

(1952) 02 PAT CK 0016
In the Patna High Court
Case No : A.F.A.D. No. 889 of 1949

Dhani Jha and Others

APPELLANT

Vs

Ram Bahadur Sah and Others

RESPONDENT

Date of Decision : 21-02-1952

Acts Referred:

Evidence Act, 1872 — Section 114
Limitation Act, 1908 — Article 142, 144

Citation : AIR 1952 Patna 303

Hon'ble Judges : Narayan, J

Bench : Single Bench

Advocate : Lalnarain Sinha and Sreenath Singh, for the Appellant; B.C. De and A.N. Chatterji, for the Respondent

Final Decision : Dismissed

Judgement

Narayan, J.—This is a plaintiffs' appeal and it arises out of a suit for declaration of title and recovery of possession with regard to two plots of land recorded in the Survey as plots Nos. 43 and 44. Plot No. 43 is a part of holding No. 493 and has got an area of 1.14 acres, and plot No. 44 is a part of holding No. 482 and has got an area of 1.11 acres. The plaintiffs are the 16 annas proprietors of the patti in which these two plots lie. With regard to plot No. 43 the case which the plaintiffs had set up was that the Belsand Kothi which had lease of the milkia interest under which plot No. 43 lies had made a temporary transfer of this plot to Aklu Sah, the ancestor of the defendants, in exchange for plots Nos. 171 and 506 of khata No. 320 and that after the expiry of the lease the patti came under the khas possession of the plaintiffs and the exchange terminated with the result that the plaintiffs obtained possession of plot No. 43, and plots Nos. 171 and 506 were returned to the ancestor of the defendants.

In respect of plot No. 44 the plaintiffs' case was that it was not in possession of the Kothi and had not been transferred by the Kothi to Aklu Sah and that it had all along been in their possession. The trouble arose in 1944, and according to

the plaintiffs" allegation the defendants had lodged a false information at the Belsand police station as to the apprehension of a breach of peace and had also filed certain criminal cases against the plaintiffs Nos. 1, 2, 3 and others alleging loot of paddy crops. These cases ended in the conviction of the plaintiffs, and it is said that after the plaintiffs had been convicted the defendants began to interfere with their possession. The plaintiffs therefore instituted this present suit in which the prayer was that their title be declared and their possession confirmed. There was, however, a proceeding u/s 144 of the Code of Criminal Procedure after the institution of the suit, and the plaintiffs filed a petition for the amendment of the plaint in which they alleged that they had been dispossessed from the two plots about 1 1/2 months after the institution of the suit. The amendment prayed for was allowed, and the prayer for recovery of possession was substituted in place of the prayer for confirmation of possession, and the plaintiffs further claimed a sum of Rs. 185/4/- as the price of paddy crops alleged to have been forcibly cut and removed by the defendants from an area of 1 bigha 6 kathas out of the land in suit.

2. The defendants contended that both the plots had been in possession of the Belsand Kothi as thicadars and that their ancestor Aklu Sah had exchanged his plots Nos. 133, 143, 424, 441 and 442 with these two plots, and that by virtue of the exchange which was of a permanent nature these two plots had all along been in their possession. The story of possession and dispossession as put forward by the plaintiffs was challenged as absolutely incorrect.

3. The Court of first instance decreed the suit on the finding that plot No. 44 had never come in possession of the Kothi and had never been the subject of exchange and that plot No. 43 had only been temporarily exchanged. The evidence of possession adduced by the plaintiffs was accepted by the learned Munsif, and he accordingly held that the plaintiffs were entitled to a decree. On appeal by the defendants, the learned 1st Additional Subordinate Judge of Muzaffapore decreed the plaintiffs' claim in respect of plot No. 44 but dismissed their claim with regard to the other plot. The finding of the learned Subordinate Judge is that the title of the plaintiffs with regard to plot No. 44 has been established but that they have failed to prove their title with regard to plot No. 43. On the question of possession the learned Subordinate Judge held that the plaintiffs had failed to establish their possession over any of these two plots within the period of twelve years preceding the institution of the suit, but in spite of such a finding on the question of possession he was of opinion that the plaintiffs were entitled to a decree with regard to plot No. 44, inasmuch as the defendants had failed to show that they had any title over this plot or had adversely been in possession of it for the statutory period.

4. The plaintiffs have come up in second appeal and their contention is that the learned Subordinate Judge should have upheld the decision of the learned Munsiff, and should not have dismissed their claim with regard to plot No. 43. The defendants-respondents have filed a cross-objection which is directed

against the decision of the learned Subordinate Judge with regard to plot No. 44.

5. As already pointed out, the plaintiffs had pleaded that the Kothi was never in possession of plot No. 44 and that plot No. 43 which had been in its possession as a thicadar had only been temporarily exchanged. According to the plaintiffs' version Aklu Sah, the ancestor of the defendants, had made over plots 171 and 508 which had been recorded in the survey as his kaemi kasht to the Belsand Kothi and in lieu of them the disputed plot No. 43 had been made over to him by the Kothi, but with the expiry of the thica the exchange became inoperative with the result that plot No. 43 was restored to the plaintiffs and plots Nos. 171 and 506 were restored to Aklu Sah. With regard to plot No. 44 the definite case made out by the plaintiffs was that it was never in possession of the Kothi and had never been exchanged by the Kothi with Aklu Sah. The defendants' version, however, was that both the plots were included in the thica of the Belsand Kothi and that they had been exchanged with plots 133, 143, 424, 441 and 442 of Aklu Sah. This exchange, according to the defendants, was intended to be a permanent one, and they do not admit that after the expiry of the thica the plots in suit came in possession of the plaintiffs as proprietors.

6. The finding of the learned Subordinate Judge on the question of title appears to me to be unassailable, the learned Subordinate Judge having given very good reasons in support of his view that while the plaintiffs have been able to prove their title with regard to plot No. 44, they have failed to prove their title with regard to the other plot. Plot No. 44 was recorded in the survey as the bakasht of the plaintiff Dhani Jha and it was shown as appertaining to khewat No. 28. The survey entry indicated that neither khatia No. 482 under which this plot lies nor khewat No. 28 under which khata No. 482 lies was in the thica of Bel-sand Kothi. The presumption arising from the entry in the record of rights was not rebutted, and the learned Subordinate Judge says that no reliable evidence was adduced on behalf of the defendants for proving that plot No. 44 had been in possession of the Belsand Kothi as thicadars. If the evidence did not show that the Belsand Kothi had anything to do with this plot, then the story of exchange so far as this plot is concerned could not be accepted. It is certainly very significant that while there is a clear note of exchange in the Survey khatian with regard to plot No. 43, there is not such note with regard to plot No. 44, and there was no other reliable evidence for proving an exchange of this plot or the fact of this plot having been included within the thica.

The learned Subordinate Judge was perfectly justified in holding that the plaintiffs had been able to prove their title with regard to this plot. The defendants' case of possession so far as this plot is concerned rested only on the plea of exchange and when the plea of exchange failed the learned Subordinate Judge was right in his view that though the evidence adduced by the plaintiffs on the question of possession was not quite satisfactory, that could not stand in the way of the plaintiffs' obtaining a decree with regard to this plot. When the plea of exchange and also the plea that this plot had been given in thica to the

Belsand Kothi could not be accepted there was nothing to show that the defendants ever got possession of this plot, and therefore the irresistible conclusion was that the plaintiffs had been able to prove their antecedent title and continued possession over this plot. So far as plot No. 44 is concerned, the question of onus of proof appears to be wholly academic, inasmuch, as there is a definite finding of the Court below that this plot was never given in thica and was never the subject of exchange. There is therefore no reason why the defendants should have come in possession of this plot, and even the weak evidence of possession adduced by the plaintiffs so far as this plot is concerned was bound to be accepted by the Courts below.

There is undoubtedly some distinction between the mere dispossession or discontinuance of possession of the plaintiffs and the adverse possession of the defendants, and ordinarily an owner of a property is presumed to be in possession of it, this presumption being very strong in his favour when there is nothing to the contrary or when the defendant has miserably failed to establish the ground on which he claims to have come in possession. This, I may respectfully point out, is exactly what Dawson-Miller, C. J. meant to say while explaining his decision in the well-known case "SHIVA PRASAD SINGH v. HIRA SINGH" 6 Pat L J 478. Ramaswami, J., who delivered the judgment of the Division Bench case reported in M.A. Rauf Vs. Bodhi Singh and Others, a decision which has been strongly relied on by Mr. Lal Narain Sinha for the appellants has referred to the explanation which is to be found in the judgment of Dawson-Miller, C. J. in "MATUK SINGH v. TIAN SAHU" 2 Pat 1 with regard to the dictum laid down by him in "SHIVA PRASAD SINGH'S case. Fortunately, in the case of Matuk Singh as well the defendant had pleaded that he had got the land from the predecessor or the vendor of the plaintiff, who was claiming it by way of exchange. The exchange transaction set up by the defendant was completely discredited, and a single Judge of this Court relying on the Full Bench decision in "SHIVA PRASAD SINGH'S case" held that though the fact of exchange had not been established the plaintiff, as he had not adduced satisfactory evidence on the question of possession, was not entitled to a decree. This decision was reversed in Letters Patent Appeal, and the judgment in the Letters Patent Appeal was delivered by Dawson-Miller C. J. who had also delivered the leading Judgment in "SHIVA PRASAD SINGH'S CASE". I should like to quote the following passage from his Lordship's judgment in "MATUK SINGH'S CASE", for two reasons, the first being that those who might be inclined to think that Dawson-Miller C. J. later on modified his view as it had been put forward in "SHIVA PRASAD SINGH'S CASE" have to remember in what context the learned Chief Justice had to make this observation, and the second being that in this particular case, in so far as it relates to plot No. 44 the view of the learned Subordinate Judge can easily be supported on the basis of this observation.

"The reason why the learned Judge of this Court came to that conclusion was because the District Judge had held that the oral evidence of possession was not satisfactory on either side and he appears to have thought that in such a case it

was not open to the learned District Judge, who was the ultimate Judge of fact, to take into account either the probabilities of the case or any presumption that might arise in favour of possession remaining in the person who had proved his title. The Full Bench case to which I have referred did not lay down the proposition that in no case could the probabilities and presumptions be taken into account. The rule there laid down was that it is only in cases where there is no evidence of the plaintiff as to dispossession or, what amounted in the opinion of the Full Bench to the same thing, where the evidence is valueless, that the plaintiff fails to make out his case by merely proving that he had an antecedent title and possession, but it must not be considered, merely because, where evidence was given by both sides, the learned Judge who had to determine the case had a difficulty upon that) evidence or even considered that evidence not altogether satisfactory, that in such circumstances he was not entitled to give weight to the probabilities of the case or to any presumption which might properly arise from the fact that the plaintiff had previously been in possession and had title. I think it would be extending the doctrine laid down in that case too far if we were to say that merely because the Judge had some difficulty in arriving at a conclusion upon the evidence of possession or because he did not consider the evidence altogether satisfactory, he was thereby precluded from looking either at the probabilities of the case as disclosed by other parts of the evidence or from the presumptions which might arise from the plaintiff's title."

The probabilities are bound to be considered, and the Full Bench case did never lay down the proposition that in no case can the probabilities and the presumptions be taken into account. His Lordship has more than once used the word "probabilities" in the above quoted passage, and undoubtedly the probability in this case is, as the probability in that case ("MATUK SINGHS CASE") was, that the defendants who had miserably failed to prove their story of exchange would never have come in possession of the land (plot No. 44 in this case). Even if, therefore, the evidence adduced by the plaintiffs on the question of possession with regard to the plot No. 44 was not sufficiently strong, the fact that the defendants had failed to prove that this plot had been the subject of exchange raised a presumption in favour of the plaintiffs, and the probability certainly is that the defendants had never come in possession of the land. According to their own case they came in possession only because of an exchange and when this plot was not even included within the thica of the thicadar with whom the exchange is said to have taken place, then certainly it is highly probable that the plaintiffs had continued in possession of the plot and it seems impossible that the defendants should have ever come in possession of this plot. In this view of the matter, I think the conclusion of the learned Subordinate Judge that the plaintiffs are entitled to a decree so far as plot No. 44 is concerned even though their evidence on the question of possession is not as strong as that of the defendants is easily sustainable. The cross-objection therefore is not fit to succeed.

7. The appeal is, however, directed as against the finding of the learned

Subordinate Judge so far as plot No. 43 is concerned, and it has been strenuously contended on behalf of the plaintiffs-appellants before me that Article 144 of the Limitation Act should have been applied in this case and that if this Article is held applicable, then the plaintiffs' claim with regard to plot No. 43 should be held fit to succeed. In my opinion, the question of onus of proof even with regard to plot No. 43 as raised by the learned Government Pleader on behalf of the plaintiffs-appellants is entirely academic.

The learned Subordinate Judge has given very cogent reasons for holding that the plaintiffs had failed to prove their title to plot No. 43. The plaintiffs' case that plot No. 43 had been exchanged for plots Nos. 171 and 506 was not supported by the survey entry in respect of plots Nos. 171 and 506, and there was no reason for supposing that the entry with regard to the exchange in the Survey record should be taken to be an entry indicating an exchange on a temporary basis. It would appear from the judgment of the learned Munsiff that the thica or the lease expired in the year 1307 Fasli, and I have been referred to the statement of P. W. 6 in his deposition that the thica expired in 1307 or 1308. Thus, it would be manifest that the thica expired quite long before the institution of this present suit. For determining the question as to whether the exchange was a temporary exchange or a permanent exchange sanctioned by the proprietors it was simply reasonable to look to the evidence on the question of possession ever since the termination of the lease in 1307 or 1308. This suit came to be instituted in the year 1946 and if the plaintiffs had failed to prove their possession over this plot from the year 1307 Fs., till the year of the institution of the suit, then certainly that was a circumstance to indicate that the exchange had been made on a permanent basis and that it had the sanction,, express or implied of the proprietors. It is impossible that the plaintiffs, if they thought that they had a valid title to plot No. 43 would have slept over their rights for such a long period and if they never attempted to take khas possession of this plot for such a long period, it is an extreme probability, that they were satisfied that they had no valid claim to this plot.

The learned Subordinate Judge has considered the evidence adduced by both parties on the question of possession and after a consideration of the evidence he has come to the conclusion that the oral evidence adduced by the defendants is superior to the oral evidence adduced by the plaintiffs, though it is insufficient to establish a case of adverse possession so far as plot No. 44 is concerned. He even says that so far as plot No. 43 is concerned "the defendants have established a title to remain in possession over it", and does not this conclusion of his indicate that even taking the onus to be on the defendants he felt satisfied that they had been able to prove their possession over this plot? And again I should like to point out that if the plaintiffs' case that there had been an exchange of plot No. 43 with plots Nos. 171 and 506 on a temporary basis was not correct then certainly the probability is that the defendants had been allowed to remain in possession of this plot ever since the time of exchange. The factual distinction has to be remembered that while there was a clear entry -- an entry

unrebutted -- indicating the exchange of plot No. 43 there was no such entry with regard to plot No. 44, and therefore, just as it is probable and believable that plot No. 44 never came in possession of the defendants it is probable and believable that plot No. 43 never came in possession of the plaintiffs after the exchange. In this view of the matter, I do not think it is necessary in this case to enter into a discussion as to whether the case of M.A. Rauf Vs. Bodhi Singh and Others, so strongly relied on by the learned Government pleader was rightly or wrongly decided. But in view of the submissions made by the learned Government pleader it is necessary for me to consider as to whether the Full Bench decision in "SHIVA PRASAD v. HIRA SINGH" 6 Pat L J 478 applies to the facts of this case or not. It is certainly common ground that the plaintiffs are the 16 annas landlords of the patti in which the disputed plot No. 43 lies, and on the strength of the recent decision of this Court in M.A. Rauf Vs. Bodhi Singh and Others, , the learned Government pleader submitted that because the plaintiffs were admittedly the 16 annas proprietors, the onus was on the defendants to show that they had acquired a title to this land by adverse possession. The learned Government pleader thus raised the ancient controversy regarding the effect of presumption of continuous possession, but I think, in view of the propositions laid down by this Court in "R. SHIVA PRASAD SINGH'S CASE and by the Judicial Committee in several cases, the onus is on the plaintiffs to prove their title to remain in khas possession of this land even though the defendants are asserting only a tenancy interest in the land. His Lordship Sir Dawson-Miller C. J. who had referred the case to a Full Bench had observed in his order of reference that in the absence of any evidence of the plaintiff's possession within 12 years he failed to prove a subsisting title because he might have lost by lapse of time his right to recover, and the onus of proving that he was dispossessed within that time was upon him. His Lordship further observed that where there was evidence equally strong on both sides as to possession within 12 years so that it was difficult to determine where the truth lay the probabilities might be sufficient to determine the question of fact in favour of one side or the other. In this case, as I have already pointed out, the probabilities are that plot No. 44 has remained in possession of the plaintiffs and plot No. 43 has remained in possession of the defendants ever since the time of exchange. In his leading judgment of the Full Bench his Lordship observed as follows :

"Assuming that there was no evidence worthy of credit on behalf of either party as to possession, which is what the District Judge found, and assuming, as it is assumed, and I think properly assumed in the judgment now under appeal, that the plaintiff in a suit, for ejectment, must prove not only his antecedent title but also his possession within 12 years of the suit, then in the absence of any credible evidence as to possession I consider that the plaintiff must fail and that the presumption arising from title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. In the order of reference I have given at length my reasons for arriving at this conclusion and have referred to the authorities which in my opinion support it.

After further argument I see no reason to modify the view there expressed and it is unnecessary to repeat what I then said. It has been argued, however, that in all cases where the defendant sets up a title by adverse possession, whether the suit is one based upon dispossession or not, the onus lies upon the defendant to prove his adverse possession for 12 years before the suit. In my view this is stating the legal proposition too broadly."

This Full Bench decision has to be followed by us, and even if a somewhat contrary view was expressed in any other case by a Division Bench, that cannot be followed if it in any way conflicts with the view taken by the Full Bench. Dawson-Miller C. J. referred to the Privy Council decisions in "MAHARAJAH KOOMAR BABOO NITRASUR SINGH v. BABOO NUNDO LALL SINGH" 8 Moo Ind App 199 (PC) and "MOHIMA CHANDER v. MOHESH CHUNDER" 16 Cal 473 (P C). In the former case it has been decided that in a suit for ejectment based upon possession or dispossession within 12 years, the onus lay upon the plaintiffs to prove that the dispossession took place within 12 years and that he did not discharge his burden by merely proving title coupled with enjoyment at some earlier period. In the latter case the following important observation was made:

"This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession, and "a fortiori" where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit."

This was approved by the Judicial Committee in "RANI HEMANTA KUMARI DEBI v. JAGADINDRA NATH" 10 Cal W N 630 (PC) in which also the principle was reiterated that it was for the plaintiff in a suit for ejectment to prove possession prior to the alleged dispossession. Their Lordships further observed in this case that in the question of evidence the initial fact of the plaintiff's title comes to his aid with greater or less force according to the circumstances established in evidence. This is, I may respectfully add, again relying on the probabilities, and I need not repeat that the probability in this case is that plot No. 43 has remained in the possession of the defendants ever since the exchange.

In "MAHAMMUD AMANULLA KHAN v. BADAN SINGH" 17 Cal 137 the Judicial Committee observed as follows:

"The Chief Court in their judgment say also "All this shows that in 1838 plaintiffs were undoubtedly proprietors; but the land is now, and has been since 1842, equally undoubtedly in the possession of the defendants, who have exercised over it all the rights of proprietors." There has been no possession of any description in the plaintiffs or their ancestors since the period of the engagement

with the defendants; and whether any proprietary right may have existed is not the question: it is whether there has been a dispossession or discontinuance which there clearly was. No doubt the proprietary right would continue to exist! until by the operation of the law of limitation it had been extinguished; but upon the question whether the law of limitation applies, it appears to be clear that it comes within the terms of the Article 142, and if there has been any doubt in the minds of the Courts in the Punjab as to what was the effect of the law of limitation in cases of this description, it seems to have arisen from the introduction of some opinion that there must be what is called adverse possession. It is unnecessary to enter upon that enquiry, Article 144, as to adverse possession, only applies where there is no other article which specially provides for the case."

I can draw out a parallel by saying that in this case also there has been no possession of any description in the plaintiffs or their ancestor since the time of the exchange, and therefore the proprietary title claimed by them does not go to establish their title in the limited sense of title to khas possession. The decision of the judicial Committee in "DHARANI KANTA v. GABAR ALI KHAN" 17 Cal W N 389 also appears to me to be laying down the same principle. As against all this Ramaswami J. in M.A. Rauf Vs. Bodhi Singh and Others, has relied on a decision of the Judicial Committee in "SECRETARY OF STATE v. CHELLIKANI RAMARAO" 25 CLJ 69: AIR 1916 P C 21 and has quoted a passage from their Lordship's judgment. But I have to say with the greatest respect that we are bound to consider the context in which such an observation was made. The subject of that suit were lands and islands which had been formed in the bed of the sea near the mouth or delta of the river Godavari, and the islands and lands "were mostly jungle lands." Dawson-Miller C. J. in his order of reference said that possession was not always capable of proof by acts of actual use, and the absence of evidence of user in the case of submerged or jungle waste lands did not necessarily raise a presumption against the plaintiff's continued possession where antecedent title and possession were proved, and in such cases, it had been held that the continuance of possession might be presumed if antecedent title and possession were proved. His Lordship referred to the observation of Sir Arthur Wilson who had delivered the judgment of the majority of the Full Bench In "MOHAMMAD ALI KHAN v. KHAJA ABDUL GUNNY" 9 Cal 744, and I should like to quote the following passage from the judgment of Wilson J.:

"The nature of possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by inundation; it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff

should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he has done this his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed."

The fact, therefore, that the land which was the subject of litigation in "SECRETARY OF STATE V. CHELLIKANI RAMARAO" AIR 1916 PC 21, was a jungle land makes the whole difference, and it is certainly now very well-established that in the case of jungle or waste lands the presumption of title would lead to a presumption of continued possession. It cannot be said that in "CHELLIKANI RAMARAO'S CASE", the Judicial Committee in any way modified the principles which had been laid down in the several other cases.

A Full Bench of the Allahabad High Court in "BINDHYACHAL CHAND v. RAM GHARIB CHAND" 57 All 278 had to consider all these decisions, and while referring to the case of "CHELLIKANI RAMA RAO", their Lordships observed as follows:

"In "SECRETARY OF STATE v. CHELLIKANI RAMA RAO" 39 Mad 617 the question of limitation arose in connection with the claim of the objectors who claimed title under the Madras Forest Act. They were admittedly in possession at the time and their claim could not be regarded as one brought by persons for recovery of possession on the ground of dispossession. Their Lordships of the Privy Council accordingly held that the only question was whether they had established their case of acquisition of title by adverse possession for over twelve years within the meaning of Article 144. That case obviously is no authority for the proposition that where the suit is for possession on the ground of dispossession, Article 144 nevertheless applies."

I can say with respect that in this ruling their Lordships of the Allahabad High Court have taken great pains to explain the distinction between Article 142 and Article 144 of the Limitation Act.

As pointed out by their Lordships Article 144 is a residuary article applicable to suits for possession of immovable property not otherwise specially provided for in the Act. It is only when there is no other special article applicable, that the omnibus Article 144 applies, and twelve years will be computed from the date when the possession of the defendants became adverse to the plaintiffs. Article 144 has to be excluded whenever there is a special article applicable. In order to apply Article 144 the suit must be a suit for possession of immovable property not specially provided for in any other article of the Act and then on proof of title the plaintiff's suit cannot be dismissed until the defendant further establishes his adverse possession for more than twelve years. Their Lordships did recognise that it would in every case be a question of fact whether the plaintiff had proved his possession, actual or constructive, within the period of twelve years, and Sulaiman C. J. says that after considering all the evidence and circumstances, if a Court were to record a finding that the plaintiff had failed to prove his

possession, constructive or actual, within twelve years, then the suit must fail, even though the Court does not record a definite finding that the defendant had established his adverse possession for more than twelve years. His Lordship further says that no doubt in many cases the distinction is very fine, and the line of demarcation between dispossession and adverse possession is thin, but that the question in each case is one of burden of proof, and that it is incumbent on the plaintiff, when he admits his dispossession, to establish his possession within twelve years. What their Lordships say is in perfect accord with the principles laid down by the Judicial committee in several cases some of which have been referred to above.

I think I ought to mention here that though the plaintiffs had, by an amendment! petition, added a prayer for recovery of possession in the suit and had alleged that they had been dispossessed after the institution of the suit, the clear finding of the learned Subordinate Judge is that the "plaintiffs" allegation about this dispossession during the pendency of the suit is nothing but a false and concocted story as is proved by the evidence on the record and the circumstances of the case". The story of possession and dispossession put forward by the plaintiffs therefore stood thoroughly discredited, and in such circumstance the onus was on them to show that in spite of the admitted exchange which had happened long ago and after the termination of lease in 1307 or 1308 they had come in khas possession of this plot. It is probably also necessary for me to refer to a somewhat objectionable observation of the learned Subordinate Judge to the effect that the "question of possession has got to be judged in the light of certain criminal proceedings and cases which preceded the institution of the present suit". But even if an exception can be taken to this observation, it cannot reasonably be urged in this case that the learned Subordinate Judge has not considered the evidence as to possession. He has entered into an elaborate discussion of the evidence and after having fully considered the evidence he has come to the conclusion that the evidence adduced by the defendants is superior to the evidence adduced by the plaintiffs.

8. In the result, therefore, this appeal fails and is dismissed with costs. The cross-objection is also dismissed but without costs.