

(2023) 12 CAL CK 0063
In the Calcutta High Court
Case No : S.A. No. 143 Of 2021

Jai Kumar Karnani

APPELLANT

Vs

Union Of India & Ors.

RESPONDENT

Date of Decision : 18-12-2023

Acts Referred:

Constitution Of India, 1950 — Article 31, 32, 226, 300A
Limitation Act, 1963 — Article 64, 65, 119(b), 142
Defence of India Rules, 1962 — Rule 75A(1), 75(2), 75(3), 75(e)(2)
Code Of Civil Procedure, 1908 — Section 80
Land Acquisition Act, 1894 — Section 4, 4(1), 48
Limitation Act, 1963 — Section 3, 5, 30
Evidence Act, 1872 — Section 60, 101, 103

Citation : (2023) 12 CAL CK 0063

Hon'ble Judges : Siddhartha Roy Chowdhury, J

Bench : Single Bench

Advocate : Surojit Nath Mitra, Shyamal Sarkar, Kumar Gupta, Supratim Laha, Binay Kumar Jain, Piyush Jain, Indrajeet Dasgupta, Puspita, Bhowmick

Final Decision : Allowed

Judgement

Siddhartha Roy Chowdhury, J

1. Challenge in this appeal is to the judgement and decree passed by learned Additional District Judge, 4th Court, Howrah in Title Appeal No. 12 of 2017 affirming thereby the judgement and decree passed by learned Civil Judge, Senior Division, 3rd Court, Howrah in Title Suit No. 64 of 1975, dismissing the said suit.
2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.
3. Briefly stated, one Chandmull Karnani was the absolute owner of the 'A' and 'B' schedule properties, who was governed by Mitakshara School of Law. After his demise his eldest son Indra Kumar Karnani stepped into his shoes. Sometime in

the year 1955, Suraj Kumar Karnani, another member of Hindu undivided family, filed a suit for partition of the joint Hindu family properties which was decreed on compromise on 29th October, 1975 and the suit properties described in schedule 'A' and 'B' were allotted to Indra Kumar Karnani, the eldest son of Chandanmull Karnani as karta of the said branch of the family.

4. On 29th May, 1943, the Collector, Howrah in exercise of power conferred under Sub-Rule 1, 2 and 3 of Rule 75A of Defence of India Rules, requisitioned the properties described in schedule 'B' on behalf of the then government of India for securing the defence of British India or the efficient prosecution of the war or for maintaining supplies and services, essential to the life of the community. Subsequently, the said properties more particularly described in schedule 'B' was acquired by an order dated 2nd June, 1955 under Rules 75(e) (2) of the Defence of India Rules.

5. The claim for compensation in respect of the acquisition of land was lodged by Indra Kumar Karnani, who died on 8th July, 1966 and award and decree was granted by the learned Land Acquisition Judge, Howrah on 16th September, 1971, which was received by the legal heirs of Indra Kumar Karnani. It is the specific case of the plaintiff that 'A' schedule property was neither requisitioned nor acquired by or on behalf of the government of India at any point of time. The government of India pursuant to the order of acquisition constructed boundary pillars covering the said property, described in schedule 'B' to the plaintiff and set up a printing press over there keeping the 'A' schedule property, beyond the ambit of the 'B' schedule property.

6. In November, 1966 the defendant no. 4, a subordinate of defendant no. 1 (should be defendant no. 3 as there were three defendants in the proceeding) wrongfully and illegally trespassed into the suit property and fenced entire area partly by brick built wall and partly by barbed wire. The defendants have also made some construction illegally over the suit property.

7. It is contended further that at the time of death of Indra Kumar Karnani, the plaintiff was a student. Because of sudden premature death of Indra Kumar Karnani, the family became unstable and the defendants committed the mischief on 23rd November, 1966. When this fact came to his notice, the plaintiff voiced protest and after obtaining legal advice the plaintiff filed an application before the Hon'ble Court under Article 226 of the Constitution of India, inter alia, for a direction upon the defendants no. 1 and 3 to restore possession of the suit property to the plaintiff. However, by an order dated 31st May, 1972 Hon'ble Mr. Justice P.K. Banerjee discharged the Civil Rule No. 198(W) of 1967 with the following observation :

"Liberty is given to the petitioner after he is so advised to file a suit on the same cause of action. It is however, clear in the affidavit-in-opposition that the respondents do not say which of the plots were under acquisition and which were not. There is dispute that some of the plots are in possession of the respondents

which were not the subject matter of the requisition. At least no such paper was shown to me. If the respondents are in possession of some lands, it is fit and proper that the said respondents must pay compensation for those plots of lands. But I am not making any direction in this regard, in fact, I cannot make any such direction in this proceeding."

8. Thereafter, the plaintiff served a notice through lawyer upon the defendants under Section 80 of the Code of Civil Procedure. Despite receipt of the said notice the defendants refused to buzz. By filing the suit, the plaintiff adverted that cause of action for the suit first arose on 23rd November, 1966 and, thereafter, on 31st May, 1972 and finally on 3rd May, 1975. The plaintiff prayed for a decree for recovery of Khas possession of the suit property described in schedule 'A' and for mandatory injunction and for damages among other relief.

9. The defendants contested the suit by filing written statement denying all material averments made in the plaint. According to defendants the suit as framed is not maintainable for non-joinder of parties. It is the specific case of the defendants that defendant no. 1, Union of India (previously Government of India) is in possession of the suit properties since 1942 for over 12 years peaceably, openly to the knowledge of the plaintiff as well as his predecessor-in-interest by erecting boundary wall. The suit is barred by limitation. It is denied that in November, 1966 the defendant no. 4 trespassed into the suit land. It is adverted that the defendants are in possession of the suit property adversely to the plaintiff as well as others since 1942. According to defendants, the plaintiff does not have any right title interest in the suit property.

10. Based on such pleadings learned Trial Court framed following issues:

1. Has the plaintiff any cause of action of this suit?
2. Is the suit maintainable in its present form?
3. Is the suit barred by limitation?
4. Is the suit bad for mis-joinder and non-joinder of parties?
5. Where the notice U/S – 80 C.P.C. served upon the defendant, if so, are they legal, valid and sufficient?
6. Is the plaintiff entitled to a decree for recovery of khas possession of the suit properties mentioned in schedule 'A' to the plaint?
7. Is the plaintiff entitled to the damages or mesne profit as claimed for?
8. What other relief or reliefs is the plaintiff entitled to?

11. Considering the evidence adduced by the parties both oral and documentary, learned Trial Court dismissed the suit on 10th May, 1997. The said judgement and decree was challenged in appeal being Title Appeal No. 183 of 1997. Learned First Appellate Court accepted the appeal, preferred by the plaintiff and setting aside the judgement, was pleased to send the suit back to learned Trial Court for

fresh adjudication, with the direction to decide the issue of adverse possession. Accordingly, learned Trial Court framed an additional issue in the following manner :

1. Whether the defendant has acquired title in the suit property by way of adverse possession or not?

12. Learned Trial Court upon fresh adjudication again answered the issues substantially against the plaintiff and the suit was dismissed being barred by limitation. However, learned Trial Court refused to declare the title of defendants over the suit property by way of adverse possession as there was no counter claim to that effect.

13. The plaintiffs made an unsuccessful attempt to get the judgement passed by learned Trial Court reversed. Hence this second appeal which was admitted on 29th September, 2021 on the following substantial questions of law :-

1. Whether the government is entitled to take the defence of adverse possession to perfect its title to immovable property by resorting to Article 64 of the Limitation Act, 1963 or Article 142 of the Indian Limitation Act?

2. Whether in case of a suit for possession based on title, the period of limitation should be computed in accordance with the provisions of Article 65 of the Limitation Act, 1963, i.e. from the time when the possession of the defendant becomes adverse to the plaintiff, and not on the basis of the date when the plaintiff was allegedly dispossessed?

3. Whether, after the learned appellate court below, after having held that the learned trial court, despite specific direction of the learned appellate court had not adjudicated on the issue of adverse possession and limitation could have sustained the impugned judgement and decree which held that the plaintiff had failed to prove that he was in possession within 12 year before the commencement of the suit?

4. When the defendant did not lead any evidence to establish when its possession of the suit property became adverse to the plaintiff, could the suit be dismissed by ignoring the evidence of the plaintiff solely by ignoring the evidence of the plaintiff solely on the ground that it was barred by limitation?

14. Mr. Surojit Nath Mitra, learned Senior Counsel for the appellant assailing the impugned judgement submits that the learned Courts below failed to appreciate the evidence in its proper perspective and the judgement impugned is a manifestation of utter misreading of evidence.

15. Drawing my attention to the testimony of P.W. 2, Mr. Vir Dutta Sharma who adduced evidence on 14th February, 1979, Mr. Mitra submits that from the oral testimony of that witness it would be evident that the defendants dispossessed the plaintiff in the month of November, 1966 and the defendants started construction over the suit premises in the year 1967 while the suit was filed on

1st October, 1975 well within 12 years from the date of knowledge of the plaintiff and from the date when cause of action arose for the first time.

16. It is further adverted by Mr. Mitra that both the Courts below came to a concurrent finding that the defendants have been possessing the suit property since the time of acquisition of land in the year 1944 or at least before 1950 as the Arbitration Mis. Case was filed in the year 1950 and registered as Arbitration Mis. Case No. 2 of 1950. This finding of learned Courts below is unfounded and perverse.

17. It is further contended by Mr. Mitra that the Union of India cannot claim to have acquired title in respect of property of its citizens by way of adverse possession. To buttress his point Mr. Mitra places his reliance on the judgement of Hon'ble Supreme Court in STATE OF HARYANA VS. MUKESH KUMAR & ORS. reported in (2011) 10 SCC 404 wherein it is held :

"20. Unfortunately, despite serious strictures passed by the Court, the State of Haryana did not learn a lesson and preferred a Second Appeal (RSA No. 3909 of 2008) before the High Court of Punjab and Haryana, Chandigarh against the judgments and decrees of the two courts below. The High Court, relying on the earlier judgments, observed that the welfare State which was responsible for the protection of life and property of its citizens, was in the present case, itself trying to grab the land/property of the defendants under the garb of plea of adverse possession and hence the action of the plaintiff is deplorable and disgraceful.

22. In a democracy, governed by rule of law, the task of protecting life and property of the citizens is entrusted to the police department of the government. In the instant case, the suit has been filed through the Superintendent of Police, Gurgaon, seeking right of ownership by adverse possession.

45. If the protectors of law become the grabbers of the property (land and building), then, people will be left with no protection and there would be a total anarchy in the entire country. It is indeed a very disturbing and dangerous trend. In our considered view, it must be arrested without further loss of time in the larger public interest. No Government Department, Public Undertaking, and much less the Police Department should be permitted to perfect the title of the land or building by invoking the provisions of adverse possession and grab the property of its own citizens in the manner that has been done in this case."

18. Hon'ble Apex Court in VIDYA DEVI VS. STATE OF HIMACHAL PRADESH & ORS. reported in (2020) 2 SCC 569 held :

"12.1. The Appellant was forcibly expropriated of her property in 1967, when the right to property was a fundamental right guaranteed by Article 31 in Part III of the Constitution. Article 31 guaranteed the right to private property 1, which could not be deprived without due process of law and upon just and fair compensation.

12.2. The right to property ceased to be a fundamental right by the Constitution

(Forty Fourth Amendment) Act, 1978, however, it continued to be a human right 2 in a welfare State, and a Constitutional right under Article 300 A of the Constitution. Article 300 A provides that no person shall be deprived of his property save by authority of law. The State cannot dispossess a citizen of his property except in accordance with the procedure established by law. The obligation to pay compensation, though not expressly included in Article 300 A, can be inferred in that Article.”

19. It is further submitted by Mr. Mitra that the plaintiff by adducing evidence has proved that the defendants trespassed into the ‘A’ schedule property on 23rd November, 1966 and thus the plaintiff has discharged his onus to prove the case. The defendants since pleaded to have acquired title by way of adverse possession, onus lies upon the defendant to prove the same. On behalf of the defendants only one witness Syed Kai Wan Jah adduced evidence as D.W. 1 and the witness only stated that defendants are possessing the property for more than 60 years either by acquiring title or by way of adverse possession. No document was produced in support of such claim. Mr. Jah admittedly joined his present posting in the year 2012. Therefore, he cannot be expected to have any direct knowledge about the incident and thus his testimony is of no consequence.

20. It is further adverted by Mr. Mitra that both the learned Courts below failed to appreciate the fact that the delay and laches cannot be raised in a case of a continuing cause of action like the case at hand or if the circumstances shock the judicial conscience of the Court. To buttress his point Mr. Mitra places his reliance upon the judgement of Hon’ble Apex Court in D.B. BASNETT (DEAD), THROUGH LRS. VS. COLLECTOR, EAST DISTRICT, GANGTOK, SIKKIN & ANR. reported in (2020) 4 SCC 572 where Hon’ble Court referring to paragraph 12.12 from the judgement of Vidya Devi (supra) was pleased to decide the Civil Appeal.

“17. There is also a discussion in the judgment on the aspect of delay and laches, which is as under:

“12.12. The contention advanced by the State of delay and laches of the Appellant in moving the Court is also liable to be rejected. Delay and laches cannot be raised in a case of a continuing cause of action, or if the circumstances shock the judicial conscience of the Court. Condonation of delay is a matter of judicial discretion, which must be exercised judiciously and reasonably in the facts and circumstances of a case. It will depend upon the breach of fundamental rights, and the remedy claimed, and when and how the delay arose. There is no period of limitation prescribed for the courts to exercise their constitutional jurisdiction to do substantial justice.

12.13. In a case where the demand for justice is so compelling, a constitutional Court would exercise its jurisdiction with a view to promote justice, and not defeat it (P.S. Sadasivaswamy v. State of T.N. (1975) 1 SCC 152). 12.14. In Tukaram Kana Joshi &Ors. v. M.I.D.C. &Ors. (2013) 1 SCC 353, this Court while dealing with a similar fact situation, held as follows:

"There are authorities which state that delay and laches extinguish the right to put forth a claim. Most of these authorities pertain to service jurisprudence, grant of compensation for a wrong done to them decades ago, recovery of statutory dues, claim for educational facilities and other categories of similar cases, etc. Though, it is true that there are a few authorities that lay down that delay and laches debar a citizen from seeking remedy, even if his fundamental right has been violated, under Article 32 or 226 of the Constitution, the case at hand deals with a different scenario altogether. Functionaries of the State took over possession of the land belonging to the Appellants without any sanction of law. The Appellants had asked repeatedly for grant of the benefit of compensation. The State must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode." (emphasis originally supplied)

18. The aforesaid legal principles do not leave the respondents with any defence in the given facts of the case.

19. The result of the aforesaid would be that the respondents have failed to establish that they had acquired the land in accordance with law and paid due compensation. The appellant would, thus, be entitled to the possession of the land as also damages for illegal use and occupation of the same by the respondents, at least, for a period of three (3) years prior to the notice having been served upon them. We are strengthened in our observations on account of the judgment of this Court in *LAO v. M. Ramakrishna Reddy*,⁵ where it was held that the owner can be entitled to damages for wrongful use and possession of land in respect of which no notification is issued under Section 4 of the Land Acquisition Act, from the date of possession till the date such notification is finally published."

21. Mr. Indrajeet Dasgupta, learned Counsel representing the defendant, refuting such contention of Mr. Mitra, submits that learned First Appellate Court while deciding the appeal observed that :

"Government being the protector of the citizens cannot perfect the title by adverse possession as held by Hon'ble Apex Court of India in (2011) 10 SCC 404."

22. The defendants accepted the said verdict by not preferring any appeal against the judgement. Therefore, the issue of adverse possession cannot be and/or need not be discussed in the second appeal. As the defendants have accepted that they have not acquired title by way of adverse possession there is no reason to saddle the defendants with the liability to prove anything relating to the issue of adverse possession. According to Mr. Dasgupta, it is admitted that the plaintiff is not in possession of the suit property, it is the obligation of the plaintiff to file the suit claiming declaration and/or recovery of possession within the period of limitation prescribed under law.

23. Mr. Dasgupta draws my attention to the testimony as P.W. 1 recorded after

the suit was sent back on remand and submits that according to P.W. 1 Jai Kumar Karnani Union of India is in possession of the suit property adversely and forcibly, without indicting the time. Drawing my attention to the report of the Advocate Commissioner Exhibit-1 and Exhibit-8, the judgement in the Arbitration Mis. Case No. 2 of 1950 Mr. Dasgupta submits that this issue of forcible possession was involved in the arbitration proceeding, learned District Judge, Howrah as Arbitrator framed the following point for determination in the said proceeding :

"What is the extent of property? Was any land in excess of the area notified for acquisition taken possession of, if so, what is the area? This issue is answered in the following manner under point no. 8 : "In his report the Commissioner has pointed out a large number of plots in Jagacha Mouza in occupation of government by enclosing with the boundary wall and the claimant's plots (except the last six plots) are within this enclosure. That these plots belonged to the claimant are not disputed and this is also borne out by the settlement khatians. The last 5 plots are outside the boundary wall."

24. The learned District Judge, however, refused to consider that fact for the purpose of determining award. The learned Commissioner in the report also failed to indicate the date of such alleged trespass.

25. Since the plaintiffs failed to establish by cogent evidence that defendants trespassed into the suit property in the year 1966, learned Courts below had sufficient reason to hold that the property was acquired long before 1966 and with all probability before 1950, otherwise this issue of acquiring excess land would not have arisen in the Arbitration Mis. Case registered in the year 1950.

26. Mr. Dasgupta further submits that in view of the statutory mandate as laid down under Section 3 of the Limitation Act, the Court has the obligation to decide the issue of limitation irrespective of the fact whether it has been taken as a defence or not. It is further submitted that when the suit palpably appears to have been filed beyond the period of limitation it destroys the right of the plaintiffs to claim title or to pray for recovery of possession.

27. To buttress his point Mr. Dasgupta places his reliance of a judgement of Hon'ble Apex Court in PUNJAB NATIONAL BANK & ORS. VS. SURENDRA PRASAD SINGH reported in 1993 Supp (1) SCC 499. In BINOD BIHARI SINGH VS. UNION OF INDIA reported in (1993) 1 SCC 572 Hon'ble Apex Court held:

"10. After giving our anxious consideration to the facts and circumstances of the case, we do not find any reason to interfere with the decision of the High Court. In our view, the High Court has rightly held that the application made by the appellant was an application for directing the arbitrator to file the award in Court so that such award is made a rule of Court. In this case, there was no express authority given by the arbitrator to the applicant to file the award to make it a rule of Court although a signed copy of the award was sent to the applicant. The forwarding letter clearly indicates that the award was sent for information. Accordingly, the decision of this Court made in Kumbha Mauji's case (supra) is

applicable. The High Court has given very cogent reasons which, we have indicated in some details, for not accepting the case of the appellant that he had received a signed copy of the award and the forwarding letter sometime in May, 1965 and we do not find any reason to take a contrary view. The applicant has not produced the registered cover received by him which would have established the actual date of the receipt of the postal cover by the applicant convincingly. We are also not inclined to hold that the delay in presenting the application deserves to be condoned in the facts and circumstances of the case. The appellant has taken a very bold stand that he had received the signed copy of the award only in May, 1965 and only within three weeks of such receipt, he had filed the application. On the face of such statement, the plea of ignorance of the change in the Limitation Act need not be considered and accepted. As the case sought to be made out by the appellant that he had received the signed copy of the award only in May, 1965 has not been accepted, and we may add, very rightly by the Court, the question of condonation of delay could not and did not arise. In our view, it is not at all a fit case where in the anxiety to render justice to a party so that a just cause is not defeated, a pragmatic view should be taken by the Court in considering the sufficient cause for condonation of delay under Section 5 of the Limitation Act. Coming to the contention of Mr. Ranjit Kumar that to defeat a just claim of the appellant, the ignoble plea of bar of limitation sought to be raised by the respondent should not be taken into consideration, we may indicate that it may not be desirable for the government or the public authority to take shelter under the plea of limitation to defeat a just claim of a citizen. But if a claim is barred by limitation and such plea is raised specifically the court can not straightway dismiss the plea simply on the score that such plea is ignoble. A bar of limitation may be considered even if such plea has not been specifically raised. Limitation Act is a statute of repose and bar of a cause of action in a court of law, which is otherwise lawful and valid, because of undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy. That apart, the appellant, in this case, having taken a false stand on the question of receipt of the signed copy of the award to get rid of the bar of limitation, should not be encouraged to get any premium on the falsehood on his part by rejecting the plea of limitation raised by the Respondent. We may also indicate here that the High Court is justified in its finding that the objection petition has been filed within time by the respondent and the service of the copy of the application made by the appellant on the counsel of the respondent who had appeared in an earlier proceeding did not constitute a notice as contemplated under Article 119(b) of the Limitation Act. In the aforesaid circumstances, the appeal must fail and is dismissed but we make no order as to costs."

28. From the attending facts of the case, it is admitted that the property is owned by the plaintiff and part of the property described in 'B' schedule was initially requisitioned and subsequently acquired by the State of West Bengal for Union of India.

29. It is also admitted that the 'A' schedule property is in possession of the defendants and it has not been acquired following due process of law. The suit was filed on 1st October, 1975 and the suit was decreed for the first time by learned Trial Court on 10th May, 1979. The said judgement was set aside and the suit was sent back on remand.

30. During the trial for the first time i.e. before order of remand two witnesses were examined on behalf of the plaintiff. Mr. Ranadhir Sen who submitted local investigation report in Arbitration Misc. Case No. 2 of 1950, adduced evidence as P.W. 1 and Virdutta Sharma was examined as P.W. 2. Virdutta in his oral testimony during evidence-in-chief stated : "The defendant dispossessed us in November, 1966 from the suit land." Unfortunately, the said witness was not cross-examined on this point.

31. It is trite law to say that failure of cross-examination of witness on the vital point amounts to admission. In this regard we may profitably rely upon the decision of Hon'ble Supreme Court in State of UP vs. Man Singh & Ors. reported in AIR 2002 SCW 4458. The evidence adduced by the plaintiff as P.W. 1 ('post remand') in my humble opinion is inadmissible. P.W. 1 Jai Kumar Karnani stated : "That at the final stage of the suit during the course of trial one Virdutta Sharma was examined as P.W. 2 who used to look after the affairs on behalf of the plaintiff but subsequently Virdutta died. Accordingly after remand I am deposing on behalf of the plaintiff." This statement unerringly demonstrates the lack of personal knowledge of the witness in this matter. Therefore, testimony of P.W. 1 Jai Kumar Karnani is but hearsay and inadmissible under Section 60 of the Evidence Act.

32. Section 60 of the Evidence Act says :

"Section 60 in The Indian Evidence Act, 1872

60. Oral evidence must be direct.—Oral evidence must, in all cases whatever, be direct; that is to say— If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds: Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable: Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection."

33. Similarly, the evidence of D.W. 1 is inadmissible being hearsay. D.W. 1 though claimed to have acquired knowledge from the official documents but not a single scrap of paper in the form of order or otherwise was produced from the side of the defendant.

34. It is Vir Dutta Sharma who had personal knowledge as he used to look after the property at the relevant point of time. When the testimony of Vir Dutta the P.W. 2 as to the date of dispossession or time of dispossession goes unchallenged, learned Trial Court had no reason to hold that the suit property was taken into possession by the defendant before 1950. This finding of learned Courts below is bereft of foundation of fact if not figment of imagination and thus is perverse. The suit could not have been dismissed being barred by limitation.

35. When Mr. Dasgupta submits that the defendants since have not challenged the observation of learned First Appellate Court to the effect that Union of India cannot be allowed to perfect their title by way of adverse possession, the issue of adverse possession, the said issue is no more relevant for discussion in this judgement. But I consider it expedient to record the view of this Court on the plea of adverse possession because of the statement made by D.W. 1 albeit inadmissible.

36. Since it is the specific case of the plaintiff that the defendants took the possession of 'A' schedule property illegally and by force in the year 1966 onus to prove such fact lies upon the plaintiff under Section 101 of the Evidence Act. The testimony of P.W. 2, Vir Dutta Sharma, as indicated hereinbefore, is sufficient to hold that the plaintiff has discharged the onus to prove the case. Since it is the defendant who wishes the Court to believe that the defendants have been possessing the property since 1950 or soon after acquisition of 'A' schedule property, Section 103 of the Evidence Act creates an obligation upon the defendant to prove the said fact under Section 103 of the Evidence Act which says :

"The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration

1[(a)] A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

(b) B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it."

37. There is no doubt that the defendants have failed to discharge such onus. Therefore, after taking into consideration the testimony of P.W. 2 by preponderance of probability, I feel no hesitation to hold that the plaintiff was dispossessed in the year 1966 precisely in November, 1966.

38. Article 65 of the Limitation Act, prescribes that within 12 years from the date of dispossession the plaintiff can file the suit for recovery of possession and the suit was filed in 1975. The provision of Section 30 of the Limitation Act cannot be said to have any manner of application in this case. I do not find any reason to be in agreement with Mr. Dasgupta, learned Counsel representing the Union of India.

39. In my humble opinion, the judgement impugned should not be allowed to remain in force and should be set aside, which I accordingly do. Consequently the judgement passed by learned Trial Court also stands dismissed.

40. Hon'ble Supreme Court in REVENUE DIVISIONAL OFFICER, KURNOOL DISTRICT VS. M. RAMAKRISHNA REDDY (D) BY LRS. reported in (2011) 11 SCC 648 held :

"14. Though respondents are not entitled to interest under Section 28 of the Act, from a date prior to the date of preliminary notification, they are entitle to damages for wrongful use and damages of the lands from the date of possession till date of notification under Section 4(1) of the Act. In R.L. Jain (supra), this court held:

"In a case where the landowner is dispossessed prior to the issuance of preliminary notification under Section 4(1) of the Act the Government merely takes possession of the land but the title thereof continues to vest with the landowner. It is fully open for the landowner to recover the possession of his land by taking appropriate legal proceedings. He is therefore only entitled to get rent or damages for use and occupation for the period the Government retains possession of the property. Where possession is taken prior to the issuance of the preliminary notification, in our opinion, it will be just and equitable that the Collector may also determine the rent or damages for use of the property to which the landowner is entitled while determining the compensation amount payable to the landowner for the acquisition of the property. The provisions of Section 48 of the Act lend support to such a course of action. For delayed payment of such amount appropriate interest at prevailing bank rate may be awarded."

41. In D.B. Basnett (supra) it is held by Hon'ble Supreme Court :

"20. We are conscious that the land is being used by the respondent- State through respondent No.2 Department. That, however, does not give such a license to the State Government. We had endeavoured to refer the matter for mediation, to find an amicable solution, but that did not fructify. We, however, would like to give some time to the respondent- State to analyse the consequences of this judgment, and, in case they so desire, to acquire the land through a proper notification under the said Act, and to take proper recourse in law so as to enable them to keep the land. We grant three (3) months' time from the date of the judgment for the respondent-State to make up their mind as to what they want to do. Would they still like to retain the land by issuing a proper

notification, or would they like to surrender possession of the land. In either eventuality, the question of payment for use and occupation would still arise, which will have to be determined in accordance with law. Mesne profits would be determined by a Court Commissioner, to be appointed by the trial court, as a relief in that behalf has been sought in the plaint itself.”

42. Taking lumen from the aforesaid judgement, I am inclined to hold that the plaintiff is entitled to decree for recovery Khas possession. Since the property is being used by Union of India through the defendant no. 2, I am inclined to give three months time to the defendants from date to decide their course of action. If the defendants wish to retain the suit property, described in schedule 'A' they shall have to do so following due process of law of the land, thereby compensating the plaintiff for the land else the defendants shall quit and vacate the property and shall deliver peaceful possession of the suit land to the plaintiff within three months from date. In either eventuality the question of payment for use and occupation of the suit property would still arise, which will be determined in accordance with law.

43. Consequently, the appeal is allowed.

44. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court immediately.

45. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.