

(1979) 07 DEL CK 0019

In the Delhi High Court

Case No : Regular Second Appeal No. 28 of 1970

Delhi Cloth and General Mills Co. Ltd.

APPELLANT

Vs

Ganga Charan Sharma

RESPONDENT

Date of Decision : 10-07-1979

Acts Referred:

Citation : (1980) ILR Delhi 196 : (1979) RLR 401

Hon'ble Judges : T.P.S Chawla, J

Bench : Single Bench

Advocate : D.R. Dhamij, for the Appellant;

Judgement

T.P.S. Chawla, J.

(1) Although I wavered much while listening to the arguments, on further deliberation I am quite clear that this appeal should be allowed. The problem is the old one, whether Article 142 of the Limitation Act 1908 applies to a suit for possession of immovable property when the plaintiff's claim is founded on title And, whether the fact that the defendant is in possession raises the inference that the plaintiff was dispossessed, if it be not established that the possession of the defendant had a consensual origin. A glance at any commentary on the Limitation Act shows how much these questions have vexed the courts, and the mass of conflicting and confusing case-law they have produced.

(2) The relevant facts in the present case are few and simple. In 1933, the Delhi Cloth and General Mills Company Limited purchased a large area of land measuring 52,902 sq. yds. According to the Mills, a small parcel comprising 2584 sq. ft. of this land was leased to one Murari Lal in June 1947. It is alleged that Murari Lal sub-leased a portion to Bhagwan Das and the rest to Ganga Charan. In July 1948, Murari Lal died and his heirs were recognised as tenants. Sometime afterwards the lease was terminated, and the Mills instituted a suit for eviction on 3rd June 1955. The heirs of Murari Lal admitted the claim and a decree was passed against them. Bhagwan Das initially contested the suit, but

later did not participate in the proceedings. It is said that, whilst the suit was pending, he delivered possession of his portion of the land to Ganga Charan, and, Therefore, disappeared from the scene. Ganga Charan was the only one who fought the suit to the end. He denied that the land had been leased to Murari Lal and that he was a sub-lessee. On the contrary, he maintained, that he and his ancestors had been in adverse possession of the land for more than 20 years. The suit, is against Bhagwan Dass and Ganga Charan. was dismissed on 27th November 1958 on the ground that it had not been proved that the land "in dispute was over let out to Murari Lal". An appeal was also dismissed on 23rd February 1961.

(3) Then, on 12th June 1961, the Mills filed the suit out of which this second appeal has arisen, A decree for recovery of possession and mesne profits was sought against Ganga Charan. The basis of the suit was that the Mills had title to the land. Again, Ganga Charan pleaded adverse possession. But, subsequently a statement was made on his behalf expressly abandoning this plea. Both the courts below have found it proved that the title to the land vests in the Mills. Yet, they have dismissed the suit as being barred by time under Article 142 as the Mills had not been able to establish their possession within 12 years prior to the institution of the suit.

(4) It is agreed by both sides that since the suit was instituted in 1961 it is governed by the Limitation Act of 1908 which was in force at that time. Even otherwise, section 31 of the Limitation Act of 1963 is clear on the point. Counsel for the Mills conceded that if Article 142 applied the judgments of the courts below had to be upheld as there were concurrent findings of fact that the Mills had failed to establish possession within the statutory period. Likewise, counsel for Ganga Charan conceded that if Article 144 applied the suit had to be decreed, for the plea of adverse possession had been given up. "Thus, the only question is, which of those two Articles in the Act of 1908 is the right one to apply?

(5) Article 142 applies to a suit "For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession". The period of limitation is 12 years from "The date of the dispossession or discontinuance". Article 144 is residuary. It applies to suits "For possession of immovable property or any interest therein not hereby otherwise specifically provided for". The period of limitation is again 12 years, but it begins to run "when the possession of the defendant becomes adverse to the plaintiff. There were identical Articles in the Limitation Act 1877 which was replaced by the Act of 1908.

(6) In my opinion there are three reasons why Article 142 does not apply to the suit by the Mills. First, notwithstanding earlier authorities to the contrary, I do not think it can, or should, now be held that Article 142 applies to a suit based on title. On reading the cases it becomes apparent that the question began to be agitated under the Act of 1877 and the difference of opinion persisted till 1963 when the present Act was passed. The conflict has continued even thereafter. but

has acquired a different context But, let me start from the beginning.

(7) In *Mohima Chunder Mozoomdar and others v. Mohesh Chunder Neoghi and others*, ILR 16 Cal 473, it was pleaded that the suit was barred under Article 142. The Privy Council seems to have held, on the analogy of an English "action for ejectment", that where the plaintiff has been dispossessed and sues on his title, he must nevertheless prove his possession "at some time within 12 years before the commencement of the suit". At least, this is how the decision was understood. "The concept came to be known as "subsisting title". It required the plaintiff to prove not only that he was the owner, but also that he had been in possession within 12 years. In this, it was implicit that Article 142 takes within its scope suits based on title, provided, of course, the plaintiff has been "dispossessed or has discontinued the possession".

(8) Accordingly, judgments were delivered by the High Courts in India which proceeded on the subsisting title theory. In particular, there were three judgments of the High Court of Madras and one of the High Court of Allahabad. The three Madras cases were overruled in *Secretary of State for India v. Chetlikani Rama Rao and others*, 1916 PC 21. The Privy Council said :

" THEIR Lordships are of opinion that the view thus taken of the law is erroneous. Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say,

"I am here ; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfill all the legal conditions."

And, after illustrating the disastrous results of the "erroneous" view. it was observed that

IT would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession."

The subsisting title theory was rejected, and it was made plain that it meant no more than ownership.

" BUT with reference to the "subsisting title," it appear- ". their lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for the period of sixty years, that fundamental fact remains, and that fact forms "subsisting title" ".

The following statement in AIR 1931 1 (Privy Council) , is to the same effect ;

" ONCE title is proved or admitted to be in the zamindar he will be presumed to

continue in possession until adverse possession by the trespasser is established, and that, whether the trespasser is the grantee of the surface or a stranger."

The Allahabad case which proceeded on the subsisting title theory was overruled in *Jai Chand v. Girwar Singh*, Air 1919 All 403, It was explained that *Mohima Chunder Mozoomdar and others v. Mohesh Chunder Neoghi and others*, ILR 16 Cal 473, only required that, in a case falling under Article 142, the cause of action must be shown to have arisen within limitation :

" Whereas plaintiff comes into Court complaining of dispossession, and founds his cause of action upon a specific act of the defendant of that kind, it stands to reason that inasmuch as he is compelled to establish a cause of action of some kind, within limitation he must show that he was in possession within limitation; otherwise he could not have been dispossessed, and dispossession is the grievance of which he complains."

In any case, it was said, "The matter was recently made perfectly clear by an important decision of the Privy Council reported as *Secy. of State v. Chelikani Rama Rao*". The rule of law was that if the plaintiff established title, the defendant was "without any defense to the suit, unless he succeeded in establishing his title by adverse possession. By tracing the "history of the authorities" it was sought to be demonstrated that the law is really settled and has only become unsettled by misunderstanding".

(9) According to this later view, a suit based on title fell under Article 144. and hence the plaintiff did not have to prove his possession , within 12 years. It was held that Article 142 was restricted to suits based on "possessory title". For a little over a decade this view appears to have held the field. It was adhered to in *Allahabad : (Bohra) (Bohra) Kanhaiya Lal Vs. Girwar and Others ; Kallan and others v, Mohammad Nabi Khan and others*, A.t.R. 1923 All 775 . And, the Madras and Lahore High Courts also accepted it : *Peria Koil Kelvi Appan Govinda Ramaniya Peria Jeeyangarswami Vs. Mahomed Esoof Sahib, Mohammad Yar and others v. Mohammad Yar and another*, Air 1929 Lah 596 ; *Daulu Mal v. Rawal Baksh and another*, Air 1930 Lah 608 ; *Kallu Mal v. Maman*, Air 1933 Lah 721 and *Ganpat Rai and others v. Har Dial*, Air 1933 Lah 722. The subsisting title theory lost its sway.

(10) However, it was restored to great vitality by *Bindhyachal Chand and Others Vs. Ram Gharib Chand and Others*, , which, in effect, overruled *Jai Chand v. Girwar Singh*, Air 1919 Allahabad 403, whilst purporting to distinguish it. A Full Bench categorically declared that Article 142 is not restricted to suits based on possessory title only". The argument which prevailed was that Article 144 was residuary and could be resorted to only if no other Article was applicable; and, the words of Article 142 were very general and gave no indication that it was confined to suits based on possessory title. A Full Bench of the Lahore High Court followed suit and overruled the earlier judgments of that court : *Behari Lal and others v. Narain Das and another*, Air 1935 Lah 475. A Full Bench of the Madras

High Court did the same : Official Receiver of East Godavari at Rajahmundry v. Chava Govindaraju and another, AIR 1940 Mad 798 . The Nagpur High Court also adopted the Allahabad view : AIR 1937 129 (Nagpur) and Meherban Lalli Pinjara v. Yusufkhan Kallu Pinjara, Air 1939 Nag 7. And. Allahabad remained firm in its stand : Sangam Lal Vs. Ganga Din and Others, .

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(12) The last cited case was overruled by a Full Bench in Lingamma v. Putts Gowda and another, Air 1963 Mys 1. I do not think the Full Bench was quite accurate in saying :

" TILL the decision of this Court in Basanna's case, Air 1959 Mys 227, all the High Courts were unanimous in holding that the plaintiff is not entitled to succeed unless he shows in addition to his title to the property, that he or his predecessor-in-title was in possession of the suit property within 12 years of the suit".

No doubt the subsisting title theory was dominant, but not all the High Courts" had accepted it. Considering the conflict that had existed since the turn of the century, and the swings of the pendulum that had occurred, there was little justification" for invoking the stare decisis rule. That rule pre-supposes that the law has "become settled by a series of decisions". Here, it should be apparent from the resume I have given. that the cases on the subject were divergent, and even in the same High Court the view had changed from time to time. Besides, the stare decisis rule is not "imperative or inflexible" but discretionary, and should not be followed to the extent that grievous wrong may result" : Maktul Vs. Mst. Manbhari and Others,

(13) This, briefly, is how matters stood when the new Limitation Act of 1963 was passed and the Act of 1908 was repealed. Of course, there are numerous other reported cases in which the question has been; discussed, but they only follow one view or the other and I have indicated the broad trends. My purpose was only to outline the shifts and changes in the case law. Before I pass on to the Act of 1963, I think, this is a convenient point at which to state my own view.

(14) ownership is the largest right, or bundle of rights, relating to property, known to law. It includes the right of possession, and usually the two go together and inhere in the same person. The only defense to a suit by an owner for recovery of possession of immovable property is adverse possession. Section 27 of the Limitation Act 1963, which is a verbatim reproduction of section 28 of the Act of 1908, extinguishes the right to any property when a suit for possession has become time-barred. No other defense is open in law. This is one principle.

(15) The other is, that possession must be protected so as to deter people from taking the law, into their own hands Hence, section 9 of the Specific Relief Act 1877 provided a summary remedy to a person in possession who had been dispossessed. In a suit under that section the fact that the defendant was the

owner of the property was of no avail. But, Article 3 of the Limitation Act 1908 required, the suit to be brought within six months from the date of dispossession. A suit based on previous possession, unsupported by title, lay even after six months from the date of dispossession. It was maintainable u/s 8 of the Specific Relief Act 1877. However, in this kind of suit the defendant could succeed by proving his title, unless the plaintiff proved a better one. These propositions are settled law : Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others, . The legal position under the Specific Relief Act 1963 is the same : see Sections 5 and 6.

(16) So, there are three conceivable classes of suits for possession of immovable property : (i) a suit based on previous possession filed within six months of dispossession, (ii) a suit based on previous possession filed after six months from the date of dispossession, and (iii) a suit based on title. It is not unreasonable to presume that the draftsman of the Limitation Act 1908 was familiar with the provisions of the Specific Relief Act 1877 and understood its effect. This is amply borne out by the fact that in Article 3 he specifically provided a period of limitation for a suit "Under section 9 of the Specific relief Act, 1877". One would expect him also to provide for a suit u/s 8 of that Act: and, separately, for a suit based on title. I think, this is exactly what he did in Articles 142 and 144. He must have known the difference between those two kinds of suits, and it seems incredible that he did not distinguish between them for purposes of limitation". The 183 Articles in the Schedule testify to his meticulous drafting.

(17) There are internal indications in Article 142 that it was intended to apply only to suits based on previous possession. The words "while in possession of the property" in the first column must have some significance. The sentence makes perfect sense even if those words are omitted. It then reads : "For possession of immovable property when the plaintiff.....has been dispossessed or has discontinued the possession". Why, then, were they inserted ? It seems to me, they were intended to convey the idea that the plaintiff was suing on the ground of his possession before he was dispossessed, that is, his previous possession. Also, time under the third column begins to run from the date of dispossession. It is the same in Article 3. That tends to show the underlying similarity in suits coming under those two Articles"

(18) In contrast, under Article 144 time runs from the date "when the possession of the defendant becomes adverse to the plaintiff". Adverse possession, as I have already stated, is a defense to suit based on title. It has no meaning in relation to a suit based on previous possession. The defense to such a suit is title, not adverse possession. This, to my mind, is strong evidence that Article 144 was meant to apply to suits based on title.

(19) Conversely, there is no indication in Article 142 that adverse possession is a defense to a suit falling under that Article. If suits based on title are included under that Article, then the astonishing result is that adverse possession is lost as a defense.

(20) Looking at the matter in this way, everything falls into place. There are three kinds of suits for recovery of possession of immovable property, and the Limitation Act, 1908 provided three different periods of limitation for them by Articles 3, 142 and 144. Thus, I align myself with the view that Article 142 applies to suits based on possessory title.

(21) In the many cases that I have been shown, and others that I have read for my own profit, there emerges only one criticism of that view. It is said the words of Article 142 are general and do not indicate that suits on title are excluded. My answer is that the words "while in possession of the property" indicate precisely that, and were so intended.

(22) The subsisting title theory is subjected to much more objection. It results in the grave illogicality, one might even say illegality, that an owner can be defeated even if the defendant neither pleads nor proves adverse possession. He can fail simply because he did not succeed in proving that he was in possession within 12 years prior to the institution of the suit, although his title is unimpeachable. In *Official Receiver of East Godavari at Rajahmundry v. Chava Govindaraju and another*. AIR 1940 Mad 798, this "hardship" was realised but the court considered itself helpless because of "what the Limitation Act says and the Court must administer the law".

(23) But, the greatest objection to the subsisting title theory is that it leaves no room for Article 144 at all. The Full Bench in *Lingamma v. Putte Gowda and another*, Air 1963 Mys 1, said: "For the reasons mentioned already, every suit for possession based on title attracts to itself the mischief of Article 142. If that is so, what use is Article 144? It is very noticeable that in none of the cases adhering to the subsisting title theory is any example offered of a suit for possession which would fall under Article 144. The lone exception is the judgment of Mukherjee, J., in *Bindhyachal Chand and Others Vs. Ram Gharib Chand and Others*, which, if I may say so, is "the most lucid and comprehensible enunciation of the subsisting title theory that I have found. Even he is able to give only one example drawn from *Rustam Khan and Another Vs. Mt. Janki and Others*, where some heirs who were never in "physical possession of any of the properties" sued a co-heir who had executed a deed of transfer. That is so rare a case, that it does not give any worthwhile content to Article 144. As against that, I find the judgment in *(Bohra) Kanhaiya Lal Vs. Girwar and Others*, which contains an admirably clear exposition of possessory title, wholly convincing and unanswerable.

(24) In its Third Report (1956) the Law Commission proposed revision of the Limitation Act 1908. Articles 142 and 144 are discussed on pages 49 to 53. The Commission says that the case law has "introduced a good deal of confusion" and, as it stands, "seems to favor a trespasser against an owner". Blame for this "anomaly" is placed on the subsisting title theory. In the opinion of the Commission, the Full Bench decisions of the High Court of Allahabad and Madras, to which I have already referred, did not accord with the "language" of Article

142. After quoting the passage in the Madras judgment which recognises "hardship", the Commission goes on to say :

" WE propose that this hardship should be remedied. If the defendant wants to defeat the right of the plaintiff he must establish his adverse possession for over 12 years which has the effect of extinguishing the title of the owner by the operation of section 28 of the Limitation Act read with article 144. If he fails to do so there is no reason for non executing the plaintiff merely because he was not able to prove possession within 12 years."

Accordingly, it was proposed that "in order to avoid injustice and inequity to the true owner to simplify the law, Article 142 should be restricted to suits based on possessory title.....".

(25) These recommendations were implemented in" Articles 64 and 65 of the Limitation Act 1963. They replace respectively the previous Articles 142 and 144. The words "based on previous possession and not on title" have been inserted in Article 64. The words "based on title" have been inserted in Article 65. In the Objects and Reasons it is said:

"ARTICLES142 and 144 of the existing Act have given rise to a good deal of confusion with respect to suits for possession by owners of property. Article 64 as proposed replaces Art. 162, but is restricted to suits based on possessory title so that an owner of property does not lose his right to the property unless the defendant in possession is able to prove adverse possession".

So. there can be no manner of doubt that the legislature has totally rejected the subsisting title theory and approved that of possessory title.

(26) I think one can now confidently say, on the authority of Parliament, and the Report of the Law Commission which was accepted, that the subsisting title theory was always wrong. It was contrary to, and defeated, the intention of the legislature, and brought discord into this branch of the law. It also resulted in serious injustice. The question is, whether it is permissible to take notice of these subsequent developments for interpreting Articles 142 and 144 ?

(27) This is no new situation. It has come about before. If, in the opinion of Parliament, the courts have misinterpreted the law, the correction can be administered only by legislation. The amendment "is intended to give effect to and clarify what was all along the intention of the legislature" : F. Bulaqi Dass Madan Mohan and others v. Ram Sarup, 1960 P.L.R. 231. Such legislation has been aptly described as "parliamentary exposition" of the law. It must, surely, behoove the courts to correct the error, so far as they can, even as regards the past.

(28) In Cape Brandy Syndicate v. Inland Revenue Commissioners, (1921) 2 K.B. 403, Lord Sterndale said :

" I think it is clearly established in Attorney-General v. Clarkson that subsequent

legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceeded upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier."

With reference to this passage, Lord Buckmaster said in *Ormond Investment Company Limited v. Betts*, (1928) AC 143 :

" THIS is ,in my opinion, an accurate expression of the law, if by "any ambiguity" is meant a phrase fairly and equally open to diverse meanings....."

And, Lord Atkinson said :

"SARGANTLJ. seems to hold that a legislative interpretation of the statute of 1918 is to be found in this s. 26 of the Act of 1924, and, Therefore, the case comes within a well recognized principle dealing with the construction of statutes namely, that where the interpretation of a statute is obscure or ambiguous, or readily capable of more than one interpretation, light may be thrown on the true view to be taken of it by the aim and provisions of a subsequent statute.

In *Westby's Settlement*, *Westby v. Westby and others*, (1950) 1 All E.R. 479, Evershed, M.R. asked the rhetorical question :

" TRUE, we apply the law as it stood when the proceedings began, but does it follow that, in construing s. 148 of the Act of 1890, you may not be entitled to look at any parliamentary affirmation of any view of construction even though such affirmation is contained in a statute passed since the proceedings began ?"

Other cases on this topic can be found in *Craies on Statute Law* (7th edn.) page 146 and *Maxwell on Interpretation of Statues* (12th edn.), page 69.

(29) In the face of the conflict which existed for so long in the cases, it can hardly be denied that Articles 142 and 144 were "obscure" and "Ambiguous". Therefore, the condition for applying this principle of interpretation is fulfilled .

(30) A very relevant observation occurs in *Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others*, . In order to show that a suit for possession based on previous possession could be brought even after six months from the date of dispossession, the Supreme Court referred to Articles 64 and 65, and said : "The amendment is not remedial but declaratory of the law" Granted that the question before the Court was different. Nevertheless, this observation must have had some purpose and meaning. It seems obvious to me that, at the very least, the Supreme Court was saying that what was now contained in Articles 64 and 65 was always intended to be the law. The sentence could even be construed to mean that previously, too, that was the law. Either way, there is a very strong implication in favor of possessory title.

(31) That is the sense in which a single Judge in Madras understood the judgment of the Supreme Court : see *Konappa Mudaliar Vs. Kusalaru alias Munuswami Pillai and Others*, . He thought, the effect of that judgment was that the law as stated in Articles 64 and 65 "should always be deemed to have been the law". Therefore, without actually naming the case, he did not follow the Full Bench judgment in *The Official Receiver of East Godavari Vs. Chava Govindaraju and Another*, . Another single judge in Madras took the same view in an unreported judgment.

(32) However, both these single judges were overruled by a Division Bench in *The Southern India Education Trust, Madras Vs. M.S. Jagadambal*, . The Division Bench said that section 31 of the Limitation Act 1963 showed that pending suits were to remain unaffected, and the new Act could not be construed as to take away the vested right of a defendant to raise a defense based on Article 142 of the old Act". With respect, I think, the Division Bench misapprehended the argument. No one maintains that the Act of 1963 is retrospective. The" argument is that since the legislature has clearly indicated that the subsisting title theory was incorrect, and opposed to its intention, the courts should pay heed and not persist in misinterpreting Article 142. There can be no question of anyone having a "vested right" in a particular interpretation of the law by the courts. Any such rule would obliterate dissent, review and revision after the first judgment on a point was delivered. I suppose what the Division Bench really had in mind was the stare decisis rule ; but that, as I have already tried to show, was inapplicable.

(33) Again, in *Madhao Pandurang and Another Vs. Yeshwant*, , a single judge has interpreted Article 142 in the after light of Articles 64 and 65. He has held that "a suit based on title will not be covered by the said Article". But, in *Surajmal and Another Vs. Mangilal and Another*, , a Division Bench has gone the other way influenced by the notion of a "vested right" in the defendant. As to that, I have my criticism.

(34) Thus, the conflict has started once again. As far as I am aware, the question whether Article 142 applies to a suit based on title has never yet been" ruled upon by the Supreme Court. Counsel for Durga Charan referred to *Munshi Manzoor Ali Khan Vs. Sukhbasi Lal*, , but the point was not raised in that case. Nor was it raised in *Smt. Raj Rani and Another Vs. Kailash Chand and Another*, . By making a passing reference to the "change in law" and paraphrasing the Objects and Reasons, the Supreme Court did not decide, in that case, what the law under the earlier Act was. In fact the passage ends with a disclaimer. It is also worth observing, that at one place it is stated that the object of the new Act was to remove difficulty "by a more clarified position". I think, counsel attempted to derive too much from stray phrases in that judgment.

(35) This being the state of the case-law today, how should I decide ? I have not the slightest doubt remaining that the subsisting title theory is wrong, and always was wrong. Should I perpetrate the error, and the injustice, against which

even Parliament and the Law Commission have now spoken ? I was told that I ought to consider myself bound by the Full Bench judgment in Behari Lal and others v. Narain Das and another, Air 1935 Lah 475 , as Delhi High Court was the successor in this territorial jurisdiction, of the Lahore High Court; and, in support of this submission two cases were cited : District Board, Hoshiarpur Vs. F. Hira Singh Jagat Singh and Others, and State of Gujarat Vs. Gordhandas Keshavji Gandhi and Others, . However, I do not propose to go into that question. I reject the submission on the ground that it proceeds on too narrow and rigid a view of the doctrine of precedent. Recently, in Smethurst v. Smethurst, (1977) 3 All E.R. 1110, Sir George Baker, P. commenced his judgment as follows :

" THE late Lord Reid said in an address in 1971 that, in the search for a middle way between certainty and justice, judges must prevent precedent becoming master, and with this in view a court should have regard to common sense, legal principle and public policy in that order. While remembering that common sense may not always be common to all men or women, and that it may vary from generation to generation, I am going to put it first before precedent or principle in this appeal."

If necessary, I will do the same, though, on the present occasion, I think, common sense, justice and legal principle all point to the same conclusion, for Parliament has in fact overturned the Full Bench judgment of the Lahore High Court. Accordingly, I hold, that Article 142 was not applicable to the suit by the Mills at it was based on title.

(36) That was my first reason. Secondly, in my opinion, the word "dispossession" in Article 142 means physical and not "constructive" dispossession. That is the ordinary sense in which the word is always used. The cases which subscribe to the possessory title theory attribute that meaning to the word : Peria Koil Kelvi Appan Govinda Ramaniya Peria Jeeyangarswami Vs. Mahomed Esoof Sahib, , and Basantilal v. Ramcharan and others, Air 1956 MB 166 . Those that accept the subsisting title theory include within it "constructive" dispossession : Bindhyachal Chand and Others Vs. Ram Gharib Chand and Others, and Behari Lal and others v. Narain Das and another, Air 1935 Lah 475. Since this theory makes suits based on title subject to Article 142, the requirement of "dispossession" in that Article has to be complied with. Quite often, in such suits, the plaintiff was never in physical possession of the property. Consequently, the notion of "constructive" dispossession is created, without any analysis.

(37) But if one remembers that the reason behind, the law, as embodied in the Specific Relief Act, was to discourage interference with actual possession, so as to prevent a breach of the peace, it follows as a corollary that the dispossession visualised must be physical. I would ask, what do we mean by "constructive" dispossession ? Presumably, it connotes some interference with or deprivation of "constructive" possession. Both in fact, and in law, "constructive" possession means that a person has title which gives him the right to possess. By the nature of the thing, actual possession is with another: "Constructive" dispossession,

can, Therefore, only mean the denial of the right to possess issuing from title, or, in other words, denial of title. Denial of title, it has been held, is not dispossession: *Basantilal v. Ramcharan and others*, Air 1956 MB 166 and *Bindhyachal Chand and Others Vs. Ram Gharib Chand and Others*, (per Mukerji, J.) It could never have been the intention of the law to prohibit "constructive" dispossession. As is well known denial of title is the very foundation of adverse possession which the law itself recognises.

(38) It is true that in *Smt. Raj Rani and Another Vs. Kailash Chand and Another*, , the suit was remanded to determine whether the plaintiff had been in "actual or constructive possession" within 12 years, but the meaning of "dispossession" was neither argued nor decided. The meaning of "possession" and "dispossession" do not necessarily have to be co-extensive. Counsel for the Mills referred to *Musammat Murti Dussadhin and Others Vs. Surajdeo Singh and Others*, , *Gurbinder Singh and Another Vs. Lal Singh and Another*, , *Shivagonda Subraigonda Patil and Others Vs. Rudragonda Bhimagonda Patil and Another*, and *Feroza Begam and Others Vs. Dewan Daulat Rai Kapoor and Others*, . There are some small indications in these cases that the dispossession envisaged by Article 142 is physical, but they do not deal with the point and are not of any real assistance.

(39) So, consistently with my view that Article 142 applies only to suits based on possessory title, I hold that it applies only to cases of physical dispossession and not "constructive" dispossession. As no such thing has been alleged or proved in this case, for this reason, also, that Article does not apply.

(40) Thirdly, I do not accept the proposition that if the plaintiff alleges that the possession of the defendant is "permissive", but is unable to prove it, the inescapable conclusion is that the plaintiff was dispossessed. The reasoning in support of the proposition is tersely stated in *Lingamma v. Putte Gowda and another*, Air 1963 Mys 1 :

" IF a person having title to the property sues for possession of the suit property on the allegation that the defendant was his tenant but fails to establish the tenancy pleaded, then it follows that he must have either been dispossessed or that he had discontinued his possession prior to suit. Where a plaintiff pleads permissive possession and the defendant admits his possession but denies that he is in permissive possession (in either case the defendant's possession being admitted) if the plaintiff fails to establish his case, then it follows that the defendant's possession was without the consent of the plaintiff. From the time the defendant holds the property without the consent of the plaintiff, then the plaintiff must be deemed to have been dispossessed."

(41) It may be a coincidence that most of the cases which agree with this reasoning are those which adopt the subsisting title theory: *Behari Lal and others v. Narain Das and another*, Air 1935 Lah 475 ; *Sangam Lal Vs. Ganga Din and Others*, ; *Darya Singh Hari Singh and Another Vs. Kalma Nihala*, , and

Adhikarimayum Brajmohaii Sarma v. Heikrujam Tombi Singh and others, Air 1973 Gau 38 . Or, it could be that that theory induces greater readiness to infer dispossession. The cases which affirm the theory of possessory title reject this proposition" : Peria Koil Kelvi Appan Govinda Ramaniya Peria Jeeyangarswami Vs. Mahomed Esoof Sahib, and Madhao Pandurang and Another Vs. Yeshwant, .

(42) The fallacy in the proposition, has been elaborately exposed by a Full Bench in Qadir Bux Vs. Ramchand and Others, , which overrules Sangam Lal Vs. Ganga Din and Others, . According to section 3 of the Evidence Act, 1872, a fact may be "proved", "disproved" or "not proved". If an allegation fails for lack of evidence, it is not necessarily "disproved". One cannot immediately conclude that it was false. It all depends on the facts. Sometimes even the truth cannot be proved in a court of law due to technical rules. In that case the appropriate conclusion is that the allegation is "not proved". An obvious example is where a lease deed has been written, but not registered. The truth is that a lease was granted, yet due to special rules of law, it cannot be proved. And, one can easily think of many other examples.

(43) The judgment of the Full Bench in Qadir Bux's case has been followed in Udho and Others v. Smt. Khimian and others, Air 1973 All 508, and Madhao Pandurang and Another Vs. Yeshwant, . In the latter case, the judgment of the Full Bench of Mysore has been expressly dissented from.

(44) Apart from its logical weakness, the proposition leads to wholly unreal results. Take the present case. The previous suit filed by the Mills was lost because the evidence did not satisfy the judge that this particular portion of the land was let to Murari Lal. It failed for want of proof, and not because it was untrue. In the present suit the Mills do not allege that they were ever dispossessed. Nor does Ganga Charan claim that he dispossessed them. He does not even rely on adverse possession. There is no evidence on record which even remotely suggests dispossession. Nevertheless, the proposition, if applied, requires that to be the conclusion. I think, the law should not be such an ass.

(45) For these reasons, I allow this appeal and grant the Mills a decree for possession of the land which was the subject matter of the suit. The Mills are also entitled to mesne profits, but neither of the courts below inquired into the question as they dismissed the suit. The trial court will now determine the amount of mesne profits to which the Mills are entitled, and make a decree accordingly, Considering that the questions involved in this appeal were of considerable difficulty, and there was much confusion and conflict in the authorities, I will make no order as to costs.