

(1938) 08 CAL CK 0015
In the Calcutta High Court

Abdul Latif and Others

APPELLANT

Vs

Nawab Khajeh Habibulla and Others

RESPONDENT

Date of Decision : 11-08-1938

Acts Referred:

Bengal Tenancy Act, 1885 — Section 103(B)
Civil Procedure Code, 1908 (CPC) — Section 80
Criminal Procedure Code, 1898 (CrPC) — Section 107
Limitation Act, 1963 — Article 142

Citation : AIR 1939 Cal 354

Judgement

1. This appeal is on behalf of defendants 2 and 7 to 10 in a suit for establishment of title and recovery of possession. The plaintiffs are 32 in number. Plaintiffs 1 to 31 claim title on the basis of a patni taluk granted to their predecessor in interest, Bibi Manjura Banoo by the 13 annas proprietors of Touzi No. 22 of the Tippera Collectorate in the year 1880. The patni kabuliat is Ex. 28, an extract from which is printed at 11-181. It included village Sovarampore, alias Jitrampore. Plaintiff 32 is the proprietor of the remaining 3 annas share of the said estate. The plaintiffs' case is that the lands in suit which are described in three schedules, A, B and C, annexed to the plaint are re-formations in situ of their village Sovarampore, on the other side, namely the eastern side, of the river Meghna, which at the time of the that and revenue survey, formed the eastern boundary of their village, but which since then has shifted its course far to the west. According to them the lands in suit began to rise above water from 10 or 12 years before the suit which was filed on 15th September 1925, and the lands of Schedules A, B and C became fit for possession at different times. In the plaint they do not state precisely when the lands of Schedule A became so fit, but in respect of the lands of Schedules B and C the statement is that they "formed and became fit for cultivation 7 or 8 years before the suit." The contesting defendants claim the lands in suit as re-formations in situ of or accretions to the Government Khas Mehal Estate Char Maricha Kandi, Touzi No. 2717 of the Tippera Collectorate. Nos. 7-10 claim under a taluka settlement from the Government, that is, they set up the claim to hold them as permanent tenure

holders under the Government under Ex. 21(11-158). Defendant 2 claims that Schedules A and G and a good part of the lands of Schedule B falls within his occupancy holding held under defendants 7 to 10. The other defendants do not appear. The contesting defendants set up an alternative case (para. 38 of the written statement of defendants 7 to 10), that if the lands in suit or any portion thereof do not form a part of Government Estate Char Maricha Kandi, they were in the bed of the navigable river Meghna at the time of the that and revenue survey and they are accordingly the Crown lands of the Government. In that case they say the plaintiffs are to be defeated on the plea of *jus tertii*.

2. In the written statement there is no assertion that no part of Sovarampore was included in Bibi Manjuri Banoo's *patni*, but the statement is that plaintiffs 1-31 did not purchase the *putni*, at least they got no title to the said village by their purchase. They say that the lands of Schedule A had formed and had become fit for possession before 1900 and were being possessed by their predecessors since then through their tenants, and that the lands of Schedules B and C had formed and had become fit for possession long before 1910 and were being similarly possessed since they became so fit. They accordingly say that the plaintiffs' suit is barred by time; at any rate their title, if any, has been extinguished by their adverse possession. There is a special defence of defendant 2 contained in para. 15 of his written statement. It is that as he has been bona fide holding the lands in *ryoti* right he cannot in any case be ejected. This defence is founded on the principle laid down in *Binadlal prakrshi v. Kale Pramanik* (1893) 20 Cal. 708 (F.B.).

3. For the purpose of determining whether the lands in suit form part of Mouza Sovarampore a Civil Court Commissioner was appointed to relay the relevant maps. He relayed them and reported that all the lands in suit fell within the plaintiffs' village Sovarampore. His map is map No. 1 in part II of the map volumes. In his map he has shown the position of the river Meghna as it was at the time of the that and revenue survey. It is just to the east of the lands in suit. The Subordinate Judge accepted the Commissioner's finding and found that the plaintiffs have title to all the lands. He further found that 326 bighas 15 cottas forming the western part of Schedule B had re-formed after 1916. He gave the plaintiffs *khas* possession of this area. He further held that the lands of Schedules A and C and the remaining portion of Schedule B had become fit for cultivation within 12 years of the suit and the whole of A and C and a good portion of B was included in the *ryoti jote* of defendant 2, possibly of defendants 2 and 3, on the footing that defendant 3 was a *cosharer* of defendant 2. In respect of these portions his decree is that defendants 7 to 10 are not entitled to retain them but that defendant 2 cannot be turned out. He accordingly gave the plaintiffs possession of those lands through defendant 2. With regard to the remaining portion of Schedule B, i.e. the southern portion to the south of Dag No. 192, which he held was not within the *jote* of defendant 2, he also gave the plaintiffs a decree for *khas* possession.

4. Defendants 2 and 7 to 10 have preferred this appeal. The plaintiffs have filed a memorandum of cross-objections in which they attack that portion of the decree passed by the Subordinate Judge by which they have been given possession through defendant 2. They also raise questions about costs. The points urged in the appeal are : (i) that the putni of 1880 only covered so much of the lands of Sovarampore as was then above water, (ii) that plaintiffs 1 to 31 did not purchase Sovarampore at the court auction held in 1898, (iii) that the disputed lands are not re-formations in situ of Sovarampore, (iv) that the lands in suit had formed and had become fit for possession beyond 12 years of the suit and were being possessed by the defendants since they became so fit, (v) that Article 142, Limitation Act, is applicable and the plaintiffs' suit is barred by time. If however Article 144 be held to be the Article applicable, the defendants have acquired title by adverse possession, (vi) that in any case the plaintiffs cannot evict defendants 7 to 10 but can only get fair rent from them in a properly constituted suit. The points raised on the cross-objections are : (i) that defendant 2 is not a ryot but a tenure holder and the plaintiffs are entitled to turn him out also, (ii) that the plaintiffs ought to get full costs of the Court below against defendants 7-10, and (iii) at any rate the costs of hiring the theodolite ought to be paid to the plaintiffs.

5. We will first deal with the points raised in the appeal. The first two points affect only plaintiffs Nos. 1 to 31 but not No. 32. We do not see any substance in them. An extract from the patni kabuliati which is the counter part of the patni potta (Ex. 28 not printed) has been printed at page 121, Part II. From it it appears that the whole village Sovarampore was included in the patni granted to Bibi Manjura Banoo. The grantors did not retain, or reserve their right to retain, in khas any portion of the said mouza above or under water. In execution of a decree obtained by one Srish Chandra Das for his share of the patni malikana against Bibi Manjura Banoo her patni interest was sold and purchased by Nawab Asanulla Bahadur the predecessor in interest of plaintiffs 1 to 31. The sale certificate (Ex. 8, II. 133) shows clearly that the patni taluk which the judgment-debtor held under the 13 annas proprietors was sold. In mentioning the villages included in the patni taluk village Sovarampore was omitted but that does not in any way advance the defendants' contention. The patni taluk was sold and purchased by the said Nawab and he got whatever was included in the patni taluk by the patni grant of 1880. We accordingly overrule both these points on the aforesaid reasons and on the other reasons given by the Subordinate Judge which it is not necessary to repeat and with which we fully concur.

6. The third point relates to the relaying work of the Commissioner. It is admitted before us by both the parties that the plaintiffs' claim must succeed or fail according as the lands in suit are covered or not by the revenue survey map of Sovarampore (exhibited but not printed) prepared in the year 1861-1862. There was some argument on behalf of the defendants in the lower Court that the state of things shown at the time of revenue survey cannot be presumed to be what was at the time of the permanent settlement, that is to say that Sovarampore as

depicted in the revenue survey map cannot be taken to be included in Estate No. 22 at the time of the permanent settlement. But that argument is not repeated before us by the appellants' advocate, who does not challenge the conclusions of the Subordinate Judge on this part of the case. This map was relaid on the locality by the Commissioner who found that the whole of the disputed lands fell within the boundaries of Sovarampore as depicted in the revenue survey map. The Commissioner in his report says that he used a theodolite in making the survey. The appellants' advocate asks us to reject the Commissioner's work as faulty on the following three grounds : (i) that the plotting was unreliable as the Commissioner in his report admits that the theodolite supplied to him was defective, (ii) that as he could not with the instrument take any star observation, his work is unreliable, (iii) that at any rate the revenue survey line was plotted correctly up to the western bank of the present river, i.e. up to the letter "n" but no offsets were taken and the theodolite was not used for the purpose of fixing a station on the other bank of the river. This argument comes to this: that station "c" was not correctly placed by the Commissioner. Hence from the station "c" onwards the work is unreliable and accordingly the eastern boundary of Sovarampore as shown in the revenue survey map has not been correctly relaid on the locale. We cannot give effect to any of these contentions.

7. It appears from his report as also from the evidence of the Commissioner that owing to a defect in the instrument (a defect in the vernier screw on the vertical disc of the instrument) the vertical readings, i.e. the readings on the vertical disc of the theodolite could, not be taken. The result was that the theodolite could not be used for observing the pole star. But the vernier for the reading on the horizontal disc of the theodolite was all right, with the result that the angular measurements on the horizontal plane could be and were taken by that theodolite. This was quite sufficient for the survey in hand after the Commissioner had checked his work with the small bends of the small chaks at the south western part of Sovarampore which had not undergone any change with time. The place to be surveyed, was comparatively small in area, and in the survey of such an area star observations are not necessary. At p. 225 of Thuillier and Smith's Manual of Surveying (Edition 3) it is pointed out that astronomical observations are not absolutely necessary. We do not therefore see any substance in the first two contentions.

8. With regard to the third the position stands thus. To Mohim Chandra Das, the plaintiff's inspector of survey, who attended the field work of the Commissioner, the defendants put some questions in cross-examination for obtaining information as to how the Commissioner did his work in the field. One of such questions was whether in going over from the western to the eastern bank of the Meghna River the Commissioner took offsets with the theodolite from points on the western bank. He gave an affirmative answer. When the Commissioner was later on examined the defendants dropped the matter. It is a fundamental principle that a survey line cannot be taken over a big river without taking offsets and we do not see why the Commissioner should have omitted to proceed

accordingly. No suggestion is made to the Commissioner and there are no materials on which we can say that the point "c" had been wrongly located and the revenue survey boundary of Sovarampore from that point had been incorrectly relaid. In 1916 the Settlement Officers relaid the eastern revenue survey boundary of the said village (called the demarcation line in the Commissioner index to the map-index No. 6). The eastern boundary of that village is only material to the suit and it is pertinent to observe that the Commissioner's relay of the eastern boundary line of the revenue survey map has followed very closely that demarcation line. We accordingly hold that there are no grounds for rejecting the Commissioner's work and the lands in suit fall within Sovarampore as has been found by the Court below. There is no force in the suggestion made by the appellants' advocate that a part of the lands in suit may be covered by a village Baishazari. No such plan was taken in the written statement. There are, no doubt, indications in old papers that there was another village Baishazari near Sovarampore. Whether it was immediately to the east of Sovarampore the evidence is not certain. If it was, then it was in the bed of the river Meghna at the time of the revenue survey, for the revenue survey maps of Sovarampore and Char Mari-cha Kandi show that only the river was in between. The revenue survey river as has been shown in the case map is beyond and to the east of the suit lands. In fact one of the documents on which Mr. Sen relied for supporting his argument on this point would indicate that Baishazari was a part of Char Jaikalipore (Exs. 24, II. 99) which is shown in the case map far to the east of the disputed land.

9. The question of fact raised in the fourth point is a very important one in the case and on this point there is a mass of conflicting oral evidence on which, we consider, it would not be safe to proceed. There are however important documentary evidences from which reasonable inferences can be made. This part of the case, as also the questions of law which are indicated in the remaining points, have been argued with fullness and with remarkable ability both by the acting senior Government Pleader and by Mr. Sen, the leading advocate for the appellants and we acknowledge the great help rendered to us by them. Before we enter into details, it is necessary for us to notice the respective cases of the parties relating to the three different Schedules A, B and C. For convenience of reference we would divide Schedule B into two parts, call the western portion of it with an area of 326 bighas 15 cottas, for which the Subordinate Judge has given the plaintiffs khas possession, as B (1) and the rest of Schedule B, i.e. the eastern part, as B (2). Likewise we would call the south-western part of Schedule C covered by settlement dags 1 to 15 as C (2) and the rest of it as C (1). In the plaint the plaintiffs state that Schedule A re-formed on the east of river ten or twelve years before suit. They do not state when it became fit for possession. There is a negative statement that in 1900 it was not so fit and that rent on the sale was falsely assessed in 1900 when the Government granted an ijara for 30 years of Char Maricha Kandi to the defendants' predecessors, Rahim Bux, Jaha Bux and Apseruddi. Regarding Schedules B and C their case in the plaint is that

they reformed on the east of the river and became fit for possession 7 or 8 years before suit. The case of the contesting defendants is that the Schedule A lands were re-formed in about 1897, and became fit for possession before 1900. In 1900 the Government assessed it with rent and settled it with other lands as lands of Char Maricha Kandi in taluki right with their aforesaid predecessors. With regard to Schedules B and C their case is that they re-formed and became fit for possession and were being possessed by their predecessors from about 1903.

10. Regarding Schedule A land and what we have called B (1) and C (1) there is not much difficulty. It is admitted in the plaint that in 1900 Government took the assets of Schedule A land into consideration in arriving at the ijara rent which was to be paid to it by Jahabux, Rahim Bux and Apseruddi under the Kabuliati Ex. 21 (11-158) and that Rs. 51-1-3 represented the amount of rent payable to the Government for it (plaint para. 10). This fact is also borne out by documentary evidence, one of the documents being a document on which the plaintiffs rely in support of another part of their case (Ex. 1-A. 11-198). The fact that rent was assessed on it in 1900 would be very strong, almost conclusive evidence, to support the case that the land had become fit for possession and was being possessed by Jahabux and others from 1900. To counteract that inference the plaintiffs state in paras. 4 and 5 of their plaint that in 1900 the said lands were under shallow water and at that time the predecessors of defendants 1 to 14 in collusion with their tenants in expectation of future gain and for showing their possession of the same as part and parcel of Char Maricha Kandi caused the same to be measured and included within the said Government Khas Mehal Estate. In one of the recitals in Ex. 1-A which the Government executed in favour of the plaintiffs on 27th September 1923 a similar statement is made. This explanation of the plaintiffs appears to us to be unsubstantial and the recitals in Ex. 1-A not to be in accord with facts. It is the case of both parties that before the demarcation proceedings of 1916 neither the plaintiffs' nor the defendants' predecessors knew for certain, and in 1900 none of them had reason to believe, that Schedule A was a part of Sovarampore. It is a narrow and long strip of land only about 60 bighas in area being the extreme eastern portion of the lands in suit, bordering on the Government estate. We do not see why in this state of facts Jahabux and his cosharers would in 1900 by their own act take upon themselves the burden of paying to Government every year an additional sum of Rs. 51 odd as rent with no immediate prospect or any prospect, if the plaintiffs' case about the time of re-formation of the land be true, within a reasonable time of getting any profit out of it. The plaintiffs' statement in the plaint that these lands re-formed only between 1913 to 1915 is palpably an untrue one, seeing that in the notice which they served on the Government u/s 80, Civil P.C. in 1918, which was in respect of the whole of Schedule A and at least of a good part of Schedules B and C they stated that the re-formation was in 1909 and lands were fit for possession before January 1910 (Ex. A, 11-188). In Para. 2 of Ex. 39 (11-184) a letter from the Director of Land Records to the Collector of Tippera dated 23rd February 1916, there is a statement that these lands had

formed and were in the possession of the Government, obviously through their ijaradars, the defendants predecessors, since 1897 when the survey on the basis of which Ex. 21 (11-158) was executed commenced. The lands mentioned in that para-graph refer obviously to Schedule A lands. We have no hesitation in holding that the lands of Schedule A had re-formed on the east of the river Meghna about the year 1897 and had become fit for possession and were being possessed by the defendants" predecessors at least from 1900.

11. The evidence is equally clear that B (1) had come above water after 1914. In the year 1913 Jahabux and others brought two suits against their tenants for increase of rent for increase in area of their holdings by reason of lands being added thereto by accretion. An Amin, Gouri Kamal Bhattacharyya, was appointed for local investigation. He prepared a map [Ex. Z (1) Map No. 10] and submitted a report in 1914 [Ex. JZ-1 (1) 11-54]. He has been examined as a witness and has proved his report and map. In his map he showed three strips of land within the rectangle A B C I) as the accreted lands in those two suits. In the map and also in his report he showed that the river Meghna was to the immediate west of the line A B. This line A B has been relaid on the case map and its elongation is practically the eastern boundary of what we have called B (1). The proceedings in those suits have an important bearing on the question of the time of the re-formation of B (2) which we will discuss hereafter. In 1916 the District Settlement and Survey under Ch. 10, Ben. Ten. Act, which had commenced in 1913 was made final. The District Settlement map has also been relaid on the case map and the settlement dags cover B (2) but not B (1). The learned Subordinate Judge has found that B (1) re-formed after 1916 and I see no ground for disturbing that finding. The whole of Schedule C land had come above water at the time of the said District Settlement and Survey but in the Record of Rights which was finally published in 1916 dags Nos. 16 to 18, i.e. C (1) is recorded as sandy char. [Ex. Z (D) II. 80 at 81.82.] We hold that B (1) and C (1) had not become fit for possession before 1916.

12. We will now take up the question as to when B (2) and C (2) became fit for possession. That they became so fit in 1916 and were being possessed by the contesting defendants from that year admits of no doubt. In the finally published Record of Rights, to which a statutory presumption of correctness attaches u/s 103(B), Ben. Ten. Act, these are shown as nal lands (cultivated lands) in the possession of the tenants of the defendants" predecessors, Rahimbux and others. The Settlement Khatians are printed in part II from pp. 71 to 90. The one sided evidence is that the survey of the fields began in the early part of 1913, the Kistwar and the Khanapuri were finished in April-May 1913 (Bysack 1320 B. S.) and the Bujharat in November 1913 (Agrahayan 1320)(D.W. 1, p. 174, 1. 23 to 25 and p. 176, 1. 25). The attestation takes place after the Bujharat. In the report of the Assistant Superintendent of Survey [Ex. 39(A) II 182] it is stated that at the Khanapuri and attestation "present possession was followed." From this it is evident that what are stated in the different entries in the finally published Record of Rights (II. 71 to 90) were based on what the Settlement

Officers found on the spot at the Khanapuri in April-May 1913. It would accordingly be a sound inference of fact to hold that B (2) and C (2) had become fit for possession and were being possessed by the tenants of Rahimbux and his cosharers at least from April-May 1913 (Bysack 1320) and the case of the plaintiffs that they were formed and had become fit for possession seven or eight years before suit is a false one.

13. The documentary evidence and the probabilities of the case would further indicate that they had re-formed and had become fit for possession at least at the end of the year 1909. The notice of suit (II. 188) that was served on the Government in 1918 describes the lands in two Schedules. The western boundary of Schedule (1) is the river Meghna as it was in 1918. The evidence is that the river is gradually receding to the west. The lands which had been found to exist at the District Settlement, if not some more lands which had accreted to the west since 1916, were accordingly the subject of the notice. Paras. 6 and 11 of the said notice contain unequivocal admissions of the plaintiffs that the lands of Schedules 1 and 2 of that notice had become" fit for possession in 1909. A portion of para. 6 has not been correctly translated. We have looked into the original and both the learned advocates are agreed that the passage at para. 6, 1.3 of p. 192 ought to run thus : "As a matter of fact the said lands having re-formed in the eastern part of disputed land No. 1..."

14. During the District Survey and Settlement proceedings which we have stated commenced in the early part of 1913 the plaintiffs" agents came on the disputed-lands and attempted to foment trouble. They succeeded for a time in setting up the tenants of the Government ijaradars Jahabux and others against the latter. This led to criminal proceedings u/s 107, Criminal P.C. The Kanango"s report and the police report are exhibits in the case [Ex. X and Ex. X(2) only extracts have been printed at II. 179 and II. 180 but the-whole was typed for us]. From the said reports it is quite evident that the plaintiffs" agents were moving and inciting the-actual occupiers against the Government ijaradars in the interest of their principals. Their object was to win over the occupants to the side of their principals and with their help and concurrence to have them recorded in the settlement proceedings as tenants of their principals. They however ultimately failed, for the occupants made up with the said ijaradars and the finally published Record of Rights recorded the occupants as tenants of those ijaradars. These proceedings lead to the inference that the lands had for some time past been cultivated and possessed by those occupants and the plaintiffs" agents attempted, though unsuccessfully, to consolidate their principals" position in the settlement proceedings by having the actual occupants recorded as their tenants. We have already noticed that in the year 1913 the ijaradars instituted two suits against their tenants for increase of rent on the ground that the area of their holdings had increased by reason of accretions, and in those suits Gouri Kamal Bhattacharyya was appointed Amin for local investigation. Map No. 10" is his map. The accreted portions are there shown as three long coloured strips. In his report, Ex. Z 1 (1) - (II. 54) he gives details about the condition of the different

portions of the said three strips which have been marked by separate alphabets and states that the whole had become fit for possession in 1910. The judgment passed in those suits is Ex. Z B 4 - II. 59 and decrees are also exhibits in the case. One of them has been printed. It is Ex. Z C (30) - (II. 62). They show that a very substantial additional rent was imposed with effect from 1910. In one case rent was increased from Rs. 14 to Rs. 59, an enhancement of Rs. 45. These suits being not inter partes the recitals and findings in the judgment are not evidence against the plaintiffs but the fact that such decrees were passed by which additional rent was imposed from 1910 is evidence. The report of Gouri Kamal is also evidence, he having been examined as a witness. It is therefore proved that the lands of the two holdings shown in Gouri Kamal's map which fall within B (2) became fit for possession in 1910 and were from that time being possessed by the ijaradars' tenants. There is evidence that the formation of the whole of B (2) was at about the same time and the condition of the whole of the said portion of the char at a particular period of time was practically the same. Having regard to this evidence and the other evidence which we have already noticed, we think it would be a sound inference to hold that the said land, B (2), had become fit for possession towards the end of 1909 or the beginning of 1910 and was being possessed from that time by the Government ijaradars through their tenants. The same remarks apply to G (2) for similar reasons. Mr. Sen wants to go further. He contends that B (2) and O (2) had become fit for possession and were in the possession of the ijaradars' tenants at least from 1906 or so. To support this contention he has relied upon some counterfoil receipts produced by his clients (II. 165, etc.), some rent decrees (II. 51) and some registered kabuliats (II. 115, etc.). No attempt was made by his clients to relay the kabuliat lands in the locality and there is no reliable evidence to connect the said kabuliats, counterfoil receipts and decrees with the suit lands B (2) or C (2). They may as well relate to the Schedule A lands or lands further east which are undoubtedly the lands of Char Maricha Kandi. Reviewing the evidence as a whole we have come to the following conclusions : (1) The lands of Schedule A had re-formed in 1897 and had become fit for possession from at least 1900. They were in the possession from that year of the predecessors-in-interest of the contesting defendants 7 to 10 through their tenants, (2) the lands B (1) had re-formed after 1914 and had not become fit for possession before 1916, (3) the lands of C (1) had re-formed before 1913 but had not become fit for possession before 1916, (4) the lands of B (2) and C (2) had re-formed and had become fit for possession towards the end of the year 1909 or the beginning of the year 1910 and were from that time being, possessed by the contesting defendants 7 to 10's predecessors through their tenants.

15. On these findings the contesting defendants 7 to 10 cannot resist the plaintiffs' claim for possession to B (1) and C (1) as the suit was filed in September 1925. No portion of B (1) falls within the tenancy of defendant 2. The plaintiffs are accordingly entitled to khas possession thereof. We accordingly confirm the Subordinate Judge's decree giving the plaintiffs khas-possession to

326 bighas 15 cottas of land as defined in his decree. The finding that C (1) is included in defendant 2's tenancy has not been challenged before us, but the finding about the nature of his tenancy has been challenged in the memorandum of cross, objections. We will accordingly deal with the nature of the relief to which the plaintiffs are entitled in respect of the same C (1) when we would be dealing with those cross-objections. The facts bearing on the last two points urged before us in the appeal have now to be stated. During the course of the District Settlement proceedings which began in the year 1913 the lands of Schedule A and C and what we have called B (2) were recorded in the draft record as in the possession of the ijarauara of the Government khas niohak estate, Char Marieha-Katidi. The plaintiffs thereupon took up the position that a good portion of the said lands was their land and prayed for demarcation of the lands of their estate. On their application a demarcation case was started. The Assistant Settlement Officer caused the revenue survey map of Sovarampore to be relaid. As a result of the relay, he found that the lands of Schedules A and C and B (2) to be within the plaintiffs' estate. He accordingly made an order in favour of the plaintiffs on 22nd February 1916 (Ex. 39 (A) - II. 182) and caused the demarcation line between the plaintiffs' estate No. 22 and Government estate Maricha Kandi to be depicted on his map. This line has been relaid by the Commissioner in the present case map and it forms the eastern boundary of Schedule A.

16. Thereafter, there was correspondence between the Director of Land Records and the Collector of Tipperah, the latter representing Government interest. A letter of the former dated 23rd February 1916, which was in reply to the Collector's letters, is Ex. 39 (printed at page 184 of Part II). It appears from para. 2 of that letter that the Collector challenged the accuracy of the demarcation line and also set up the claim of the Government based on adverse possession. Up to this Government denied the plaintiffs' title and this position was maintained by the Government for some years. After the plaintiffs had served on the Government notice of a suit (Ex. A - II. 188) in 1918, a different attitude however was taken by the Government. In a letter from the Secretary, Board of Revenue, addressed to the Commissioner of the Chittagong Division dated 1st March 1920 (Ex. 17 (a), II. 195) we find a reference to a previous letter of the Board of Revenue dated 2nd June 1919 and the terms of that letter are set out. There the Government agreed to acknowledge the title of the plaintiffs to the lands which had been found in the demarcation proceedings of 1916 to belong to Estate No. 22 and to release the same to them with a condition that its ijaradars were to remain in possession till March 1930. It was then desired by the Board of Revenue that the Government ijaradars should also join in the compromise. It further appears that thereafter the said ijaradars made a representation to the Board of Revenue to the effect that the plaintiffs should accept them as permanent tenure-holders. This representation was rejected by the Board as would appear from paras. 4 and 5 of Ex. 17 (a) (not printed). The ijaradars ultimately refused to join and on 27th September 1923

the Government executed a document in favour of the plaintiffs (Ex. 1- A - II. 195). This document was however stamped not as a conveyance. One of the recitals runs as follows:

And whereas thereafter (e. g. after the notice of suit, Ex. A) the Hon''ble Board of Revenue on "behalf of the first party (the Secretary of State for India in Council) sanctioned the release of entire aforesaid land re-formed in situ of Mouza Sovarampore marked as aforesaid A, B and O respectively on the said plan amicably in favour of the second and third parties (the plaintiffs) on condition that the aforesaid lease of 3rd March 1903 (the ijara lease in favour of Rahim Bux and others defendants 7 to 10's predecessors-in-interest) shall be considered as comprising the said lands marked A and as good and valid in respect thereof according to its legal effect and purport and so accepted by the second and third parties.

17. This document proceeded on the footing that the Government had proceeded on a mistake, which it acknowledged, in including "A" within the ijara lease given to Rahim Bux and others executed on 3rd March 1903, and by its terms the sum of Rs. 51-1-3 was assessed as the proportionate ijara rent in respect thereof. This the plaintiffs agreed to take from the ijaradars till 31st March 1930. The document was supported by consideration, because the plaintiffs gave up their claim to mesne profits against the Government. Though the document was not stamped as a conveyance by its operative part, it conveyed to the plaintiffs whatever rights the Government then had in the lands marked A, B and C in the plan attached thereto. This would pass to the plaintiffs such title as the Government then had on the principle formulated in *Hemendra Nath Mukherjee v. Kumar Nath Roy* 12 C.W.N. 478. If the Government had then acquired title by adverse possession, the plaintiffs would by this transfer acquire the same, but then they would be bound by the terms of lease given to Rahim Bux and others in 1903, if the Government was bound by the said lease. We will consider the legal effect of this document Ex. 1-A hereafter. The appellants' contentions are of a two-fold nature. They say that, firstly Article 142, Limitation Act, applies and the plaintiffs' suit must be dismissed with regard to the lands of Schedule A and what we have called B (2) and C (2), on our finding that the defendants had remained in possession thereof for more than 12 years before the suit. The second contention is, that in any event the plaintiffs are not entitled to khas possession as against defendants 7 to 10, who must be considered as their tenants. They further say that what are exactly their rights qua tenants need not be determined in this suit but must be left over for determination if the plaintiffs later on sue in ejectment on the footing that their rights as tenants have determined.

18. The first question therefore is whether Article 142 or Article 144 applies. It is well settled that Article 142 applies if the plaintiff has sued on the footing that while in possession he was dispossessed by the defendant, or if the fact be established that while in possession he was dispossessed by the defendant. In

the plaint there is no admission which would bring the case within the first category. The plaintiffs were not in physical possession, either themselves or through persons holding under them at any time after their lands had re-formed on the other side of the river. They never exercised acts of possession and they were not turned out, neither physically expelled nor by reason of adverse acts on the part of the defendants their acts of possession, were interfered with and effaced. Through a fiction of law they, the plaintiffs, were in possession till the lands became fit for possession. It may be taken that they were by reason of this fiction in possession right up to the time when the lands became fit for possession but the question is whether they were "dispossessed" or whether they "discontinued" their possession within the meaning of Article 3 42 after the lands had re-formed and had become fit for possession e.g. had become cultivable. There cannot be any question of discontinuance of possession on their part. That term connotes three elements, two physical and one mental. There must be (1) actual withdrawal, (2) with an intention to abandon and (3) that another should step in, begin to occupy after the withdrawal. Dispossession signifies expulsion, an adverse act which has the effect of putting out. It presupposes physical contact, a collision, either with another person or with his physical acts. The physical presence on the property of the person affected is not necessary but the adverse act of the other party must have the quality of destruction. Acts of possession of the former must be effaced by the latter. On these concepts it would be (difficult to say that the rightful owner, who is only presumed to be in possession, till a chur becomes fit for enjoyment is dispossessed simply because he does not take (possession as soon as it becomes so fit, but another person occupies it and begins to till. Such a case would in our judgment come within Article 144 and not Article 142 and the defendant must prove adverse possession for 12 years or over before suit. This is our reading of the judgment of Lord Sumner in *Basanta Kumar Roy v. Secy. of State* AIR (1917) P.C 18. Article 144 was applied there not on the ground of seasonal floodings.

19. The view we are taking finds support in the observations of N.R. Chatterjea and Panton JJ. in *Rakhal Chandra Ghose and Others Vs. Durga Das Samanta and Another*, . In AIR 1931 162 (Privy Council) , the Judicial Committee of the Privy Council held that Article 144 and not Article 142 was the Article applicable to the case when the defendant took physical possession of minerals by opening and working a mine, a case where the rightful owner was in possession but only on a construction of law right up to the time when the mine was opened and worked. The case in *Suresh Chandra Mukerjee Vs. Shiti Kanta Banerjee and Others*, , cited by the appellants' advocate, does not touch this point. There was a difference of opinion between Woodroffe J. and Cuming J. whose judgments are reported in *Suresh Chandra Mukerjee Vs. Shiti Kanta Banerjee and Others*, . Woodroffe J. made it clear in the earlier part of his judgment that both parties conceded before the Division Bench that Article 142 applied. Before the Letters Patent Bench it does not appear that any question was raised as to whether Article 142 or Article 144 was the proper Article to apply. The case proceeded

throughout in the High Court on the footing that Article 142 applied. The main question was on whom the burden of proof lay, and if it lay on the plaintiff, could he discharge the burden of proving possession within 12 years from the suit by a recourse to the principle grounded on the anxiety of the Courts to come in aid of right and to disfavour wrong which imputes possession to the owner as long as the subject is incapable of enjoyment. Woodroffe J. answered this in the affirmative after holding that the onus lay on the plaintiff and his view was affirmed by the Letters Patent Bench. That case accordingly does not support the learned advocate for the appellants, nor does the case in Panchanon Sarkar and Others Vs. Basanta Kumari Dasi and Others, on which he placed reliance, a case in which Cuming J. fell in line with the final decision in Suresh Chandra Mukerjee Vs. Shiti Kanta Banerjee and Others, . We hold accordingly that Article 144, Limitation Act, and not Article 142 applies in this case.

20. The right obtained by adverse possession for more than 12 years would be co-extensive with the assertion of the claimant. Defendants 7 to 10 did not claim in themselves proprietary rights. They claimed only a subordinate right, that of tenants. If the Government had not acknowledged, as it did in 1923, the plaintiffs' title the benefit of the possession of defendants 7 to 10 would have accrued in favour of the Government, but after the deed Ex. 1-A of 1923 the Government cannot be allowed to turn round and say that the plaintiffs' title has been completely extinguished by reason of its tenants remaining in possession for more than 12 years before the suit. The effect of the possession of defendants 7 to 10 for more than the statutory period was to make the lands so possessed a part of their tenancy. As the statutory period had run out before the Government executed Ex. 1-A in favour of the plaintiffs, the lands of Schedule A and portions of Schedules B and G which: we have called B-2 and O-2, had become a part of the tenancy of the said defendants, and consequently the subsequent act of the Government by executing Ex. 1-A in favour of the plaintiffs cannot deprive the said defendants 7 to ,10 of the benefit which they had already acquired under the statute of limitation. If the Government had not acknowledged the plaintiffs' title and if it had not executed in their favour Ex. 1-A the plaintiffs' title would have been completely extinguished and the Government and the defendants 7 to 10 would between them have become the owners in fee of the said lands. It is the act of the Government which has kept alive a portion of the plaintiffs' rights and they, the plaintiffs, accordingly cannot turn out the said defendants whom the Government could not turn out at the date of the suit and obtain khas possession of Schedule A and those portions of Schs. B and G indicated above. On the other hand defendants 7 to 10 cannot take up the position that the plaintiffs cannot even get a declaration of title on the ground that their title was not subsisting at the date of the suit, for the Government as their landlord after its relinquishment in favour of the plaintiffs in 1923 was not entitled in law to the benefit of its tenants' encroachment on a neighbour's land.

21. The correct position in respect of the said lands, accordingly, seems to us to

be that the plaintiffs are entitled to get a declaration of their title and to have their possession confirmed in the same through defendants 7 to 10, the latter being regarded at the date of the suit as their tenants. In the view we have thus taken above it is not necessary for us to determine the question as to whether the landlord acquires or not title by adverse possession to the encroachments made by his tenant on a neighbour's land as soon as his tenant completes his possession for twelve years. One view may be that he does, and on that view the good title which the Government had already acquired before 1923 was conveyed to the plaintiffs, the former owners whose title had been extinguished before 1923, and Ex. 1-A would then be operative to confer a new root of title so far as the plaintiffs were concerned. In this view of the matter they, the plaintiffs, became the representatives in interest of the Government and so could not take khas possession, from defendants 7 to 10 as long as the latter's tenancy under the Government subsisted, and it was certainly subsisting in September 1925. The other view which has been expressed in *Surendra Kumar v. Ahmad Nawab* (1935) 63 Cal. 300 is that the landlord acquires no such right or title during the subsistence of the tenancy but can get the benefit of his tenant's encroachment on another's land only after the determination of the tenancy. We have already said it is not necessary, for the reasons on which we rest our judgment as stated above, to determine this question, but we desire to make it clear that we must not be taken to be in agreement with all that has been said in *Surendra Kumar v. Ahmad Nawab* (1935) 63 Cal. 300. The facts of that case were different from the facts we have before us.

22. The result of our findings is that the plaintiffs are entitled to khas possession of 326 bighas 15 cottas, being the western part of Schedule B, which is the decree of the learned Subordinate Judge. They, the plaintiffs 1 to 31 and 32, are however entitled to have only a declaration of their title as patnidars and zamindars respectively of Estate No. 22 in respect of the lands of Schedule A and also in respect of the rest of Schedule B and in respect of that portion of the lands of Schedule C as is covered by dags Nos. 1 to 15 of the settlement map. They cannot get a decree for khas possession in the same but are only entitled to be confirmed in possession through defendants 7 to 10 on the basis that defendants 7 to 10 were their tenants at the date of the suit. Mr. Mukherjee appearing on behalf of the plaintiffs respondents has contended before us that the rights of defendants 7 to 10 to hold the suit lands as tenants under the Government had come to an end on 31st March 1930, for the Government had granted a new settlement to them for another term of years excluding the lands of Schedules A, B and C. He further says that although the lease Ex. 21 (II. 158) which was for a term of 16 years gave by its terms a right of renewal to the tenants, the said lease was not binding on the Government as it was not sanctioned by the Board of Revenue, which was according to him the sanctioning authority in the case. The learned Subordinate Judge has found that the Board of Revenue was the sanctioning authority and no sanction having been given "by the latter the said lease was not binding on the Government. On this finding he

asks us to depart from the usual rule that a suit must be decided in all its stages on the cause of action at its institution and as laid in the plaint, and to give his clients a decree for khas possession on the ground that though the defendants may have occupied the position of tenants at the date of the suit and for about five years more, they* have ceased to be so since 31st March 1930. He urges that the renewal clause in Ex. 21 "was not binding on the Government and so not binding on his clients regarded by reason of Ex. 1-A as the assignee of the Government's rights so far as the lands in suit are concerned. Ex. 21 had however the sanction of the Commissioner of the Division (Ex. Q, II. 97).

23. In the settlement report, on the basis of which the lease to Jaha Bux and others was given by Ex. 21, the Settlement Officer stated that the Commissioner of the Division was the sanctioning authority [Ex. Z (1) II. 43 at 49]. The rule on the subject then in force is Rule 5, Ch. 16 of part 3 at page 118 of the Survey and Settlement Manual of 1900. The Board of Revenue is the confirming authority in the case of a permanent settlement and in the case of a regular temporary settlement at an annual revenue of Rs. 25,000 or over. In the case of a temporary regular settlement where the Government demand is below the said figure, the Commissioner of the Division is the confirming authority except in some cases where it is the Collector. It is doubtful if Ex. 21 evidences a permanent settlement. It is for a term of years with a right of renewal. It is not necessary to pursue the point further, for we have come to the conclusion that the questions as to whether defendants 7 to 10 had ceased to be tenants on 31st March 1930, what were and are their precise rights as tenants and what were their precise status ought not to be allowed to be agitated at the appellate stage, and must be left open between the parties in this suit. The finding of the learned Subordinate Judge that Ex. 21 required the sanction of the Board of Revenue and all findings consequent thereon are set aside, the matter being left open. The plaintiffs' suit for khas possession in respect of these portions of the lands in suit [Schedules A and B (2) and C (2)] is dismissed on the footing that at the date of the suit defendants 7 to 10 had become their tenants. As the plaintiffs cannot in this suit turn out defendants 7 to 10 from the said lands the possession of defendant 2 who holds the lands of Schedule A, the northern portion of the eastern part of Schedule B and dags No. 1 to 15 of Schedule C as a tenant under defendants 7 to 10 cannot also be disturbed.

24. We have already found that neither defendant 2, nor defendants 7 to 10 through the former had been in possession of the rest of Schedule C lands, i.e. of C (1) for 12 years before suit. These lands therefore stand on the same footing as the western 326 bighas 15 cottas of Schedule B, i.e. B (1). But there is this difference that whereas B (1) is not within the tenancy of defendant 2, C (1) is. If defendant 2 is a ryot and not a tenure holder, he cannot be ejected by the plaintiffs, for it has been held by the Full Bench in *Binadlal prakrshi v. Kale Pramanik* (1893) Cal. 708 that if a non-occupancy ryot bona fide holds under a trespasser, he cannot be ejected by the rightful owner who had established his rights against the trespasser. In *Krishna Nath v. Mahamed Wafiz* A.I.R.(1916)

Cal. 598 it has been pointed out that there must be bona fides both on the part of the de facto lessor and the ryot to attract the principle of Binad Lal's case *Binadlal prakrshi v. Kale Pramanik* (1893) 20 Cal. 708 (F.B.) which is an encroachment on the general principles of law. Here there cannot be any doubt that there were bona fides on the part of the ijaradars of the Government and defendant 2 when he went into occupation. The learned Subordinate Judge has held that defendant 2 is a ryot and that finding has been challenged in the memorandum of cross-objections. The Eecord of Rights records him as a tenure holder [Ex. Z (D) - II. 79] and the area of his tenancy is more than 100 bighas; the presumption is that he is a tenure holder. The original letting to his predecessors-in-interest was in the year 1846. The area then let out was 80 bighas only. (Ex. F, II. 22.) He and his predecessors extended their possession as the river receded and these gradual additions must be taken to have been held in the same right under which the original 80 bighas was held. On the construction of Ex. F (II. 22) we hold that a ryoti settlement was concluded and the presumption of the Record of Rights as also the one founded on Section 5, Sub-section (5), Bengal Tenancy Act, have been rebutted. The fact that his predecessors had been described as jotedars is not of much help, for the word "jote" by itself is an ambiguous word, which may mean a tenure or a holding. We accordingly hold that defendant 2 is a ryot, and so he cannot be ejected. Two further points have been taken in support of the cross-objections. They are (1) that full costs ought to have been awarded by the Court below to the plaintiffs against defendants 7 to 10. As we are modifying the decree of the Subordinate Judge we think that the Subordinate Judge's order giving the plaintiffs half costs against those defendants ought to stand. The other point is a trivial one. The plaintiffs paid the costs of hire of the theodolite. The sum, which is Rs. 114, has not been included in their schedule of costs. The plaintiffs ought to have the same.

25. The result is that this appeal is allowed in part and the decree of the Subordinate Judge is modified. A self-contained decree will be drawn up in this Court in the following manner, namely that it is declared that the lands in suit are the lands of village Sovarampore appertaining to Touzi No. 22 of the Tipperah Collectorate and that plaintiffs 1 to 31 have 13 annas patni interest and plaintiff 32 three annas zemin-dary interest in the same. That the plain, tiffs would recover khas possession of 326 bighas 15 cottas out of the lands of Schedule B which lie to the west of the western District Settlement line as depicted in the Commissioner's map by evicting the defendants. That the plaintiffs' possession is confirmed in the lands of Schedule A, the rest of Schedule B and in dags Nos. 1 to 15 of Schedule C through defendants 7 to 10 on the footing that they were at the date of the suit the plaintiffs' tenants. That the plaintiffs do recover possession through defendant 2 of the rest of the lands of Schedule C by evicting the other defendants. That defendants 1 to 14 do pay to the plaintiffs half the costs of the Court below, i.e. of half of the costs as appearing at part 1, page 278 of the paper. book plus the full sum of Rs. 114 with in. terest at the rate of 6 per cent, per annum from the lower Court's decree. That the other defendants do

bear their respective costs of the Court below. That the plaintiffs will be entitled to get mesne profits from defendants 7 to 10 in respect of the aforesaid 326 bighas 15 cottas in which the plaintiffs get khas possession, such mesne profits to be assessed in a subsequent proceeding. As the appeal has succeeded substantially but not in full, we direct that the plaintiffs do pay to the defendants-appellants half the costs of this Court. No costs in the cross-objections. Hearing fee assessed at Rs. 300.