining "whether a person is in possession of anything is whether he is in general control of it".

16. In **Gunwantlal**[1], this Court while noting that the concept of possession is not easy to comprehend, held that, in the context of Section 25(a) of the Arms Act, 1959, the possession of a firearm must have, firstly, the element of consciousness or knowledge of that possession in the person charged with such offence, and secondly, he has either the actual physical possession of the firearm, or where he has not such physical possession, he has nonetheless a power or control over that weapon. It was further recognised that whether or not the accused had such control or dominion to constitute his possession of the firearm, is a question of fact depending on the facts of each case. In that connection, it was observed :

> In any disputed question of possession, specific facts submitted or proved will alone establish the existence of the de facto relation of

9. (1971) 1 All ER 584

control or the dominion of the person over it necessary to determine whether that person was or was not in possession of the thing in question.

17. With this guiding criterion in mind, the Magistrate had to see whether the facts alleged and sought to be proved by the prosecution prima facie disclose the delivery of the firearms by the respondents into the possession of Mrityunjoy Dutta, without previously ascertaining whether the recipient had any licence to retain and repair those firearms within the contemplation of Section 29(b).

18. It may be remembered that the case was at the stage of framing charges; the prosecution evidence had not yet commenced. The Magistrate had, therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in **State of Bihar** v. **Ramesh Singh**[10], the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of charge against the accused in respect of the commission of that offence.

19. Now, in the instant case, at that initial stage, it was apparent from the materials before the Magistrate, that basic facts proposed to be proved by the prosecution against the accused-respondents were as follows:

(a) That the respondents held licences, inter alia, in Form IX for repairing and dealing in firearms at the place of business, factory or shop specified in Column 3 of their licences.

(i) The respondents handed over the firearms in question to Mrityunjoy Dutta for repairs.

(ii) Mrityunjoy Dutta did not have any licence for repairing or dealing in firearms.

(iii) (a) Mrityunjoy Dutta was doing the repair job in respect of these firearms at his own residence-cum-workshop which was situated at a place different from the business places specified in the licences of the respondents.

(b) The firearms in question were seized from the workshop-cum-house in the occupation and control of Mrityunjoy Dutta, when the latter was actually in the act of repairing or working on a revolver.

20. There is nothing in these materials to show that at the time of the seizure of these firearms, any of the respondents or any Managers of their concerns, was found present and personally supervising the repair-work that was being done by the mechanic, Mrityunjoy Dutta.

10. (1977) 4 SCC 39: 1977 SCC (Cri) 533: AIR 1977 SC 2018

21. These positive and negative facts, in conjunction with other subsidiary facts, appearing, expressly or by implication, from the materials which were before the Magistrate at that initial stage were, at least, sufficient to show that there were grounds for presuming that the accused-respondents had committed offences under Sections 29(b) and 30 of the Act. Facts (iii)(a) and (b) listed above, inferentially show that by handing over the firearms to Mrityunjoy Dutta to be repaired at the latter's independent workshop, the respondents had divested themselves, for the time being, not only of physical possession but also of effective control over those firearms. There is nothing in those materials to show that before handing over those firearms to Mrityunjoy Dutta for repairs, the respondents had done anything to ascertain that Mrityunjoy Dutta was legally authorised to retain those arms even for the limited purpose of repairing them. Thus, prima facie, the materials before the Magistrate showed that the respondents had delivered the firearms in question into the possession of Mrityunjoy Dutta, without previously ascertaining that he was legally authorised to have the same in his possession, and as such, the respondents appeared to have committed an offence under Section 29(b) of the Act.

22. Further, by allowing the firearms to be removed to a place other than the places of their business or factory specified in Column 3 of their licences in Form IX, the respondents appear to have contravened condition 1(c) of their licence, the material part of which reads as under :

> (c) This licence is valid only so long as the licensee carries on the trade or business in the premises shown in Column 3 thereof . . . .

23. Contravention of any condition of the licence amounts to an offence punishable under Section 30 of the Act.

24. In sum, the materials before the Magistrate, prima facie disclosed the commission of offences under Sections 29(b) and 30 of the Act by respondents 1 to 4. The Magistrate was thus clearly in error in discharging these accused-respondents.

25. We do not think it necessary to notice and discuss in detail the various decisions cited by the Counsel at the bar, because, as mentioned earlier, the question whether a particular person is or continues to be in possession of an arm (in the context of the Act) is, to a substantial extent, one of fact. This question, often resolves into the issue : whether that person is or continues to be, at the material time, in physical possession or effective control of that arm. This issue, in turn, is a mixed issue of fact and law, depending on proof of specific facts or definite circumstances by the prosecution.

26. At this preliminary stage, therefore, when the prosecution has yet to lead evidence to prove all the facts relevant to substantiate the ingredients of the charge under Section 29(b) levelled against these respondents, a detailed discussion of the principles enunciated in the cited decisions, is apt to partake of the character of a speculative exercise.

27. It will be sufficient to say in passing that almost all the decisions of the High Court cited before us were cases under the 'Old' Arms Act (Act 11 of 1878). The ratio of cases decided under the 'Old' Act should not be

blindly applied to cases under the Act of 1959 which has, in several aspects, modified or changed the law relating to the regulation of arms. For instance under the 'Old' Act, repairing of arms without a licence, was not punishable, as 'repair' was different and distinct from 'manufacture'. In **Murli** v. **Crown**[11] and **Tola Ram** v. **Crown**[12], it was held that a person in temporary possession of arms without a licence, for repairing purposes was not guilty under Section 19 of the Act of 1878. But Section 5 of the present Act of 1959, has materially altered this position by requiring the obtaining of a licence for repairing fire-arms (or other arms if so prescribed). Further, the word "keep" occurring in Section 5 of the 'Old' Act has been replaced by the words "have in his possession" in the present section.

28. Then, in three of these cases, namely, **Manzur Husain**[1], **Sadh Ram** v. **State**[2] and **Emperor** v. **Harpal Rai**[3], the licence-holder sent his licensed firearm for repairs through a person who had the licence-holder's oral authority, expressly or impliedly given, to carry it to the repairer. It was held that the carrier, though he held no licence to keep the firearm, could not be said to be in "possession" of it, nor could the licence-holder be said to have parted with the "possession" of the firearm or delivered its possession to an unauthorised person. Similarly, in one of the cases cited, the licence-holder sent his fire-arm to the Magistrate through his servant or agent for getting the licence renewed. In that case also, it was held that the servant was not guilty of any offence for having in his possession or "carrying" a gun without a licence. The possession was held to be still with the licence-holder-owner of the weapon.

29. The rule enunciated in these decisions has been given a **limited** recognition in the Proviso to Section 3 of the Act of 1959. Under this Proviso, if a licensed weapon is carried to an authorised repairer by another having no licence, he will not be guilty for carrying that firearm, if he has a **written** authority of the licence-holder for carrying that weapon to a repairer. Similarly, for carrying a licensed firearm to the appropriate authority for renewal of the licence, **written** authority of the owner of the weapon is essential to bring him within the protection of the Proviso. In some of these cases referred to by the Counsel, a person was carrying or was in custody of a licensed weapon for use by the licensee. Now, the Proviso to Section 3 of the present Act, protects such carriers or custodians of weapons for use by the licence-holder, only if they do so **in the presence** of the licence-holder concerned. We have referred, by way of example, to some of these changes brought about by the Act of 1959, only to impress on the trial Court that in considering the application of the ratio of the cases decided under the Act of 1878, to those under the present Act great caution and discernment is necessary.

30. For all the reasons aforesaid, we allow this appeal and set aside the orders of the courts below whereby respondents 1 to 4, herein, were discharged. Although offences under Sections 29(b) and 30 of the Act are summons cases, the Magistrate has followed the warrant procedure, obviously because an offence under Section 25 of the Act, for which Mrityunjoy Dutta was being jointly tried with respondents 1 to 4, was a warrant case. Moreover, trial of a summons case as a warrant case does not amount to an illegality,

11. AIR 1929 All 720 12. ILR 16 All 276

but is a mere irregularity that does not vitiate the trial unless there is prejudice. We, therefore, send the case back to the trial Magistrate with the direction that he should frame charges in respect of offences under Sections 29(b) and Section 30 of the Act against the accused-respondents 1 to 4 and proceed further with the trial in accordance with law. We decline the submission made on behalf of these respondents that on account of their prolonged harassment and expense, which are necessary concomitants of protracted criminal proceedings extending over eight years, they should not be put on trial now for offences, which, according to the Counsel, are merely technical. Even so, we think, this is a circumstance to be taken into consideration by the trial Court in fixing the nature and quantum of sentence, in the event of the accused being found guilty.

31. Before parting with this judgment, we will, however, set it down by way of caution that the Magistrate while assessing the evidence and recording his findings on its basis with regard to proof or otherwise of the factual ingredients of the offences with which the accused may stand charged, shall not allow himself to be unduly influenced by anything said in this judgment in regard to the merits of the case.

(1979) 4 Supreme Court Cases 282

(BEFORE P. N. BHAGWATI AND R. S. PATHAK, JJ.)

RAJINDER NATH AND OTHERS .. Appellants;

Versus

C.I.T., DELHI .. Respondent.

Civil Appeals Nos. 1864-1869 of 1972†, decided on August 13, 1979

Income Tax — Limitation for completion of assessments and reassessments — Exception under Section 153(3)(ii), Income Tax Act, 1961 — Applicability — Expressions "finding" and "direction" in clause (ii) — Meaning of — In absence of any opportunity of hearing being given under Explanation 3 to Section 153(3) the excess amount, held, cannot be claimed to be concealed income of "another person" — Expression "another person" in Explanation 3 — Meaning of — Words and Phrases

An HUF consisting of karta and his three sons purchased certain lands in the name of karta and paid price out of the books of the family. Meanwhile, as a result of a partial partition of the HUF, its business was taken over by a partnership firm consisting of the karta and his two major sons. The firm debited certain sums in its building account towards the cost of construction of the buildings on lands acquired by the then HUF. Buildings were thereafter constructed. The members of the firm filed separate returns in their individual status for the relevant assessment years, but ITO regarding the properties as belonging to the firm, estimated the cost of construction at a higher figure than the cost disclosed and made additions accordingly to the returned income of the firm. On appeal, the AAC finding that the firm had merely advanced money for the construction of the buildings to the individual co-owners, whose personal accounts in the books of the firm had been debited accordingly,

†Appeal by Special Leave from the Judgment and Order dated September 17, 1971 of the Delhi High Court in Income Tax Reference Nos. 22, 25 and 26 of 1970.

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was fired from the pistol Ex. III produced by the appellant from his house. There can, therefore, be no room for thinking, in the circumstances established in this case, that any one else other than the appellant might have shot Daya Ram. He was, therefore, rightly convicted for the offence of murder.

The appeal is accordingly dismissed.

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December, 5.

P. LAKSHMI REDDY

v.

L. LAKSHMI REDDY

(JAGANNADHADAS, B. P. SINHA and JAFER IMAM, JJ.)

Adverse Possession—Possession of co-heir, when adverse—Ouster—Possession of Receiver pendente lite, if can be tacked.

V died an infant in 1927 and H, an agnatic relation, filed a suit for the recovery of the properties belonging to V which were in the possession of third parties, on the ground that he was the sole nearest male agnate entitled to all the properties. During the pendency of the suit a Receiver was appointed for the properties in February, 1928. The suit having been decreed H obtained possession of the properties from the Receiver on January 20, 1930, and after his death in 1936, his nephew, the appellant, got into possession as H's heir. On October 23, 1941, the respondent brought the present suit for the recovery of a one-third share of the properties from the appellant on the footing that he and his brother were agnatic relations of V of the same degree as H, that all the three were equal co-heirs of V and that H obtained the decree and got into possession on behalf of all the co-heirs. The appellant resisted the suit and contended that the respondent lost his right by the adverse possession of H and his successor and that for this purpose not only the period from January 20, 1930, to October 23, 1941, was to be counted but also the prior period when the Receiver was in possession of the properties during the pendency of H's suit. It was found that the respondent's case that H obtained the decree and got possession from the Receiver on behalf of the other co-heirs was not true:

Held, that the respondent did not lose his right by adverse possession. Even assuming that H's possession from January 20, 1930, was adverse and amounted to ouster of the other co-heirs, such adverse possession was not adequate in time to displace the title of the respondent and the period during which the Receiver was in possession could not be added, because (I) the Receiver's

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possession could not be tacked on to H's possession, as a Receiver is an officer of the Court and is not the agent of any party to the suit and notwithstanding that in law his possession is ultimately treated as possession of the successful party on the termination of the suit, he could not be considered as the agent of such party with the animus of claiming sole and exclusive title with the view to initiate adverse possession; and (2) during the time of the Receiver's possession the respondent could not sue H, and limitation could not therefore run against him.

The possession of one co-heir is considered, in law, as possession of all the co-heirs and in order to establish adverse possession ouster of the non-possessing co-heir should be made out and as between them there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 178 of 1955.

Appeal by special leave from the Judgment and decree dated December 3, 1951, of the High Court of Judicature at Madras in Second Appeal No. 766 of 1947 against the decree dated November 19, 1946, of the District Court of Anantapur in Appeal No. 130 of 1945 arising out of the decree dated January 31, 1945, of the Court of Subordinate Judge, Anantapur, in Original Suit No. 10 of 1944.

M. C. Setalvad, Attorney-General of India, P. Ram Reddy, K. Sundararajan and *M. S. K. Aiyangar*, for the appellant.

C. K. Daphtary, Solicitor-General of India, and *K. R. Chaudhury*, for the respondent.

1956. December 5. The Judgment of the Court was delivered by

JAGANNADHADAS J.—The plaintiff in the action out of which this appeal arises brought a suit for declaration of his title to a one-third share in the suit properties and for partition and recovery of that share. The suit was dismissed as having been barred by limitation and adverse possession. On appeal the District Judge reversed the decision and decreed the suit. The High Court maintained the decree of the District Judge on second appeal. Hence this appeal before us on special

leave by the first defendant in the action, who is the appellant before us. The main question that arises in the appeal is whether the plaintiff has lost his right to a one-third share in the suit property by adverse possession.

The property in suit belonged to one Venkata Reddy. He died an infant on August 25, 1927. At that time, the properties were in the possession of the maternal uncles of the father of the deceased Venkata Reddy. One Hanimi Reddy, an agnatic relation of Venkata Reddy, filed a suit O.S. No. 26 of 1927 for recovery of the properties from the said maternal uncles and obtained a decree therein on March 15, 1929. A Receiver was appointed for the properties in February, 1928, during the pendency of the suit and presumably the properties were in his possession. This appears from the decree which shows that it directed the Receiver to deliver possession to the successful plaintiff in that suit. Hanimi Reddy obtained actual possession of these properties on January 20, 1930, and continued in possession till he died on August 16, 1936. The first defendant in the present action who is the appellant before us is a son of the brother of Hanimi Reddy and came into possession of all the properties as Hanimi Reddy's heir. The respondent before us is the plaintiff. The present suit was brought on the allegation that the plaintiff and the second defendant in the suit, his brother, were agnatic relations of Venkata Reddy, of the same degree as Hanimi Reddy and that all the three were equal co-heirs of Venkata Reddy and succeeded to his properties as such on his death. It was alleged that though Hanimi Reddy filed the prior suit and obtained possession of the properties thereunder, he did so as one of the co-heirs, with the consent of the plaintiff and the second defendant and that he was enjoying the properties jointly with the plaintiff and his brother as tenants-in-common but that the first defendant, who came into possession on the death of Hanimi Reddy denied the title of the plaintiff and his brother in or about the year 1940. The plaint in the present action was filed originally in the District Munsif's Court on October 23, 1941, and was ordered

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to be returned for presentation to the District Judge's Court on November 30, 1942. It was actually re-presented in that Court on December 2, 1942. One of the questions raised in the suit was that the suit was barred by limitation on the ground that it must be taken to have been instituted not on October 23, 1941, but on December 2, 1942. This plea was upheld by the trial Court. On first appeal the District Judge held that the plaintiff is entitled to the benefit of s. 14 of the Limitation Act and that the suit must be taken as having been instituted on October 23, 1941, and is, therefore, in time. He accordingly decreed the suit. In the High Court the question as to whether the plaintiff was entitled to the benefit of s. 14 of the Limitation Act, though raised, was not finally decided. It was held that the possession of Hanimi Reddy was not adverse to the plaintiff and that accordingly he was entitled to the decree as prayed for. The question as to the non-availability of the benefit of s. 14 of the Limitation Act to the plaintiff in the present suit has not been urged before us and the finding of the District Judge that the plaint must be taken to have been validly presented on October 23, 1941, stands. That date must, therefore, be taken to be the commencement of the action for the purposes of this appeal. It will be noticed that this date is more than fourteen years from the date when the succession opened to the properties of Venkata Reddy on August 25, 1927, but is less than twelve years after Hanimi Reddy obtained actual possession in execution of his decree on January 20, 1930. The contention of the learned Attorney-General for the appellant first defendant is that the possession of Hanimi Reddy was adverse, that the plaintiff as well as the second defendant lost their right by the adverse possession of Hanimi Reddy and his successor, the first defendant, and that for this purpose not only the period from January 20, 1930, up to October 23, 1941, is to be counted but also the prior period during the pendency of Hanimi Reddy's suit when the Receiver was in possession of the suit properties. It is the validity of

these two parts of the argument which has to be considered.

It will be convenient to consider in the first instance whether or not the possession of Hanimi Reddy from January 20, 1930, up to the date of his death in 1936 was adverse to his co-heirs. The facts relevant for this purpose are the following. At the date when Venkata Reddy died his properties were in the custody of the two maternal uncles of his father. Hanimi Reddy filed his suit on the allegation, as already stated above, that he was the nearest agnatic relation alive of the deceased minor Venkata Reddy and as his next rightful heir to succeed to *all* the estate, movable and immovable, of the said minor, set forth in the schedules thereto. He appended a genealogical tree to his plaint which showed his relationship to Venkata Reddy through a common ancestor and showed only the two lines of himself and Venkata Reddy. Plaintiff and the second defendant belong to another line emanating from the same common ancestor but that line was not shown and the plaintiff and second defendant were ignored. The first defendant in the present suit did not admit the relationship of plaintiff and second defendant in his written statement. He disputed that the father of the plaintiff and second defendant was descended from the common ancestor either by birth or by adoption, as shown in the genealogical table attached to the present plaint. It is possible that this may have been the reason for Hanimi Reddy ignoring the plaintiff and the second defendant in his suit. However this may be, at the trial in this suit it was admitted that the plaintiff and the second defendant are the agnatic relations of Venkata Reddy of the same degree as Hanimi Reddy. The defendants in the earlier suit who were in possession on that date claimed to retain possession on behalf of an alleged illatom son-in-law (of Venkata Reddy's father) a son of the second defendant therein. It may be mentioned that in that part of the country (Andhra) an illatom son-in-law is a boy incorporated into the family with a view to give a daughter in marriage and is customarily recognised as an heir in the absence of a natural-born son. This

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claim appears to have been negatived and the suit was decreed. During the pendency of the suit a Receiver was appointed in February, 1928. He presumably took possession though the date of his taking possession is not on the record. The decree in that suit dated March 15, 1929, is as follows :

"This Court doth order and decree that plaintiff do recover possession of immovable property and movables in the possession of the Receiver."

It is in the evidence of the first defendant himself as D.W. 1 that the properties were taken possession of by Hanimi Reddy on January 20, 1930. The plaintiff examined himself as P.W. 1 to substantiate the case as set out in his plaint that he and the second defendant and Hanimi Reddy were enjoying the properties jointly as tenants in common. The relevant portion of his evidence is as follows :

"Annu Reddy (Hanimi Reddy) uncle of defendant 1, and myself filed O. S. No. 26 of 1927, District Court, Anantapur—same as O.S. No. 24 of 1928, Sub-Court, Anantapur—for the properties of the deceased Venkata Reddy. As Hanimi Reddy was the eldest member, he was attending to the conduct of that suit. I was also coming to Court along with him. The suit ended in our favour. Hanimi Reddy took possession through Court after the decree in the year 1930. Since then both Hanimi Reddy and myself have been in joint possession and enjoyment of the same."

In cross-examination he said as follows :

"I told Hanimi Reddy that I would also join him as a party in O.S. 24 of 1928. He said there was no need for me to join and that he would give my share to me.....I did not file any application to be impleaded as a defendant. ..... I have nothing in writing to show that Hanimi Reddy was giving me any produce from the suit lands."

The first defendant filed the plaint, judgment and decree in Hanimi Reddy's suit as also pattas, cist receipts and lease deeds taken by Hanimi Reddy in his time. With reference to this evidence the trial Court found as follows :

"The documents filed on behalf of the first defendant completely establish that Hanimi Reddy filed the suit in his individual capacity and obtained possession thereof. There is nothing to indicate that either the plaintiff or the second defendant took any interest in those proceedings..... There is no evidence of Hanimi Reddy having given any produce to the plaintiff or to the second defendant..... The plaintiff and the second defendant have been excluded from participation of profits to their knowledege since 1930." The learned District Judge found on appeal (when the same was remanded to him for a finding by the High Court) as follows :

"I have no hesitation in holding that the plaintiff had nothing to do with the institution or conduct of the suit O.S. No. 24 of 1928 on the file of the Sub-Court of Anantapur, and that he never had any actual joint enjoyment of suit properties with the late D. Hanimi Reddy or the first defendant."

He has not given a finding as to whether the non-participation of the profits by the plaintiff and the second defendant was in the nature of exclusion to their knowledge. But there are some admitted and relevant facts brought out in evidence which are significant. The present evidence as well as the plaint in the earlier suit of 1927 show clearly that all the parties including Hanimi Reddy were residents of village Mamuduru. All the suit properties are situated in that village itself, as appears from the schedules to the plaint in the earlier suit. Hanimi Reddy and the plaintiff were fairly closely related as appears from the plaintiff's admission as follows :

"My brother-in-law who is also the nephew of Hanimi Reddy was staying with Hanimi Reddy. My father-in-law and defendant No. 1's father-in-law is the same."

On these facts the question that arises is whether, in law, the possession of Hanimi Reddy from January 20, 1930, onwards was adverse to the plaintiff and the second defendant.

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Now, the ordinary classical requirement of adverse possession is that it should be *nec vi nec clam nec precario*. (See *Secretary of State for India* v. *Debendra Lal Khan*(1)). The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (See *Radhamoni Debi* v. *Collector of Khulna* (2)). But it is well-settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession, who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. (See *Corea* v. *Appuhamy*(3)). It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title. Whether that line of cases is right or wrong we need not pause to consider. It is sufficient to notice that the Privy Council in *N. Varada Pillai* v. *Jeevarathnammal*( ) quotes, apparently with approval, a passage from *Culley* v. *Deod Taylerson*( ) which indicates that such a situation may well lead to an inference of

(1) [1933] L.R. 61 I.A.78,82.
(2) [1900] L.R. 27 I.A.136,140.
(3) [1912] A.C. 230.
(4) A.I.R.1919 P.C. 44,47.
(5) 3 P.&D. 539;52 R.R.566.

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ouster "if other circumstances concur". (See also *Govindrao* v. *Rajabai*(1). It may be further mentioned that it is well-settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession.

In the present case there can be no doubt that Hanimi Reddy obtained sole possession of the suit properties after the death of Venkata Reddy on the basis of an action against third parties in which he claimed to be the sole nearest male agnate having title to *all* the properties. After obtaining possession he was in continuous and undisputed possession of the properties till his death enjoying all the profits thereof. No doubt in an ordinary case such possession and enjoyment has to be attributed to his lawful title, he being one of the co-heirs. But the plaint in the suit of 1927 and the decree therein render it reasonably clear that he filed the suit and obtained possession on the basis of his having exclusive title ignoring his co-heirs. It is urged that knowledge of the assertion of such exclusive title averred in a plaint cannot be imputed to other co-heirs who are not parties to the suit. But in this case it is not difficult on the evidence to say that the plaintiff and the second defendant must have been fully aware, at the time, of the nature of the claim made by Hanimi Reddy in the prior litigation and on the basis of which he obtained possession. That knowledge is implicit in the very case that they have put forward in the present plant. Their case is that the prior suit was brought by Hanimi Reddy with the consent of the plaintiff and the second defendant and on their behalf. No doubt that specific case has been found against them and that finding is *res judicata* between the parties. But there is no reason why the admission as to the knowledge of the nature of the litigation and the contents of the plaint which such a case necessarily implies should not be attributed at least to the present plaintiff. It appears reasonable to think that the plaintiff being unable to explain his inaction for over fourteen years after the death of Venkata Reddy has been constrained to put

(1) A.I.R. 1931 P.C. 48.

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forward a false case that the prior suit by Hanimi Reddy was with his consent and on his behalf. It is significant that the plaintiff has remained silent without asserting his right during Hanimi Reddy's lifetime, and comes forward with this suit after his death, rendering it difficult to ascertain whether the fact of Hanimi Reddy completely ignoring the existence of the plaintiff and the second defendant as co-heirs was not in denial of their relationship and consequently of their title as co-heirs to their knowledge. The fact that even so late as in the written statement of the first defendant relationship is denied may be indicative as to why Hanimi Reddy ignored the plaintiff and the second defendant and why they remained silent. The learned Judges of the High Court thought that there was nothing to show that Hanimi Reddy was aware that plaintiff and second defendant had any rights in the properties as co-heirs. This assumption is contrary to the admission of mutual knowledge of each other's rights implicit in the plaintiff's case that Hanimi Reddy brought his suit with the consent of the plaintiff. In such circumstances and especially having regard to the fact that both the plaintiff and Hanimi Reddy were living in the same village and the plaintiff has put forward a false explanation to account for his inaction, a Court of fact might well have inferred ouster. Sitting on an appeal in special leave, however, we do not feel it desirable to decide the case on this ground. We, therefore, proceed to consider the further question that arises in the case, *viz.*, whether the Receiver's possession can be tacked on to Hanimi Reddy's possession on the assumption that Hanimi Reddy's possession on and from January 20, 1940, was adverse to the plaintiff.

The learned Attorney-General urges that prior possession of the Receiver pending the suit must be treated as possession on behalf of Hanimi Reddy with the animus of claiming sole and exclusive title disclosed in his plaint. In support of this contention he relies on the well-known legal principle that when a Court takes possession of properties through its Receiver, such Receiver's possession is that of all the

parties to the action according to their titles. (See Kerr on Receivers, 12th Ed., p. 153). In Woodroffe on the Law relating to Receivers (4th Ed.) at p. 63 the legal position is stated as follows :

"The Receiver being the officer of the Court from which he derives his appointment, his possession is exclusively the possession of the Court, the property being regarded as in the custody of the law, in *gremio legis*, for the benefit of whoever may be ultimately determined to be entitled thereto."

But does this doctrine enable a person who was *not* previously in possession of the suit properties, to claim that the Receiver must be deemed to have taken possession adversely to the true owner, on his behalf, merely because he ultimately succeeds in getting a decree for possession against the defendant therein who was previously in possession without title. A Receiver is an officer of the Court and is not a particular agent of any party to the suit, notwithstanding that in law his possession is ultimately treated as possession of the successful party on the termination of the suit. To treat such Receiver as plaintiff's agent for the purpose of initiating adverse possession by the plaintiff would be to impute wrong-doing to the Court and its officers. The doctrine of Receiver's possession being that of the successful party cannot, in our opinion, be pushed to the extent of enabling a person who was initially out of possession to claim the tacking on of Receiver's possession to his subsequent adverse possession. The position may conceivably be different where the defendant in the suit was previously in adverse possession against the real owner and the Receiver has taken possession from him and restores it back to him on the successful termination of the suit in his favour. In such a case the question that would arise would be different, *viz.*, whether the interim possession of the Receiver would be a discontinuance or abandonment of possession or interruption of the adverse possession. We are not concerned with it in this case and express no opinion on it.

The matter may be looked at from another point of view. It is well-settled that limitation cannot begin

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to run against a person unless at the time that person is legally in a position to vindicate his title by action. In Mitra's Tagore Law Lectures on Limitation and Prescription (6th Ed.) Vol. I, Lecture VI, at p. 159, quoting from Angell on Limitation, this principle is stated in the following terms :

"An *adverse* holding is an actual and exclusive appropriation of land commenced and continued *under a claim of right,* either under an *openly avowed* claim, or under a *constructive* claim (arising from the acts and circumstances attending the appropriation), to hold the land against him who was in possession. (Angell, sections 390 and 398). It is the *intention* to claim adversely accompanied by such an invasion of the rights of the opposite party as gives him a *cause of action* which constitutes adverse possession."

Consonant with this principle the commencement of adverse possession, in favour of a person, implies that that person is in actual possession, at the time, with a notorious hostile claim of exclusive title, to repel which, the true owner would then be in a position to maintain an action. It would follow that whatever may be the animus or intention of a person wanting to acquire title by adverse possession his adverse possession cannot commence until he obtains actual possession with the requisite animus. In the leading case of *Agency Company* v. *Short*(1) the Privy Council points out that there is discontinuance of adverse possession when possession has been abandoned and gives as the reason therefor, at p. 798, as follows :

"There is no one against whom he (the rightful owner) can bring his action."

It is clearly implied therein that adverse possession cannot commence without actual possession which can furnish cause of action. This principle has been also explained in *Dwijendra Narain Roy* v. *Joges Chandru De*(2) at p. 609 by Mookerjee J. as follows :

"The substance of the matter is that time runs when the cause of action accrues, and a cause of action accrues, when there is in existence a person who can

(1) (1888) 13 App. Cas. 793. (2) A. I. R. 1924 Cal. 6

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sue and another who can be sued.....The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief. The statute (of limitation) does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result."

In the present case, the co-heirs out of possession such as the plaintiff and the second defendant were not obliged to bring a suit for possession against Hanimi Reddy until such time as Hanimi Reddy obtained actual possession. Indeed during the time when the Receiver was in possession, obviously, they could not sue him for possession to vindicate their title. Nor were they obliged during that time to file a futile suit for possession either against Hanimi Reddy or against the defendants in Hanimi Reddy's suit when neither of them was in possession. It appears to us, therefore, that the adverse possession of Hanimi Reddy, if any, as against his co-heirs could not commence when the Receiver was in possession. It follows that assuming that the possession of Hanimi Reddy from January 20, 1930, was in fact adverse and amounted to ouster of the co-heirs such adverse possession was not adequate in time by October 23, 1941, the date of suit, to displace the title of the plaintiff. It follows that the plaintiff-respondent before us is entitled to the decree which he has obtained and that the decision of the High Court is, in our view, correct, though on different grounds. It may be mentioned that objection has been raised on behalf of the respondents before us that the question of tacking on Receiver's possession was not in issue in the lower Courts and should not be allowed to be raised here. In the view we have taken it is unnecessary to deal with this objection.

In the result the appeal is dismissed with costs.

Appeal dismissed.

anywhere as to whether the vocal cords were affected or not. The doctor, PW 7 specially stated in his evidence that the vocal cords were not at all affected and the victim could speak. This being the position, we do not find any substance in this point as well. For the foregoing reasons, we are of the view that the prosecution has failed to prove its case beyond reasonable doubts and the High Court was quite justified in upholding conviction of the appellant. As such, no ground whatsoever for interference by this Court is made out.

8. Accordingly, appeal fails and the same is dismissed.

(2004) 10 Supreme Court Cases 779

(BEFORE S. RAJENDRA BABU AND G.P. MATHUR, JJ.)

KARNATAKA BOARD OF WAKF .. Appellant;

Versus

GOVERNMENT OF INDIA AND OTHERS .. Respondents.

Civil Appeals No. 16899 of 1996† with Nos. 16900 and 16895 of 1996, decided on April 16, 2004

A. **Muslim Law — Wakfs — Wakf Act, 1954 — Ss. 4, 26 & 56 — Nature of suit property — Whether government property or wakf property — Held, property must be "existing" wakf property on the date of commencement of the Act so as to entitle the Wakf Board to exercise power over the same — Where the property in question had been acquired by Govt. of India under Ancient Monuments Preservation Act, 1904 and entered in the Register of Ancient Protected Monuments long back and Govt. of India remaining in absolute ownership and continuous possession thereof for the last about one century, held, the property cannot be said to be an "existing" wakf property and therefore, appellant Wakf Board cannot exercise any right over the same — Hence subsequent notification issued in 1976 by the appellant Board showing the property as having been declared wakf property under S. 26 of the Wakf Act, and published in gazette, would be null and void and liable to be deleted — Factum of ownership, possession and title over the property, having been proved on admissible evidence and records by Govt. of India, appellant's claim over the property based on some borderline historical facts, unsubstantiated by concrete evidence and records, cannot be accepted (Paras 8 and 9)**

B. **Ancient Monuments Preservation Act, 1904 — S. 4 — Acquisition of immovable property by Govt. of India under the Act — Proof — Entry in Register of Ancient Protected Monuments — Evidentiary value of — Register maintained by Executive Engineer in charge of the ancient monuments produced wherein suit property was mentioned and the Govt. was referred to as the owner — When manner of acquisition was not under challenge, held, the entry in the Register could be treated as a valid proof of acquisition under the appropriate provisions of the Act (Para 8)**

† From the Judgment and Order dated 10-3-1995 of the Karnataka High Court in RFA No. 549 of 1986

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C. Specific Relief Act, 1963 — S. 34 — Suit for declaration of ownership and title over immovable property — Proof — Held, must be proved by admissible evidence and records — In a title suit of civil nature, there is no scope for historical facts and claims — Reliance on borderline historical facts would lead to erroneous conclusion — Plaintiff filing title suit should be very clear about origin of title over the property and must specifically plead it — Civil Procedure Code, 1908, Or. 6 R. 4 (Paras 8 and 12)

D. Adverse Possession — Essentials of — Held, are exclusive physical possession and animus possidendi to hold as owner in exclusion to the actual owner — Facts to establish claim for adverse possession, stated — Pleas of adverse possession and of title are mutually inconsistent — Limitation Act, 1963, Art. 65

In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "*nec vi, nec clam, nec precario*", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (*a*) on what date he came into possession, (*b*) what was the nature of his possession, (*c*) whether the factum of possession was known to the other party, (*d*) how long his possession has continued, and (*e*) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. (Para 11)

S.M. Karim v. *Bibi Sakina*, AIR 1964 SC 1254; *Parsinni* v. *Sukhi*, (1993) 4 SCC 375; *D.N. Venkatarayappa* v. *State of Karnataka*, (1997) 7 SCC 567; *Mahesh Chand Sharma (Dr.)* v. *Raj Kumari Sharma*, (1996) 8 SCC 128, *relied on*

A plaintiff, filing a title suit, should be very clear about the origin of title over the property. He must specifically plead it. The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. (Para 12)

S.M. Karim v. *Bibi Sakina*, AIR 1964 SC 1254; *P. Periasami* v. *P. Periathambi*, (1995) 6 SCC 523; *Mohan Lal* v. *Mirza Abdul Gaffar*, (1996) 1 SCC 639, *relied on*

In this case, the respondent obtained title under the provisions of the Ancient Monuments Act. But, the alternative plea of adverse possession by the respondent is unsustainable. The element of the respondent's possession of the suit property to the exclusion of the appellant with the *animus* to possess it is not specifically pleaded and proved. So are the aspects of earlier title of the appellant or the point of time of disposition. (Para 13)

E. **Civil Procedure Code, 1908 — Or. 41 R. 27 — Scope of — Additional evidence — Production of**

Held :

The scope of Order 41 Rule 27 CPC is very clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due diligence, they could not produce such documents and such documents are required to enable the court to pronounce proper judgment. (Para 6)

Appeals dismissed R-P-M/Z/29967/S

Advocates who appeared in this case :

Salman Khurshid, Senior Advocate (Imtiaz Ahmed, Javed A. Warsi and Z. Ahmad Khan, Advocates, with him) for the Appellant;

Mukul Rohatgi, Additional Solicitor General (Sanjay Hegde, Satya Mitra, S. Wasim A. Qadri, Anil Katiyar and Ms Sushma Suri, Advocates, with him) for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (1997) 7 SCC 567, *D.N. Venkatarayappa* v. *State of Karnataka* 785*c-d*
2. (1996) 8 SCC 128, *Mahesh Chand Sharma (Dr.)* v. *Raj Kumari Sharma* 785*e-f*
3. (1996) 1 SCC 639, *Mohan Lal* v. *Mirza Abdul Gaffar* 786*a*
4. (1995) 6 SCC 523, *P. Periasami* v. *P. Periathambi* 785*f*
5. (1993) 4 SCC 375, *Parsinni* v. *Sukhi* 785*c-d*
6. AIR 1964 SC 1254, *S.M. Karim* v. *Bibi Sakina* 785*c-d*, 785*f*

The Judgment of the Court was delivered by

S. RAJENDRA BABU, J.— Three suits were filed by the first respondent in each of these cases seeking for a declaration that notifications issued by the Karnataka Board of Wakf i.e. the appellant before us, showing some of the defendants to be illegal and void or in the alternative, to declare the first respondent as owner of the suit properties on the ground that they have perfected their title by adverse possession and consequential relief for permanent injunction. There are three sets of properties in each of these three matters. One is CTS No. 24 of Ward No. VI, described as "Karimuddin's Mosque", another is CTS No. 36 of Ward No. VI, described as "Mecca Masjid" and the other is CTS No. 35 of Ward No. VI, described as "Water Tower". All of them were situated at Bijapur.

2. The claim made by the first respondent is that they acquired the suit property under the Ancient Monuments Preservation Act, 1904 (the Ancient Monuments Act) and a notification had been published in that regard and the suit property had been entered in the Register of Ancient Protected Monuments in charge of the Executive Engineer. Thereafter, the Government of India enacted the Ancient Monuments and Archaeological Sites and Remains Act, 1958 and the suit property came to be under the management of the Department of Archaeological Survey, Government of India. It is asserted by the first respondent that in all the relevant records, the name of the Government of India has been shown as the owner of the suit property and that they came to know that the defendants got published Notification No. KTW/531/ASR-74/7490 dated 21-4-1976, showing the suit property as having been declared as "wakf property" in terms of Section 26 of the Wakf Act, 1954 and was also stated to have been published in the gazette.

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Inasmuch as the suit property since inception was under the ownership of the plaintiff with lawful possession thereof, the defendants could not have made any claim thereto nor got the same declared as wakf property. The defendants contested this claim of the plaintiffs in the original suits and that after following due procedure publication has been made in the Karnataka Gazette in terms of Section 67 of the Karnataka Land Revenue Act and the order passed by the officer concerned is binding on the plaintiff and, therefore, the plaintiff cannot claim any ownership on the ground of adverse possession.

3. While this is the stand of the Wakf Board, the appellant before us, and the other defendants described as to be "*mutawallis*" of the wakf property, stated that one of the Arab preachers, Peer Mahabari Khandayat came as a missionary to the Deccan as early as AD 1304 and occupied whole Arkilla and erected "Mecca Masjid" according to the established customs to offer prayer which is surrounded by a vast open area. The said property had all along for seven centuries been treated as wakf and has since after the time of the Peer, been managed, looked after and maintained by *sajjada nashin* from time to time. No one has interfered with their right. They claim that they have appropriate *sanads* to show that the property in question is wakf property and that another portion of the suit property also belongs to the *Darga* of Peer Mahabari Khandayat and Chinni Mahabari Khandayat Darga Arkilla, Bijapur and, therefore, the same has been appropriately entered in the wakf register.

4. The trial court raised several issues in the matter and gave a finding that on a consideration of the oral and documentary evidence in the case it is clear that even prior to the introduction of the Survey Department at Bijapur, the Government of India had taken these properties as ancient monuments and they are protecting them by keeping appropriate watch over these monuments but now the defendants have come forward contending that these properties are wakf properties and they have nothing to show that even after the demise of Peer Mahabari Khandayat they remained in the possession of the same. The properties in question were acquired by the Government of India as long back as 1900 and they started preserving them as important historical monuments and they remained in possession and enjoyment of them. This was clear both from oral and documentary evidence and on that basis, the trial court held that they are owning and managing the suit properties. The trial court also gave a finding that the Wakf Board itself declared these properties as wakf properties without properly following the relevant provisions of the Wakf Act and without following due procedure prescribed therein and in a case where there is a dispute as to who is a stranger to the wakf, a mere declaration by the Wakf Board will not bind such person and on that basis the trial court decreed the suit.

5. The matter was carried in appeal. A Division Bench of the High Court examined the matter once over again and affirmed the findings of the trial court. The Division Bench also noticed that at the end of the arguments the appellant made a submission that as they have not produced some of the important documents, the matter may be remanded to the trial court in order to enable them to produce the said documents and with a direction to the trial

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court for a fresh disposal in accordance with law. The High Court did not allow the plea raised by the appellant that there are documents in question which will go to the root of the matter or which would be necessary in terms of Order 41 Rule 27 CPC to permit them to adduce further evidence and on that basis rejected that claim. The High Court affirmed the various findings given by the trial court.

6. In the circumstances, the learned counsel for the appellant reiterated the claim made before the High Court that they should be permitted to adduce further evidence before the Court to substantiate their claim but when the matters were pending before the trial court and the High Court they had ample opportunity to do so. If they had to produce appropriate documents, they could have done so and also it is not clear as to the nature of the documents which they seek to produce which will tilt the matter one way or the other. The scope of Order 41 Rule 27 CPC is very clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, unless they have shown that in spite of due diligence, they could not produce such documents and such documents are required to enable the court to pronounce proper judgment. In this view of the matter, we do not think there is any justification for us to interfere with the orders of the High Court. However, in view of the arguments addressed by the learned counsel for the appellant, we have also gone into various aspects of the matter and have given another look at the matter and our findings are that the view taken by the High Court is justified. However, one aspect needs to be noticed. The High Court need not have stated that the first respondent is entitled to the relief even on the basis of adverse possession. We propose to examine this aspect.

7. The case advanced by the appellants is that one Arabian saint Mahabari Khandayat came to Bijapur around the 13th century, acquired certain properties (suit property) and constructed "Mecca Mosque" which is under the management of the lineal descendants of the said saint; that by virtue of notification bearing No. KTW/531/ASR-74/7490 dated 21-4-1976, issued by the appellant and the Karnataka Gazette Notification, p. 608/Part VI dated 8-7-1976, they became absolute owners and title-holders of the suit property; that pursuant to the circulars dated 8-6-1978 and 22-1-1979, the Deputy Commissioner of the districts were instructed to hand over possession of any wakf properties that are under the possession of any government department; that by virtue of the said circular the Assistant Commissioner, Bijapur held enquiry under Section 67 of the Karnataka Land Revenue Act, 1964 and arrived at the conclusion that the suit property is a wakf property; that the alleged acquisition by the respondent itself is a concocted story; that the notification and the gazette publication itself is a notice to all concerned and the respondent failed to reply to this notice; that the original suit is bad by limitation; that the original suit itself is not maintainable since there is no notice under Section 56 of the old Wakf Act; that the plea regarding title of the suit property by the respondent and the plea of adverse possession is mutually exclusive; that, therefore, the appeal is to be allowed.

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8. Pertaining to the ownership claim of the appellants over the suit property there is no concrete evidence on record. The contention of the appellants that one Arabian saint Mahabari Khandayat came to India and built the Mosque and his lineal descendants possessed the property, cannot be accepted if it is not substantiated by evidence and records. As far as a title suit of civil nature is concerned, there is no room for historical facts and claims. Reliance on borderline historical facts will lead to erroneous conclusions. The question for resolution herein is the *factum* of ownership, possession and title over the suit property. Only admissible evidence and records could be of assistance to prove this. On the other hand, the respondent produced the relevant copy of the Register of Ancient Protected Monuments maintained by the Executive Engineer in charge of the ancient monuments (Ext. P-1) wherein the suit property is mentioned and the Government is referred to as the owner. Since the manner of acquisition is not under challenge, the entry in the Register of Ancient Protected Monuments could be treated as a valid proof for their case regarding the acquisition of suit property under the appropriate provisions of the Ancient Monuments Act. Gaining of possession could be either by acquisition or by assuming guardianship as provided under Section 4 thereof. Relevant extracts of Ext. P-2, CTS records fortify their case. It shows that the property stands in the name of the respondent. Moreover, the evidence of Syed Abdul Nabi who is the power-of-attorney holder (of Defendants 2-A and 2-B in the original suit) shows that the suit property has been declared as a protected monument and there is a signboard to this effect on the suit property. He also deposed that the Government is in possession of the suit property and the Government at its expenditure constructed the present building in the suit property. On a conjoint analysis of Exts. P-1, P-2 and deposition of Syed Abdul Nabi, it could be safely concluded that the respondent is in absolute ownership and continuous possession of the suit property for the last about one century. Their title is valid. The suit property is government property and not of a wakf character.

9. The old Wakf Act is enacted "for the better administration and supervision of wakfs". Under Section 4 of the old Wakf Act, Survey Commissioner(s) could only make a "... survey of wakf properties existing in the State at the date of the commencement of this Act". The Wakf Board could exercise its rights only over existing wakf properties. Since the suit property itself is not an existing wakf property the appellant cannot exercise any right over the same. Therefore, all the subsequent deeds based on the presumption that the suit property is a wakf property are of no consequence in law. The notification bearing No. KTW/531/ASR-74/7490 dated 21-4-1976, issued by the appellant and the Karnataka Gazette Notification, p. 608/Part VI dated 8-7-1976 is null and void. The same is liable to be deleted. In view of this, the aspects relating to treating gazette notification as notice and limitation need not be looked into. As regards the compliance with notice under Section 56 of the old Wakf Act, the High Court based on evidence and facts ruled that the same is complied with. This is a finding of fact based on evidence.

10. Now we will turn to the aspect of adverse possession in the context of the present case. The appellants averred that the plea of the respondent based on title of the suit property and the plea of adverse possession are mutually exclusive. Thus finding of the High Court that the title of the Government of India over the suit property by way of adverse possession is assailed.

11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "*nec vi, nec clam, nec precario*", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See *S.M. Karim* v. *Bibi Sakina*[1], *Parsinni* v. *Sukhi*[2] and *D.N. Venkatarayappa* v. *State of Karnataka*[3].) Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (*a*) on what date he came into possession, (*b*) what was the nature of his possession, (*c*) whether the factum of possession was known to the other party, (*d*) how long his possession has continued, and (*e*) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. [*Mahesh Chand Sharma (Dr.)* v. *Raj Kumari Sharma*[4].]

12. A plaintiff filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See *S.M. Karim* v. *Bibi Sakina*[1].) In *P. Periasami* v. *P. Periathambi*[5] this Court ruled that: (SCC p. 527, para 5)

> "Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with

1 AIR 1964 SC 1254
2 (1993) 4 SCC 375
3 (1997) 7 SCC 567
4 (1996) 8 SCC 128
5 (1995) 6 SCC 523

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Mohan Lal v. *Mirza Abdul Gaffar*[6] that is similar to the case in hand, this Court held: (SCC pp. 640-41, para 4)

> "*4.* As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years i.e. up to completing the period his title by prescription *nec vi, nec clam, nec precario*. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

13. As we have already found, the respondent obtained title under the provisions of the Ancient Monuments Act. The element of the respondent's possession of the suit property to the exclusion of the appellant with the *animus* to possess it is not specifically pleaded and proved. So are the aspects of earlier title of the appellant or the point of time of disposition. Consequently, the alternative plea of adverse possession by the respondent is unsustainable. The High Court ought not to have found the case in their favour on this ground.

14. In the result, these appeals stand dismissed.

(2004) 10 Supreme Court Cases 786

(BEFORE ARIJIT PASAYAT AND C.K. THAKKER, JJ.)

USMAN MIAN AND OTHERS .. Appellants;

Versus

STATE OF BIHAR .. Respondent.

Criminal Appeal No. 587 of 1999†, decided on October 4, 2004

A. **Criminal Trial — Circumstantial evidence — When can conviction be based on — Principal fact can be inferred from the chain of circumstances — Circumstances must be proved beyond reasonable doubt and must be shown to be closely connected with the principal fact — Chain of incriminating circumstances must be consistent only with the hypothesis of guilt of the accused**

B. **Penal Code, 1860 — Ss. 302/34 — Circumstantial evidence — Accused's abscondence is a vital circumstance — Falsity of defence plea provides an additional link to the chain of incriminating circumstances — Held, incriminating circumstances proved by prosecution conclusively established commission of murder by accused-appellants — Hence their conviction upheld**

A woman was found dead in her husband's house. The prosecution case was based on circumstantial evidence. The circumstances which were pressed into

6 (1996) 1 SCC 639

† From the Judgment and Order dated 7-8-1998 of the Patna High Court in Crl. A. No. 424 of 1986

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for more than six months. However, the same would be subject to the conditions laid down therein, namely, (*i*) he has to be a proclaimed offender; or (*ii*) he is one on whom an award for arrest was announced; or (*iii*) he is one for whose detention an order of arrest was issued but not served.

11. If only an order of detention was issued, the same by itself may not lead to a conclusion that the first respondent had to remain underground for more than six months, unless he proves one or the other requisite condition precedents therefor mentioned in the Scheme.

12. The appropriate authority as also the learned Single Judge had clearly come to the conclusion that the first respondent was neither declared a proclaimed offender nor was an award for his arrest announced or an order of detention had been issued but could not be served. The Division Bench of the High Court, therefore, in our opinion committed a manifest error in passing the impugned judgment insofar as it proceeded on the basis that Respondent 1 herein was entitled to grant of pension under the Samman Pension Scheme, only because an order of detention had been issued against him.

13. We are, therefore, satisfied that Respondent 1 has not been able to establish that he fulfilled the eligibility criteria/conditions laid down under the said Scheme.

14. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. No costs.

(2007) 14 Supreme Court Cases 308

(BEFORE S.B. SINHA AND H.S. BEDI, JJ.)

ANNAKILI .. Appellant;

Versus

A. VEDANAYAGAM AND OTHERS .. Respondents.

Civil Appeal No. 4880 of 2007†, decided on October 12, 2007

A. **Property Law — Adverse possession — Acquisition of title by — Requirements of — Possession must be hostile — Animus possidendi — It is a requisite ingredient of adverse possession — Along with the possession, it is also necessary that the animus possidendi must be existing at the commencement of the possession — Mere possession for a period of more than 12 years — Held, does not ripen into a title in the absence of animus possidendi — In the present case, on an earlier occasion in a writ appeal the title of the property was already decided in favour of the plaintiff wherein the defendant claimed possession only on the basis of allotment of land by the Slum Board and no independent title was claimed — Held, the order passed in writ appeal operates as res judicata — Claim of adverse possession not maintainable — Limitation Act, 1963 — Art. 65 — Civil Procedure Code, 1908 — S. 11 — Res judicata — Practice and Procedure — Res judicata**

† Arising out of SLP (C) No. 6500 of 2006. From the Judgment and Order dated 27-1-2006 of the High Court of Judicature at Madras in AS No. 441 of 1998

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B. **Specific Relief Act, 1963 — S. 6 — Suit for possession based on title — Defendant resisting suit on basis of hostile title — Title of plaintiff already adjudicated — Burden of proof — Lies on the defendant to show that he/she was in the possession of the said property on the basis of hostile title since past 12 years which has resulted in extinguishing the title of plaintiff — Limitation Act, 1963 — Art. 65**

The respondent-plaintiffs' predecessor *KL* and his brother purchased the property in question from the Corporation of Madras by a registered deed of sale dated 19-4-1944. The said property came under the preview of the notification of the year 1973 issued by the Tamil Nadu Slum Clearance Board and stood transferred to it. The suit property was allotted to the husband of the appellant-defendant by the Slum Clearance Board as he was in possession of the same at the relevant time.

The plaintiffs filed a writ petition in the year 1989 for issuance of a writ of or in the nature of mandamus directing the State of Tamil Nadu to denotify the land in question as a slum area and put them back in the possession thereof. By a judgment and order dated 10-1-1990, the said writ petition was allowed. The area in question was directed to be denotified and the respondents herein were found entitled to obtain vacant possession of the said property. The defendant and other persons similarly situated were not parties therein. The defendant preferred a writ appeal before the Division Bench which was allowed to the extent of the denotification asked for alone.

The plaintiffs filed a suit on 26-9-1995 for possession and mesne profit which was resisted by the defendant claiming title by adverse possession and on the ground that the allotment of the Slum Clearance Board was only a recognition given to the defendant's right to continue in possession forever. The suit was dismissed by the trial court holding that the suit land had been in occupation of the defendant for a long time and that they have acquired title by adverse possession. The suit was also held to be barred by limitation.

The High Court allowed the appeal filed by the respondent-plaintiffs directing the appellant-defendant to deliver possession of the property to the plaintiffs.

Dismissing the appeal, the Supreme Court

Held :

The appellant herein indisputably had been claiming title only on the basis of purported settlement made in their favour by the Tamil Nadu Slum Clearance Board. It was not their case that even prior to 1-12-1972 when the area was declared as slum area, they had acquired title by adverse possession. Indisputably, therefore, the Corporation of Madras or the Tamil Nadu Slum Clearance Board did not have any title in the suit property. They could not have transferred any right, title and interest in the said land to the appellants and others similarly situated. (Para 19)

Even in the said writ petition, the appellant did not claim any independent right on the basis of adverse possession or otherwise. The writ application filed by the respondents herein directing the Government of Tamil Nadu to issue a notification denotifying the area as slum area was allowed by the Single Judge. The said finding of the Single Judge was not overturned. The Division Bench, while upholding the title of the respondents in relation to the said land, was of

the opinion that the Single Judge was not correct in directing handing over of possession of the suit properties in favour of the respondents, although the appellant and persons similarly situated were in possession thereof. In the aforementioned premise, it was not necessary for the respondents to file a suit for a declaration of their title. The appellant had preferred the said appeal. The decision of the Division Bench was rendered in the presence of the appellant. The judgment of the Division Bench of the High Court operates as res judicata. The finding in regard to the title of the respondents had attained finality. (Para 22)

It was not obligatory on the part of the respondent-plaintiffs seeking possession to file a suit for declaration of their title also. As the title of the respondents in the suit property had already been adjudicated upon, a suit for recovery of possession on the basis of the said title attracted Article 65 of the Schedule appended to the Limitation Act, 1963. In terms of the said provision, it was for the appellant-defendant to show that she and her predecessor had been in possession of the suit property on the basis of the hostile title and as a result whereof the title of the respondent-plaintiffs stood extinguished. (Para 23)

Claim by adverse possession has two elements: (*1*) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now a well-settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more does not ripen into a title. (Paras 24 to 28)

Saroop Singh v. *Banto*, (2005) 8 SCC 330; *T. Anjanappa* v. *Somalingappa*, (2006) 7 SCC 570, *relied on*

P.T. Munichikkanna Reddy v. *Revamma*, (2007) 6 SCC 59; *M. Durai* v. *Muthu*, (2007) 3 SCC 114, *referred to*

Vasantiben Prahladji Nayak v. *Somnath Muljibhai Nayak*, (2004) 3 SCC 376; *Md. Mohammad Ali* v. *Jagadish Kalita*, (2004) 1 SCC 271, *cited*

SA-M/A/36894/S

Advocates who appeared in this case :
Dayan Krishnan, Gautam Narayan and Nikhil Nayyar, Advocates, for the Appellant;
V. Raghavachari, R. Anand Padmanabhan, S.R. Sundar and Pramod Dayal, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2006) 7 SCC 570, *T. Anjanappa* v. *Somalingappa* 316*f*
2. (2007) 6 SCC 59, *P.T. Munichikkanna Reddy* v. *Revamma* 317*b*
3. (2007) 3 SCC 114, *M. Durai* v. *Muthu* 317*c*
4. (2005) 8 SCC 330, *Saroop Singh* v. *Banto* 316*d*
5. (2004) 3 SCC 376, *Vasantiben Prahladji Nayak* v. *Somnath Muljibhai Nayak* 316*e*
6. (2004) 1 SCC 271, *Md. Mohammad Ali* v. *Jagadish Kalita* 316*f*

The Judgment of the Court was delivered by

S.B. SINHA, J.— Leave granted.

2. The respondent-plaintiffs are owners of the property in question. They purchased the same from the Corporation of Madras by a registered deed of sale dated 19-4-1944. The owners of the property, namely, Krishnadoss Lala and his brother, however, partitioned their suit properties on or about 5-5-1968 whereupon the suit properties were allotted to the share of Krishnadoss Lala. After his demise, the same vested in his heirs and legal representatives. They, along with one Mohamed Idris and one K. Peer Mohideen entered into an agreement whereby and whereunder, it was agreed that the property should be released from the notification of the year 1973 issued by the Tamil Nadu Slum Clearance Board.

3. The plaintiff-respondents herein purchased the suit properties not only from the heirs and legal representatives of the said Krishnadoss Lala but also from the said Mohamed Idris and K. Peer Mohideen for valuable consideration by a registered deed of sale dated 30-9-1986.

4. The defendants claimed possession of the suit properties described in Schedule A of the plaint therein since 1957. On or about 1-12-1972, the Government of Tamil Nadu designated an area including the suit properties as slum area. It was transferred to the Tamil Nadu Slum Clearance Board.

5. Pursuant to a scheme undertaken by World Bank in regard to sale of land situated in Corporation Division No. 122, Kamarajapuram, T. Nagar slum areas to the persons who were in occupation of the portions thereof, the Department of House and Urban Development, Government of Tamil Nadu issued two GOMs bearing No. 1117 dated 27-6-1979 and GOMs No. 1100 dated 29-8-1980 in that behalf.

6. The suit property was allotted to the husband of the appellant as appears from a letter dated 18-3-1981 which is to the following effect:

> "In pursuance of the orders stated above, action is being taken to allot land extending 18.5 sq m in Kamrajapuram Scheme Plot No. 17 is allotted to you. You have to pay the necessary amount in the following manner. A sum of Rs 89 should be paid along with the application. Later on you have to pay Rs 13 as monthly instalment (including interest) for a period of 10 years. On completion of 10 years and after payment of all the instalments the land will be given to you through a sale deed. Besides this you have to pay a sum of Rs 8 per month towards development charges and Rs 2 per month towards water and drainage charges.
>
> You are hereby requested to apply in the pro forma annexed herein and to execute a lease-cum-sale agreement document in favour of the Slum Clearance Board within 7 days from the date of receipt of this notice. If you fail to send this application with advance payment receipt, it is construed that you are not in need of the land allotted to you and the same will be allotted to some other person after evicting you from the premises."

7. The respondent-plaintiffs, however, moved the High Court by way of filing a writ petition in the year 1989 for issuance of a writ of or in the nature of mandamus directing the State of Tamil Nadu to denotify the land in question as a slum area and put them back in the possession thereof. By a judgment and order dated 10-1-1990, the said writ petition was allowed. The area in question was directed to be denotified and the respondents herein were found entitled to obtain vacant possession of the said property.

8. The appellant and other persons similarly situated were not parties therein. They preferred a writ appeal before the Division Bench of the High Court which was numbered as Writ Appeal No. 272 of 1990. The Division Bench of the High Court by a judgment and order dated 21-3-1990 found the title of the respondents herein having regard to the admitted facts in the said proceedings, but upon holding that as the appellants have ventured to put forth a case that their occupation of the property relates back to 60 years which conferred the right on them dehors the said proceedings and as direction to hand over the vacant possession would result in dispossession of the third parties to which the learned Single Judge had no occasion to advert to and adjudicate upon the rights of the third parties, because they were not parties in the said writ petition, directed:

> "Further, there is a grievance, expressed by the learned counsel for the parties, that without even a prayer therefor, the learned Single Judge has directed Respondents 1 and 2 to declare that the property ceased to be a slum area. This grievance is a tenable one and requires amelioration. There was no prayer at all to the above effect. The enquiry into that question will take us into a different sphere. Hence, we do not think it will be in order to make a declaration that the property ceased to be a slum area.
>
> In the said circumstances, we find a warrant to vacate and we do vacate the directions of the learned Single Judge to Respondents 1 and 2 to declare that the property ceased to be a slum area and also to hand over vacant possession of the property to the petitioners. The prayer in the writ petition to the extent of the denotification asked for alone could be and is being sustained. The other controversies with reference to recovery of possession from the third parties and the declaration with reference to the property ceasing to be a slum area are left open."

9. Consequent upon the said decision of the Division Bench, the Government of Tamil Nadu cancelled the earlier Notification dated 1-12-1972 notifying the suit properties as slum area.

10. The respondents filed a suit on 26-9-1995 which was marked as CS No. 1485 of 1995 (renumbered as 14770 of 1990) praying, inter alia, for the following reliefs:

> "(*a*) Direct the defendants to quit and deliver vacant possession of the premises mentioned in Schedules B, C, D and E and remove all structures put up by the defendants and in default direct the plaintiffs to remove the structure and recover the cost from the defendants.

(*b*) To award past mesne profits at Rs 3,60,000 jointly and severally towards past mesne profits.

(*c*) To award future mesne profit at the rate of Rs 10,000 per month jointly and severally.

(*d*) To award future mesne profit at the rate of Rs 10,000 per month jointly and severally."

11. In their written statement, the appellant, inter alia, contended:

"(*1*) That the plaintiffs have not filed a suit for declaration of title but merely a suit for possession which is not maintainable inasmuch as the title of the plaintiff-respondents herein have been denied in all proceedings.

(*2*) That the plaintiff-respondents herein are not the owners of the property and have not been in possession of the property from 19-4-1944 onwards.

(*3*) The defendant-petitioner herein are in continuous uninterrupted possession and have perfected title by adverse possession.

(*4*) That the allotment of the Slum Clearance Board was only a recognition given to the defendants' right to continue in possession forever."

12. The learned trial Judge dismissed the said suit opining that the suit land had been in occupation of the appellants for a long time and that they have acquired title by adverse possession. The suit was also held to be barred by limitation.

13. By reason of the impugned judgment, the High Court allowed the appeal filed by the respondents herein directing the appellant to deliver possession of the property to the respondents.

14. Mr Dayan Krishnan, learned counsel appearing on behalf of the appellant, would submit that the High Court proceeded on an erroneous basis that the title of the suit property was not in dispute.

15. It was submitted that the High Court committed a serious error in opining that the appellant had no animus to possess the suit property adverse to the interest of the respondent-plaintiff.

16. Evidence on record would clearly show, Mr Krishnan submitted, that the appellant had been in continuous possession for more than 60 years and, thus, they had perfected their title by adverse possession. It was urged that the respondents having not sought for any relief in regard to declaration of their title, the suit will be governed by Article 64 and the Schedule appended to Article 65 of the Limitation Act, 1963.

17. Mr V. Raghavachari, learned counsel appearing on behalf of the respondents, on the other hand, drew attention of this Court not only to the findings of the Division Bench of the High Court in Writ Appeal No. 272 of 1990 but also to another writ application filed by the appellant herein in the year 1989 and the judgment passed therein as also in the writ appeal to contend that in view of the findings of the Division Bench of the High Court

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in the aforementioned writ proceedings which was disposed of in the year 1991, limitation, if any, would start running only from the said date and not prior thereto. It was contended that the petitioner had never asserted any right in them but had all along been asserting their title under the settlement made by the Corporation of Madras.

18. The fact that title of the land was with the Corporation of Madras is not in dispute. It is furthermore not in dispute that the Corporation of Madras had transferred the suit property in favour of Mr Krishnadoss Lala. Despite the fact that the Corporation of Madras had divested itself of the said property, it erroneously transferred the same in favour of the Tamil Nadu Slum Clearance Board on 1-12-1973. Pursuant thereto, certain development activities were taken by the Board. At that point of time, Shri Krishnadoss Lala submitted a representation to the Corporation of Madras stating that although the property belonged to him, the same was illegally transferred to the Tamil Nadu Slum Clearance Board. The Corporation accepted the said mistake on its part and informed the Tamil Nadu Slum Clearance Board thereabout. A request was made to the Board to exclude the said property from the list of properties owned by the Slum Clearance Board. The predecessors and representatives of the respondent thereafter paid the development charges incurred by the Slum Clearance Board. A request was made by the Board to denotify the slum area but the State did not take any action thereupon.

19. It was in the aforementioned factual scenario, the writ petition was filed. The appellant herein indisputably had been claiming title only on the basis of purported settlement made in their favour by the Tamil Nadu Slum Clearance Board. It was not their case that even prior to 1-12-1972 when the area was declared as slum area, they had acquired title by adverse possession. Indisputably, therefore, the Corporation of Madras or the Tamil Nadu Slum Clearance Board did not have any title in the suit property. They could not have transferred any right, title and interest in the said land to the appellants and others similarly situated.

20. We may notice that the appellant, in his writ application filed before the High Court of Judicature at Madras being Writ Petition No. 7785 of 1987, stated:

> "In accordance with the scheme the slum-dwellers of Kamrajapuram were provided with the bank loan for constructing their houses or putting up construction. We understand that financial assistance was availed from World Bank for construction of drainage, toilet and bathroom facilities and as well as for making water supply to the slum-dwellers of Kamrajapuram. We obtained the loan from Bank as already submitted through the Slum Clearance Board and put up new constructions after obtaining sanction from the Corporation, and are in possession and enjoyment of our respective land and superstructure. We were paying the instalments towards sale consideration and towards bank loan and also development charges, etc., since 1981."

21. It was under the said title, therefore, the appellant and others had been claiming the land. They had been paying instalments to the Slum Clearance Board. In the writ petition filed by the appellants and others, a prayer was made for issuance of direction to the Slum Clearance Board to accept instalments from them. The said writ petition was dismissed. A writ appeal preferred thereagainst, inter alia, by the appellant herein, was dismissed by a Division Bench of the High Court, holding:

> "We have heard learned counsel for the parties at length and perused the materials on record. It is seen from the facts narrated above, that after 19-4-1944 sale, the property in question does not belong to the Corporation of Madras. The transfer of the property thereafter to the Slum Clearance Board on 17-12-1973 is only a mistake. That apart, the owners of the property have paid the amounts spent by the Slum Clearance Board for the development of the property and had also paid compensation to most of the slum-dwellers for their resettlement. They have also agreed to pay compensation to the remaining slum-dwellers for their resettlement. The order directing denotification has been upheld by the Division Bench in WA No. 272 of 1990 and the appellants had not agitated this issue at the appropriate time, when they had the knowledge of the decision dated 21-3-1990 and also when G.O. was issued on 16-5-1991 pursuant thereto. Civil suit is pending only for possession. Under the circumstances, the arguments advanced by the appellants now are not sustainable, as the same had not been agitated at the appropriate time. As such, the order of the learned Single Judge cannot be said to be unjust. In any view of the matter, in the facts of the given case, we do not find any error or illegality in the order of the learned Single Judge so as to call for interference. The writ appeal is, therefore, dismissed."

22. Even in the said writ petition, the appellant did not claim any independent right on the basis of adverse possession or otherwise. We have noticed hereinbefore that the writ application filed by the respondents herein directing the Government of Tamil Nadu to issue a notification denotifying the area as slum area was allowed by the learned Single Judge. The said finding of the learned Single Judge was not overturned. The Division Bench, while upholding the title of the respondents in relation to the said land, was of the opinion that the learned Single Judge was not correct in directing handing over of possession of the suit properties in favour of the respondents, although the appellant and persons similarly situated were in possession thereof. In the aforementioned premise, it was not necessary for the respondents to file a suit for a declaration of their title. The appellant had preferred the said appeal. The decision of the Division Bench was rendered in the presence of the appellant. The judgment of the Division Bench of the High Court operates as res judicata. The finding in regard to the title of the respondents had attained finality.

23. We cannot accept the submission of Mr Dayan Krishnan that it was obligatory on the part of the respondents to file a suit for declaration of their title also. As the title of the respondents in the suit property had already been

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adjudicated upon, a suit for recovery of possession on the basis of the said title attracted Article 65 of the Schedule appended to the Limitation Act, 1963. In terms of the said provision, it was for the appellant to show that she and her predecessor had been in possession of the suit property on the basis of the hostile title and as a result whereof the title of the respondent-plaintiff extinguished.

24. Claim by adverse possession has two elements: (*1*) the possession of the defendant should become adverse to the plaintiff; and (*2*) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now a well-settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more does not ripen into a title.

25. In *Saroop Singh* v. *Banto*[1] in which one of us was a member, this Court held: (SCC p. 340, paras 29-30)

> "*29.* In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See *Vasantiben Prahladji Nayak* v. *Somnath Muljibhai Nayak*[2].)
>
> *30.* 'Animus possidendi' is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See *Md. Mohammad Ali* v. *Jagadish Kalita*[3], SCC para 21.)"

26. The said statement of law was reiterated in *T. Anjanappa* v. *Somalingappa*[4] stating: (SCC p. 577, para 20)

> "*20.* It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse

1 (2005) 8 SCC 330
2 (2004) 3 SCC 376
3 (2004) 1 SCC 271
4 (2006) 7 SCC 570 : (2006) 8 Scale 624

possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

27. Yet recently, in *P.T. Munichikkanna Reddy* v. *Revamma*[5] this Court noticed the recent development of law in other jurisdiction in the context of property as a human right to opine: (SCC p. 80, para 56)

"*56.* Therefore it will have to be kept in mind the courts around the world are taking an unkind view towards statutes of limitation overriding property rights."

28. We may also notice that this Court in *M. Durai* v. *Muthu*[6] noticed the changes brought about by the Limitation Act, 1963, vis-à-vis, the old Limitation Act, holding: (SCC p. 116, para 7)

"*7.* The change in the position in law as regards the burden of proof as was obtaining in the Limitation Act, 1908 vis-à-vis the Limitation Act, 1963 is evident. Whereas in terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession."

29. The appellant herein, it will bear repetition to state, did not raise any claim on adverse possession prior to the filing of the aforementioned writ appeal. She and her husband has been claiming title only through or under the Board. No independent title was claimed. The respondents, on the one hand and the Corporation of Madras, the Slum Board and the Government of Tamil Nadu on the other were litigating since 1973. They accepted the title of the respondents. The respondents also reimbursed the Board in regard to the expenditure incurred by them. In the aforementioned fact situation, it is not possible to hold as has been contended by Mr Dayan Krishnan, that the Division Bench posed unto itself a wrong question leading to a wrong answer or the appellant had acquired title by adverse possession or otherwise.

30. For the views we have taken, there is no infirmity in the judgment of the High Court. The appeal is dismissed. No costs.

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5 (2007) 6 SCC 59
6 (2007) 3 SCC 114

THE MOSQUE KNOWN AS MASJID SHAHID GANJ AND OTHERS . . . } APPELLANTS.

AND

SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR, AND ANOTHER . . . . . } RESPONDENTS.

J. C.*
1940
May 2.

ON APPEAL FROM THE HIGH COURT AT LAHORE.

Limitation—Property made waqf for purposes of mosque—Adverse possession by Sikhs—Claim for declaration of right to worship in mosque—Applicability of period of limitation—Suits against Muslim institutions as artificial persons incompetent—Res judicata—Indian Limitation Act (IX. of 1908), s. 28; art. 144—Sikh Gurdwaras Act (Punjab Act VIII. of 1925), s. 37.

It is impossible to read into the modern Limitation Acts any exception for property made waqf for the purposes of a mosque, whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building. Where, therefore, property which had originally consisted of a mosque and adjacent land, dedicated in A.D. 1722, had been possessed by Sikhs adversely to the waqf and to all interests thereunder for more than twelve years, the right of the mutawali to possession for the purposes of the waqf came to an end under art. 144 of the First Schedule to the Limitation Act, 1908, and the title derived under the dedication from the settlor or wakif became extinct under s. 28 of that Act.

Abdur Rahim v. *Narayan Das Aurora* (1922) L. R. 50 I. A. 84, referred to.

The individual character of the right to go to a mosque for worship mattered nothing when the land was no longer waqf, and was no ground for holding that a person born long after the property had become irrecoverable could enforce partly or wholly the ancient dedication.

Suits cannot competently be brought by or against Muslim institutions as artificial persons in the British Indian Courts.

Shankar Das v. *Said Ahmad* (1884) No. 153 P. R.; *Jinda Ram* v. *Husain Bakhsh* (1914) No. 59 P. R.; and *Maula Bukhsh* v. *Hafiz-ud-din* A. I. R. (1926) Lah. 372, referred to.

Held, further, that the suit, brought in 1935 by a number of persons claiming (inter alia) a declaration that the suit property was a mosque in which they and all followers of Islam had a right to worship, and an injunction to restrain any interference

* *Present:* LORD THANKERTON, LORD RUSSELL OF KILLOWEN, SIR GEORGE RANKIN, LORD JUSTICE GODDARD, and MR. M. R. JAYAKAR.

J. C.

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with their so doing, was concluded on the general principle of res judicata by a decision in a suit brought in 1855 by a person claiming as mutawali to recover the property for the purposes of the waqf, and also under s. 37 of the Sikh Gurdwaras Act, 1925, by the decision of the Sikh Gurdwaras Tribunal rejecting a petition "on behalf of the Mohammedans" claiming that the land and property were dedicated for a mosque, and did not belong to the Sikh gurdwara. There mere circumstance that the plaintiffs in the present suit of 1935 had not chosen to seek recovery of the land in dispute, but asked for relief in the forms of declaration and injunction, did not avail to enable them to litigate again the claim made by the person as mutawali in 1855, and the ground of the decision in that suit did not affect the question of res judicata.

Decree of the High Court affirmed.

APPEAL (No. 91 of 1938) from a decree of the High Court (January 26, 1938) which had affirmed a decree of the District Judge, Lahore (May 25, 1936).

A structure which had been built as a mosque in Lahore was dedicated in A.D. 1722, but from about 1762 the building and adjacent land had been in the occupation and possession of the Sikhs. In 1849, at the time of the British annexation, the mosque building and the property which had been dedicated therewith were in the possession of certain Sikhs, Mahants of a Sikh shrine (gurdwara), and the mosque building was used by the custodians of the Sikh institution. In 1927, by notification made pursuant to the Sikh Gurdwaras Act (Punjab Act VIII. of 1925), the old mosque building and land adjacent thereto were included as belonging to the Sikh gurdwara. Litigation was brought before the Sikh Gurdwaras Tribunal in 1928 "on "behalf of the Mohammedans," who claimed that the land and property were dedicated for a mosque and did not belong to the gurdwara. The Tribunal held that the claim failed by reason of adverse possession and previous decisions, and in the result the property and building were given into the custody of the defendants, and on July 7, 1935, the building was suddenly demolished by or with the connivance of its Sikh custodians under the influence of communal ill-feeling.

The suit out of which the present appeal arose was brought by eighteen plaintiffs, the first being the mosque itself, in the sense of the site and building, suing by a next friend, and the

other plaintiffs, including minors and women, were persons who claimed that they had a right to worship in the mosque. The suit was brought against the Shiromani Gurdwara Parbandhak Committee and the Committee of Management for the notified Sikh gurdwaras at Lahore, who were in possession of the disputed property, and was for (inter alia) a declaration that the building was a mosque in which the plaintiffs and all followers of Islam had a right to worship there, and a mandatory injunction to reconstruct the building.

The facts appear fully from the judgment of the Judicial Committee.

The District Judge dismissed the suit, and his decision was affirmed on appeal to the High Court (Young C.J. and Bhide J., Din Mohammad J. dissenting).

1940. April 4, 5, 8 and 9. *L. P. E. Pugh K.C.* and *J. M. Pringle* for the appellants. The question is: Can the appellants maintain a right to worship in a particular mosque and on the site of that mosque, and in a new mosque on the same site if they can get it erected; is that suit hit by the Limitation Act? It is conceded that it cannot be argued that Mahomedan law is entirely outside the Limitation Act. The appellants' case may be put briefly thus: s. 28 of the Limitation Act has no application, because it only relates to a suit for possession; the appellants have not brought a suit for possession, and are not obliged to do so, and therefore they are not affected by s. 28. Their bare right of suit as individual Mahomedans continues so long as the mosque is there, and is not affected by their disuser or their father's or grandfather's disuse; their right is not inconsistent with the decision that the mosque now belongs to somebody else. It is conceded that if a mosque be pulled down and a secular building erected in its place, that would attract the provisions of adverse possession. A masjid or mosque is a juristic person owned by no one, perpetual, inalienable, irrevocably dedicated, and has a sanctity and existence which can never be destroyed, even if it falls into ruins, and is therefore not subject to any law of limitation based upon adverse possession. [Reference was made to *Vidya Varuthi Thirtha* v.

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Balusami Ayyar (1) ; *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (2) ; and *Hukum Chand* v. *Maharaj Bahadur Singh.* (3)] *Kanhaiya Lal* v. *Hamid Ali* (4) makes it clear that there cannot be res judicata in respect of sacred property unless the juristic person is represented. *Kumaravelu Chettiar* v. *Ramaswami Ayyar* (5) shows that unless the procedure of the Code is followed and the suit is made a representative one it cannot bind anybody but the actual parties. The orders of the criminal court and the civil court against Nur Ahmad (who instituted the proceedings of 1855 as mutawali) in his personal capacity are not governed by the principles of res judicata against the appellants, nor is the decision of the Sikh Gurdwaras Tribunal of any effect against them in a non-representative suit. On the question once a mosque always a mosque, see *Court of Wards* v. *Ilahi Bakhsh* (6) ; *Ballabh Das* v. *Nur Mohammad* (7) ; and *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar.* (8) In the present case, whatever the right that the Gurdwara may have in the property, it is subject to the right of people to worship in the mosque, and by destroying that mosque the Sikhs cannot take away that right ; this is not a suit about a right or interest in immovable property, and therefore it does not come within art. 144 of the Limitation Act.

J. M. Pringle followed. With regard to the question of the title to the site of what was, until 1935, a mosque, it has been held that where property is waqf circumstances can exist in which that property ceases to be waqf, but there has been no case where that has been applied to a property that is ear-marked with the insignia of its dedication. This is property which proclaims itself to be the property of God ; a mosque is a building of a very distinctive character, it is just like a church, the analogy is complete, and this differentiates it from other cases of waqfs. There is no evidence of exclusion, but

(1) (1921) L. R. 48 I. A. 302, 310–12.
(2) (1925) L. R. 52 I. A. 245, 250.
(3) (1933) L. R. 60 I. A. 313, 321–23.
(4) (1933) L. R. 60 I. A. 263.
(5) (1933) L. R. 60 I. A. 278, 285, 291.
(6) (1912) L. R. 40 I. A. 18.
(7) (1935) 40 C. W. N. 449.
(8) (1917) I. L. R. 41 Mad. 124.

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only of mere non-user, and such mere non-user does not carry as against the worshippers any loss of their rights. The argument is that the House being God's House preserves God's possession of the site. [Reference was made to Ameer Ali's Mahommedan Law, 2nd ed., vol. i., p. 310.] With regard to the Sikh Gurdwaras Act of 1925, it is submitted that s. 30 clearly contemplates the possibility of the institution of a suit in certain circumstances. In the present case the appellants are not caught by the bar in s. 30 (ii.). As to the effect of the litigation of 1855, in order to find that it binds the institution it must be established that Nur Ahmad was qualified to represent the waqf; it has not been proved that he was competent to do so.

H. U. Willink K.C. and *Wallach* for the respondents were not called upon to argue.

May 2. The judgment of their Lordships was delivered by SIR GEORGE RANKIN. Before 1935 there had stood for many years to the south of what is now called the Naulakha Bazaar, in the city of Lahore, a structure having three domes and five arches, which had been built as a mosque (*masjid*) and which retained, notwithstanding considerable disrepair, sufficient of its original character to suggest, or even to proclaim, its original purpose. It had a projecting niche (*mehrab*) in the centre of the west wall such as is used in mosques as the place from which the imam leads the prayers. Its dedication is no longer in dispute, having been established as of the year A.H. 1134, or A.D. 1722, by the production and proof of a deed of dedication executed by one Falak Beg Khan. By this deed, Sheikh Din Mohammad and his descendants were appointed mutawalis.

The deed speaks of a school, a well and an orchard as being among the appurtenancies of the mosque, and gives the total area of the dedicated property as three kanals and fifteen marlas; but it is not now necessary to ascertain with precision the limits of the original curtilage.

No less well established than the dedication is the fact that from about A.D. 1762 the building, together with the court-yard, well and adjacent land, has been in the occupation and possession of Sikhs. The occupation of Lahore by the "Bhangi

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"Sardars" in 1762 was the commencement of Sikh power in this part of India. Sikh rule continued under Ranjit Singh, who in 1799 established himself by force of arms as the local ruler. It ended only in 1849, ten years after the death of Ranjit Singh, when the Punjab, as a result of the second Sikh war, became part of British India by annexation. At some time during the Sikh domination, land adjacent to the mosque building (but to the north of what is now the Naulakha Bazaar) became the site of a Sikh shrine (*gurdwara*), and the tomb of a Sikh leader, named Bhai Taru Singh, situated thereon was held in reverence. The land, which in 1722 had been dedicated to the purposes of a mosque, came to be held and occupied by the managers and custodians of the Sikh institution, and the mosque building was used by them. Until about 50 years ago, part of the building was used for the worship of the Granth Sahib or holy book of the Sikhs. Other parts have been used for secular purposes, being let out to tenants, or used for storing chaff (*bhusa*) or holding rubbish. By a tradition which cannot be ignored (though their Lordships are thankful to be free of any duty to investigate its truth) the land adjacent to the building was regarded by the Sikhs as a place of martyrs (*shahid ganj*), it being commonly held among them that Bhai Taru Singh had on this spot suffered for his religion at the hands of Muslim rulers, and that many others, including women and children, had been executed here. Thus communal feelings have long been in a state of tension as between Muslims and Sikhs with respect to this *masjid shahid ganj*. Its history after 1760 is summarized in the trial judge's finding that "this "mosque has not been used as a place of worship by Muslims "since it came into Sikh possession and control"; in the Chief Justice's statement that "there has been a complete "denial to the Muslims of all their rights"; and in the language of Bhide J. that "it is scarcely likely that the "Muhammadans would have been allowed to have access to "the building for any purpose whatever during this period "(1760 to 1853)." These findings are not in any way blunted by the consideration that a pious mutawali might properly have let parts of the waqf property to tenants, appropriating

the rents to the purposes of the waqf. The possession of the Sikhs has been hostile not merely to the claim of other persons to the office of mutawali of this mosque, but hostile to the *waqf* itself and all interests thereunder. On the other hand, it is true that the building has been frequently, and, indeed, has been generally referred to as a mosque by those who have had its custody, as well as by others, and that it retained to the end the outward appearance of a mosque.

In 1849, at the time of the British annexation, the mosque building and the property which had been dedicated therewith were in the possession of certain Sikhs, mahants of the *gurdwara*. It is unnecessary to decide whether they held it under a revenue-free grant made to them by the Sikh authorities, as it is certain that they held it and used it for their own purposes, and for the purposes of the *gurdwara* as already described. The facts are made plain by the action taken to recover the property for the purposes of Islam soon after Sikh authority had given place to British. A criminal case brought in 1850 by one Nur Ahmad claiming to be mutawali, and proceedings in the Settlement department, brought by him in 1853, came to nothing, as he had been long out of possession. A civil suit with a like object was brought and dismissed in 1853. On June 25, 1855, yet another suit by Nur Ahmad was brought in the Court of the Deputy Commissioner, Lahore, against the Sikhs in possession of the property: it was dismissed by that officer on November 14, 1855, by the Commissioner on April 9, 1856, and, on further appeal, by the Judicial Commissioner on June 17, 1856.

In 1925 the Sikh Gurdwaras Act (Punjab Act VIII. of 1925) was passed for the purpose of ascertaining what Sikh shrines were in existence, and what property they owned; and of vesting the management of such shrines in certain committees (and other bodies). This step had become necessary to bring to an end disturbances which had been caused by disagreement between different schools or sects among the Sikhs. On December 22, 1927, by a Government notification, the old mosque building and land adjacant thereto were included as belonging to the Sikh *gurdwara* "Shahid Ganj Bhai Taru

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"Singh." Seventeen claims were made by various petitioners to have rights therein. One, dated March 8, 1928, was by Mahant Harnam Singh and others to the effect that the property belonged to them personally and not to the institution of which they were the head. Another, dated March 16, 1928, was by the Anjuman Islamia of the Punjab "on behalf "of the Mohammedans," claiming that the land and property were dedicated for a mosque and did not belong to the *gurdwara*. Both sets of claimants failed before the Sikh Gurdwaras Tribunal, which decided on January 20, 1930, that the mahants' possession had been held on account of the *gurdwara*, and that the Anjuman's case failed by reason of adverse possession and previous decisions. No appeal was brought by the Anjuman from the latter decision, but against the former an appeal brought by the mahants was dismissed by the High Court on October 19, 1934. In the result the property and building were given into the custody of the defendants, and on the night of July 7, 1935, the building was suddenly demolished by or with the connivance of its Sikh custodians under the influence of communal ill-feeling. Riots and disorder ensued, and much resentment was felt and expressed by the Muslims.

The plaint in the present suit was filed on October 30, 1935, in the Court of the District Judge, Lahore, against the Shiromani Gurdwara Parbandhak Committee, and the Committee of Management for the notified Sikh gurdwaras at Lahore—the authorities who were in possession of the disputed property as being property belonging to the *gurdwara*.

It contained no claim for possession of the property, or ejectment of the defendants, or that the property be handed over to the hereditary mutawali. The relief claimed was a declaration that the building was a mosque in which the plaintiffs and all followers of Islam had a right to worship, an injunction restraining any improper use of the building and any interference with the plaintiffs' right of worship, and a mandatory injunction to reconstruct the building. The learned District Judge dismissed the suit by decree dated May 25, 1936, and an appeal to the High Court was dismissed on

January 26, 1938, by Young C.J. and Bhide J., Din Mohammad J. dissenting.

By the Punjab Laws Act, 1872, the Mahomedan law is made applicable to the religious institutions of the Muslims, but only in so far as it has not been modified by legislation. Thus the Indian Limitation Act, 1908, applies though limitation is not an original principle of Mahomedan law. The length of time which had elapsed since the property claimed had been lost to Muslims, and the repeated failure of the attempts previously made to recover it for their use and benefit, were manifest objections to the grant of the relief sought. To assist in surmounting these difficulties, the suit was brought by eighteen plaintiffs, of which the first was the mosque itself, suing by a next friend—not the waqf, or institution or charity in some abstract sense, but the mosque in the sense of the site and building. The declaration sought was "that plaintiff No. 1 was and is the site of a waqf mosque," the injunction sought was that the defendants "should not "use plaintiff No. 1 for any purpose which may be contrary "to its sanctity," and the mandatory injunction asked for was "to reconstruct that portion of plaintiff No. 1—i.e., the "mosque which they demolished." The choice of this curious form of suit was motived apparently by a notion that if the mosque could be made out to be a "juristic person" this would assist to establish that a mosque remains a mosque for ever, that limitation cannot be applied to it, that it is not property but an owner of property. A second feature of the suit as framed is that a number of the plaintiffs were minors or women. This was thought to be of some assistance to the plaintiffs in meeting objections taken under the Sikh Gurdwaras Act, 1925, to the competence of the suit, but it was also relied upon before the Board in argument as relevant to the general question of limitation.

A third feature of the suit has reference to the method of trial, the learned District Judge having been persuaded that the mode by which a British Indian Court ascertains the Mahomedan law is by taking evidence. The authority of Sulaiman J. to the contrary (*Aziz Bano* v. *Muhammad*

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Ibrahim Husain (1) was cited to him, but he wrongly considered that s. 49 of the Evidence Act was applicable to the ascertainment of the law. He seems also to have relied on the old practice of obtaining the opinions of *pandits* on questions of Hindu law and the reference made thereto in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*. (2) No great harm, as it happened, was done by the admission of this class of evidence, as the witnesses made reference to authoritative texts in a short and sensible manner. But it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case, and it would introduce great confusion into the practice of the Courts if decisions upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses, and so forth. The Muslim law is not the common law of India: British India has no common law in the sense of law applicable prima facie to every one, unless it be in the statutory Codes, e.g., Contract Act, Transfer of Property Act. But the Muslim law is under legislative enactments applied by British Indian Courts to certain classes of matters and to certain classes of people as part of the law of the land which the Courts administer as being within their own knowledge and competence. The system of "expert advisers" (*muftis*, *maulavis* or, in the case of Hindu law, *pandits*) had its day, but has long been abandoned, though the opinions given by such advisers may still be cited from the reports. Custom, in variance of the general law, is matter of evidence, but not the law itself. Their Lordships desire to adopt the observations of Sulaiman J. in the case referred to (3): "It is the duty of the Courts "themselves to interpret the law of the land and to apply "it and not to depend on the opinion of witnesses howsoever "learned they may be. It would be dangerous to delegate "their duty to witnesses produced by either party. Foreign "law, on the other hand, is a question of fact with which

(1) (1925) I. L. R. 47 A. 823, 835.
(2) (1868) 12 Moo. I. A. 397, 436–439.
(3) I. L. R. 47 A. 835.

"courts in British India are not supposed to be conversant. "Opinions of experts on foreign law are, therefore, allowed to "be admitted."

It has been made clear by learned counsel for the appellants that the plaintiffs do not now claim any relief extending beyond the actual site of the mosque building. The first question to be asked with reference to this immovable property is: In whom was the title at the date when the sovereignty of this part of India passed to the British in 1849? It may have been open to the British, on the ground of conquest or otherwise, to annul rights of private property at the time of annexation, as, indeed, they did in Oudh after 1857. But nothing of the sort was done so far as regards the property now in dispute. There is nothing in the Punjab Laws Act, or in any other Act, authorizing the British Indian Courts to uproot titles acquired prior to the annexation by applying to them a law which did not then obtain as the law of the land. There is every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property (cf. *West Rand Central Gold Mining Co., Ld.* v. *The King*. (1) Who, then, immediately prior to the British annexation was the local sovereign of Lahore? What law was applicable in that State to the present case? Who was recognized by the local sovereign or other authority as owner of the property now in dispute? These matters do not appear to their Lordships to have received sufficient attention in the present case. The plaintiffs would seem to have ignored them. It is idle to call upon the Courts to apply Mahommedan law to events taking place between 1762 and 1849 without first establishing that this law was at that time the law of the land recognized and enforced as such. If it be assumed, for example, that the property in dispute was by general law, or by special decree or by revenue-free (*muafi*) grant, vested in the Sikh *gurdwara* according to the law prevailing under the Sikh rulers, the case made by the plaintiffs becomes irrelevant. It is not necessary to say whether it has been shown that Ranjit Singh took great

(1) [1905] 2 K. B. 391.

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interest in the *gurdwara* and continued endowments made to it by the Bhanji Sardars, as was held by Hilton J. (January 20, 1930) presiding over the Sikh Gurdwaras Tribunal. Nor is it necessary that it should now be decided whether the Sikh mahants held this property for the Sikh *gurdwara* under a *muafi* grant from the Sikh rulers. It was for the plaintiffs to establish the true position as at the date of annexation. Since the Sikh mahants had held possession for a very long time under the Sikh State there is a heavy burden on the plaintiffs to displace the presumption that the mahants' possession was in accordance with the law of the time and place. There is an obvious lack of reality in any statement of the legal position which would arise assuming that from 1760 down to 1935 the ownership of this property was governed by the Mahommedan law as modified by the Indian Limitation Act, 1908.

The rules of limitation which apply to a suit are the rules in force at the date of institution of the suit, limitation being a matter of procedure. It cannot be doubted that the Indian Limitation Act of 1908 applies to immovables made waqf, notwithstanding that the ownership in such property is said in accordance with the doctrine of the two disciples to be in God. Thus in *Abdur Rahim* v. *Narayan Das Aurora* (1) it was expressly stated by Lord Sumner, delivering the judgment of the Board (2): "The property, in respect of which a wakf "is created by the settlor, is not merely charged with such "several trusts as he may declare, while remaining his property "and in his hands. It is in very deed 'God's acre,' and this "is the basis of the settled rule that such property as is held "in wakf is inalienable, except for the purposes of the wakf."

Yet in that very case it was taken as plain that if art. 134 of the Limitation Act did not apply to a waqf the claim to recover possession of waqf property was governed either by art. 142 or art. 144. The rule of Hanafi law that waqf property is taken to have ceased to be held in human ownership is applied to all such property, even if the waqf be a *waqf-alal-aulad* or waqf for the benefit of descendants.

(1) (1922) L. R. 50 I. A. 84. (2) Ibid. 90.

The result of the rule is not that the property cannot in any circumstances be alienated, but that it can only be alienated for proper purposes and, save as provided by the terms of the endowment, with the leave of the Court. In some circumstances it can even be taken in execution. In the particular case of a mosque, like that of a graveyard, the waqf property is intended to be used in specie for a certain purpose—not to be let or cultivated so that the income may be applied to the purposes of the waqf. This and other facts make some case for a contention that such property cannot be alienated on any conditions or with any sanction, though their Lordships are by no means satisfied to affirm so wide a proposition. But the Limitation Act is not dealing with the competence of alienations at Mahomedan law. It provides a rule of procedure whereby British Indian Courts do not enforce rights after a certain time, with the result that certain rights come to an end. It is impossible to read into the modern Limitation Acts any exception for property made waqf for the purposes of a mosque, whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose. While their Lordships have every sympathy with a religious sentiment which would ascribe sanctity and inviolability to a place of worship, they cannot under the Limitation Act accept the contentions that such a building cannot be possessed adversely to the waqf, or that it is not so possessed so long as it is referred to as "mosque," or unless the building is razed to the ground or loses the appearance which reveals its original purpose.

The argument that the land and buildings of a mosque are not property at all because they are a "juristic person" involves a number of misconceptions. It is wholly inconsistent with many decisions whereby a worshipper, or the mutawali, has been permitted to maintain a suit to recover the land and buildings for the purposes of the waqf by ejectment of a trespasser. Such suits had previously been entertained by Indian Courts in the case of this very building. The learned District Judge, in the course of his able and careful judgment,

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noted that the defendants were not pressing any objection to the constitution of the suit on the ground that the mosque could not sue by a next friend. He went on to say: "It is "proved beyond doubt that mosques can and do hold property. "There is ample authority for the proposition that a Hindu "idol is a juristic person, and it seems proper to hold that on "the same principle a mosque as an institution should be con-"sidered as a juristic person. It was actually so held in *Jinda* "*Ram* v. *Husain Bakhsh* (1) and later in *Maula Bukhsh* v. "*Hafiz-ud-Din*. (2)"

That there should be any supposed analogy between the position in law of a building dedicated as a place of prayer for Muslims and the individual deities of the Hindu religion is a matter of some surprise to their Lordships. The question whether a British Indian Court will recognize a mosque as having a locus standi in judicio is a question of procedure. In British India the Courts do not follow the Mahomedan law in matters of procedure (cf. *Jafri Begam* v. *Amir Muhammad Khan* (3) per Mahmood J.) any more than they apply the Mahomedan criminal law or the ancient Mahomedan rules of evidence. At the same time, the procedure of the Courts in applying Hindu or Mahomedan law has to be appropriate to the laws which they apply. Thus the procedure in India takes account, necessarily, of the polytheistic and other features of the Hindu religion, and recognizes certain doctrines of Hindu law as essential thereto, e.g., that an idol may be the owner of property. The procedure of our Courts allows for a suit in the name of an idol or deity, though the right of suit is really in the *sebait* (*Jagadindra Nath Roy* v. *Hemanta Kumari Debi*. (4) Very considerable difficulties attend these doctrines—in particular as regards the distinction, if any, proper to be made between the deity and the image (cf. *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* (5); Gopalchandra Sarkar, Sastri's Hindu Law, 7th ed., pp. 865 et seq.). But there has never been any doubt that the property

(1) (1914) No. 59 P. R.
(2) A. I. R. (1926) Lah. 372.
(3) (1885) I. L. R. 7 A. 822, 841–842.
(4) (1904) L. R. 31 I. A. 203.
(5) (1910) I. L. R. 37 C. 128, 153.

of a Hindu religious endowment—including a *thakurbari*—is subject to the law of limitation (*Damodar Das* v. *Lakhan Das* (1); *Sri Sri Iswari Bhubaneshwari Thakurani* v. *Brojo Nath Dey*. (2) From these considerations special to Hindu law no general licence can be derived for the invention of fictitious persons. It is as true in law as in other spheres "entia non sunt "multiplicanda praeter necessitatem." The decisions recognizing a mosque as a "juristic person" appear to be confined to the Punjab: *Shankar Das* v. *Said Ahmad* (3), *Jinda Ram* v. *Husain Bakhsh* (4) and *Maula Bukhsh* v. *Hafiz-ud-din*. (5) In none of these cases was a mosque party to the suit, and in none, except, perhaps, the last, is the fictitious personality attributed to the mosque as a matter of decision. But so far as they go these cases support the recognition as a fictitious person of a mosque as an institution—apparently hypostatizing an abstraction. This, as the learned Chief Justice in the present case has pointed out, is very different from conferring personality upon a building so as to deprive it of its character as immovable property.

It is not necessary in the present case to decide whether in any circumstances, or for any purpose a Muslim institution can be regarded in law as a "juristic person." The recognition of an artificial person is not to be justified merely as a ready means of making enactments—well or ill expressed—work conveniently. It does not seem to be required merely to give an extended meaning to the word "person" as it appears in the Punjab Preemption Act, 1905, or in the definition of gift contained in s. 122 of the Transfer of Property Act. It is far from clear that it is required in order that property may be devoted effectively to charitable purposes without the appointment of a trustee in the sense of the English law. It would seem more reasonable to uphold a gift, if made directly to a mosque and not by way of waqf, as having been made to the mutawali, than to do so by inventing an artificial person in addition to the mutawali (and to God in whom the ownership of the mosque is placed

(1) (1910) L. R. 37 I. A. 147.
(2) (1937) L. R. 64 I. A. 203.
(3) (1884) No. 153 P. R.
(4) (1914) No. 59 P. R.
(5) A. I. R. (1926) Lah. 372.

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by the theory of the law). Their Lordships do not understand that in this respect a mosque is thought to be in any unique position according to the authorities on Mahomedan law. "A "gift may be made to a mosque or other institution" (Tyabji Principles of Muhammadan Law, 2nd ed., 1919, p. 401, cf. Abdur Rahim's Muhammadan Jurisprudence, p. 218). A gift can be made to a *madrasah* in like manner as to a *masjid*. The right of suit by the mutawali or other manager, or by any person entitled to a benefit (whether individually or as a member of the public, or merely in common with certain other persons), seems hitherto to have been found sufficient for the purpose of maintaining Mahomedan endowments. At best the institution is but a caput mortuum, and some human agency is always required to take delivery of property and to apply it to the intended purposes. Their Lordships, with all respect to the High Court of Lahore, must not be taken as deciding that a "juristic personality" may be extended for any purpose to Muslim institutions generally or to mosques in particular. On this general question they reserve their opinion; but they think it right to decide the specific question which arises in the present case, and hold that suits cannot competently be brought by or against such institutions as artificial persons in the British Indian Courts.

The property now in question having been possessed by Sikhs adversely to the waqf and to all interests thereunder for more than twelve years, the right of the mutawali to possession for the purposes of the waqf came to an end under art. 144 of the Limitation Act, and the title derived under the dedication from the settlor or wakif became extinct under s. 28. The property was no longer, for any of the purposes of British Indian Courts, "a property of God by the advantage "of it resulting to his creatures." The main contention on the part of the appellants is that the right of any Moslem to use a mosque for purposes of devotion is an individual right, like the right to use a private road (*Jawahra* v. *Akbar Husain* (1)); that the infant plaintiffs, though born a hundred years after the building had been possessed by Sikhs, had a right to

(1) (1884) I. L. R. 7 A. 178.

resort to it for purposes of prayer; that they were not really obstructed in the exercise of their rights till 1935, when the building was demolished; and that, in any case, in view of their infancy the Limitation Act does not prevent their suing to enforce their individual right to go upon the property. This argument must be rejected. The right of a Muslim worshipper may be regarded as an individual right, but what is the nature of the right? It is not a sort of easement in gross, but an element in the general right of a beneficiary to have the waqf property recovered by its proper custodians and applied to its proper purpose. Such an individual may, if he sues in time, procure the ejectment of a trespasser and have the property delivered into the possession of the mutawali or of some other person for the purposes of the waqf. As a beneficiary of the religious endowment such a plaintiff can enforce its conditions and obtain the benefits thereunder to which he may be entitled. But if the title conferred by the settlor has come to an end by reason that for the statutory period no one has sued to eject a person possessing adversely to the waqf and every interest thereunder, the rights of all beneficiaries have gone; the land cannot be recovered by or for the mutawali, and the terms of the endowment can no longer be enforced (cf. *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*. (1) The individual character of the right to go to a mosque for worship matters nothing when the land is no longer waqf, and is no ground for holding that a person born long after the property has become irrecoverable can enforce partly or wholly the ancient dedication.

This seems to their Lordships a sufficient answer to the argument that the only article of the Limitation Act which affects the right of the plaintiffs (other than the first plaintiff) is art. 120. Under that article any plaintiff who had been of age for more than six years before the date of the suit would be barred as he has clearly been excluded from resort to the building for purposes of prayer. But the true answer to these plaintiffs, and to the minor plaintiffs, is that the rights of the

(1) (1917) I. L. R. 41 M. 124, 135.

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worshippers stand or fall with the waqf character of the property, and do not continue apart from their right to have the property recovered for the waqf and applied to its purposes. As the law stands, notice of the rights of individual beneficiaries does not modify the effect under the Limitation Act of possession adverse to the waqf. Were the law otherwise the effect of limitation upon charitable endowments would be either negligible or absurd. The plaintiffs may, if they choose, refrain from asking that the land be recovered for the waqf, but they do not alter the character of their right by deserting the logic of their case.

It remains to say that, in the opinion of their Lordships, the present suit is concluded on the general principle of res judicata, by the decision in the suit of 1855, and also under s. 37 of the Sikh Gurdwaras Act, 1925, by the decision of the Tribunal (January 20, 1930) rejecting the petition of the Anjuman Islamia. The mere circumstance that the plaintiffs have chosen not to seek recovery of the land in dispute, but ask for relief in the forms of declaration and injunction does not avail to enable them to litigate again the claim made by Nur Ahmad as mutawali to recover the property for the purposes of the waqf. The ground of the decision of 1855 does not affect the question of res judicata.

Sect. 37 of the Act of 1925 is as follows: "Except as "provided in this Act no court shall pass any order or grant "any decree or execute wholly or partly, any order or decree, "if the effect of such order, decree or execution would be incon- "sistent with any decision of a tribunal, or any order passed "on appeal therefrom, under the provisions of this Part."

It is sufficiently plain that if the present suit were to succeed the effect of the decree would necessarily be inconsistent with the decision of the Tribunal rejecting the petition of the Anjuman Islamia. Unless, therefore, the case can be brought within the opening words of s. 37—" except as provided in "this Act "—that section is fatal to the claim. Their Lordships are of opinion that the words of exception have no reference to the provisions of cl. (ii.) of s. 30, which states the circumstances under which a suit shall be tried notwithstanding that

the claim was not put forward before the Tribunal. Sect. 37 assumes that a civil court has before it a competent suit in which one party or another would, but for the section, be entitled to a certain order or decree, and it provides that such order or decree shall not be made if the effect of it would be inconsistent with any decision of a Tribunal. The words of exception with which s. 37 opens are doubtless accounted for by the provisions of s. 34 authorizing appeals to the High Court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the respondents' costs.

Solicitors for appellants: *Peake & Co.*
Solicitors for respondents: *Charles Russell & Co.*