

(1947) 03 PAT CK 0009

In the Patna High Court

Ramlakhan Pandey and Others

APPELLANT

Vs

Digbijay Narain Singh and Others

RESPONDENT

Date of Decision : 14-03-1947

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 147
Evidence Act, 1872 — Section 94

Citation : AIR 1948 Patna 274

Hon'ble Judges : Sinha, J;Bennett, J

Bench : Full Bench

Judgement

Sinha, J.—This is an appeal on behalf of the defendants parties 1 and 3 from the concurrent decisions of the Courts below decreeing the plaintiffs' suit for possession and mesne profits in respect of a mun which has been, described as a lake, but from the map attached to, and forming part of, the plaint it would appear that it is a serpentine water channel which is now closed at both ends but which at one time may have been the bed of the river Burk Gandak which flows at some distance, about a. mile, from the mun.

2. The plaintiffs' case, shortly stated, was that the lake in question is situate in village Bishunpur Mathura alias Morsandi, which in. the course of this judgment, will be described as village Morasandi for brevity. It is shown, in the record of rights finally published in or about the year 1897 as a part of village Morsandi in survey plot No. 2695 with an area of considerably over 200 acres. Village Nariar joins the village Moraandi on the east so that village Nariar is situate on the eastern extremity of the-lake. Village Nariar contained an indigo factory which was originally an outwork of Kanti factory. It was claimed in the plaint that that water of the lake used to be utilised for the purposes of manufacture of indigo, and the fishery right was also exclusively possessed by the Nariar factory for a long period of time, much in excess of the statutory period of twelve years. As a result of that exclusive possession off the fishery rights, the Nariar factory is alleged to have acquired a right to the same by adverse, possession. There was an alternative claim that, if the Court came to the conclusion that the plaintiffs

were not entitled to mesne profits, they should be awarded a decree for rent for the years 133 to 1846 fasli at the rate of RS. 302 per year, the amount which used to be paid by the lessees to the Nariar factory.

3. The plaintiffs traced their title to village Nariar and the lake in question in the following manner. One Mr. Toomy was in possession of the Nariar factory from before 1881 down to the year 1910 in which year Messrs Shaw Wallace & Co., and another company purchased the, Kanti and the Nariar concerns at an auction sale, The auction-purchasers aforesaid sold the two concerns to the late Hon^{ble} Mr. B.N. Basu, predecessor-in-interest of the defendants fourth party, and to Babu Langat Singh, grand father of the plaintiffs. The plaintiffs and their co-sharers continued in joint possession until there was a partition made on the basis of an award, as a result of which village Nariar was allotted to the plaintiffs' share and Kanti to their co-sharers.

4. The defendants' title to village Morsandi is derived from the Motipur Concern, which was also an indigo factory owned by certain Europeans. The Motipur Concern appears to have been the lessee of village Morsandi since before 1861. In 1881, Mr. Toomy aforesaid, as proprietor and mukhtar of Kanti Indigo Concern and thikadar of Mauza Nariar, granted a lease to Mr. Thomas Fraser, proprietor and manager of the Motipur Concern, for a term of four years (1289 to 1292 Pasli) in respect of "mahal jalkar mun situate in Mauza Nariar." The deed evidencing the lease (Ex. A-1) is dated 27-6-1881, but is not registered. In the record of rights finally published in or about the year 1897 the Kanti Concern is shown as the thikadar of village Morsandi, and the Motipur Concern as the Katkenadur (sub-lessee). It appears further that in the year 1894 the Motipur Concern purchased a six pieg share in the proprietary interest in village Morsandi, and, subsequently, in or about the year 1920, the concern acquired another six annas six pies proprietary interest therein. Hence, by the year 1920, the Motipur Concern was not only lessee in respect of the village Morsandi but also a co-sharer proprietor to the extent of about seven annas share. It appears further that in 1922 the Kanti Concern also acquired a small share in the proprietary interest in village Morsandi. In 1927, the Motipur Concern conveyed their right, title and interest in village Morsandi to the defendants first party, that is to say, the defendants first party acquired by their purchase aforesaid a seven annas share in the proprietary interest and a leasehold in respect of the entire village excepting a two and a half pies share which was under the Court of Wards. The Motipur Concern also executed a deed of surrender in favour of the plaintiff³ and the defendants fourth party in respect of their rights under the lease of the year 1881, referred to above.

5. To continue the plaintiffs' case, they alleged further that seven annas milkiat share in village Morsandi and their interest in the village as lessee and sub-lessees except in respect of a two and a half pies share continued in possession of the Motipur Concern until the transfer aforesaid in favour of the defendants first party. The plaintiffs continued to receive rent for the lake in question until

November 1927 that is to say, until the surrender by the Motipur Concern in favour of the plaintiffs." When the defendants first party came on the scene, they began to interfere with the plaintiffs' possession over the lake, with the result that a proceeding u/s 147, Criminal P.C, was started. The proceeding ended partly in favour of the plaintiffs and mostly in favour of the defendants in that the plaintiffs' possession in respect of one-fifth portion of the lake in its eastern extremity and the defendants' possession in respect of the remaining four-fifths western portion was declared.

6. It was further decided by the learned Magistrate it does not appear under what provision of law that the plaintiffs were entitled to recover Rs. 802 per year from the defendants second party as rent. This adverse decision against the plaintiffs for the four fifths western portion of the lake was alleged to be the cause of action for the suit, as, it is said, the defendants first party dispossessed the plaintiffs from the portion aforesaid, with an area of 183.45 acres, in Aswin 1334 Fasli. The contesting defendants, including the defendants first and many of the defendants third parties, contested the suit alleging inter alia that the lake in question remained all along in possession of the owners of the Motipur Indigo Concern as lessees of the village Morsandi, and not as lessees under the Kanti Concern (which included the Nariar Concern); that the plaintiffs had not acquired any right to the lake by adverse possession nor did they realise any rent in respect of the same from the Motipur Concern; that, if any rent was paid to the Nariar Concern, it must have been in respect of the jalkar in village Nariar itself; and that the proprietors of the Kanti Concern had a permissive use of the water of the lake for manufacture of indigo.

7. On these pleadings, the most important-issue in the case was issue No. 2, which runs as follows: "Have the plaintiffs acquired any right, title or interest in the lake in dispute?" The learned Subordinate Judge, on a consideration of the voluminous oral and documentary evidence, came to the conclusion that the disputed mun was known as Nariar mun: that the Motipur Concern had been in possession of a portion of the mun in question till 1927 as a tenant of the Nariar Kothi as an annual rental of Rs. 302; that after surrender by the Motipur Concern, the maliks of Nariar Kothi came in possession of the fishery rights in dispute and that the plaintiffs were dispossessed in Aswin 1334 Fasli, as alleged by them. On the question of whether the disputed fishery rights had been sold by the Nariar Concern to the plaintiffs he came to the conclusion that the entire Kanti Concern, with all its properties and outworks, was sold, and, even though the fishery rights in question had not been specifically mentioned in the sale deeds (Exs. 6 and 6-A), they must be deemed to have been included in the general description of the properties sold as contained in those documents. He further held that the adverse possession of the disputed fishery by the plaintiffs' predecessor-in-title began from June 1881, apparently on the basis of the patta of that year (Ex. A-1), and that possession continued till 1343 Fasli. Hence, he concluded by holding that the plaintiffs had acquired title to the disputed fishery by adverse possession for more than 12 years ending within the period of

limitation for the suit.

8. On appeal by the defendants first and some of the defendants third parties, the learned Additional District Judge came to the conclusion that the Motipur Concern was in possession of the disputed fishery all along. But he pointed out that it was a difficult question to find out in which capacity the Motipur concern was in possession of the disputed fishery, inasmuch as it derived its title to village Morsandi as lessees from the Kanti Kothi, as a cosharer of a part and as a thekadar of another part and as a Katkenadar of another share in village Morsandi. He further found that the jalkar in question was settled by Mr. Toomy in 1881 with the Motipur concern at an annual rent of Rs. 291. On the question of adverse possession, he came to the conclusion that the plaintiffs' predecessors-in-title had not acquired any rights by adverse possession until the year 1900, and that after 1922 there had been certain transaction which would make it doubtful as to whether they could claim title by adverse possession. Hence, his conclusion was that the plaintiffs, including their predecessors-in-title, had been adversely possessing the disputed fishery for more than 12 years between the years 1900 and 1922 on the ground that during this period it had not been established that the Kanti concern or the Nariar concern had any interest in the proprietary rights in village Morsandi. In the result, he agreed with the trial Court in decreeing the suit for recovery of possession and mesne profits to be determined in a separate proceeding. Hence this second appeal by defendants 1 and 3 parties.

9. Mr. S.N. Bose on behalf of the appellants has raised mainly three contentions, namely, (1) that the Courts below erred in law in their construction of Ex. A-1, the lease of the year 1881, in coming to the conclusion that the disputed fishery was settled by the Nariar concern, with the Motipur concern, the predecessors-in-title of defendants first party; (2) that the plaintiffs suing in ejectment must prove that they had acquired any right in the disputed fishery by virtue of the sale deed of the year 1912 or that their vendors had purchased the disputed fishery by the auction sale of the year 1910; and (3) that adverse possession against the lessees, that is to say, the Motipur concern, would not be adverse to the lessors, that is to say, the proprietors of village Morsandi. Other subsidiary questions were raised and argued at great length; but they are, more or less, branches of arguments relating to the three main points set out above.

10. On the first question, Mr. Bose has argued that u/s 94, Evidence Act, no extraneous consideration could be admissible to determine as to what was actually leased by the document of the year 1881 (Ex. A-1). The document had been officially translated, and, as the original translation was found to be incorrect on the admission of the Head Translator himself, who appeared before us, we directed him to make a revised translation and that was done. On the revised translation, it would appear that, by virtue of that document, Mr. George Toomy let out to Mr. Thomas Fraser proprietor of the Motipur concern, "Mahal Jalkar mun situate in Mauza Nariar." Mr. Bose contended that this document

taken at its face value is, as the words are absolutely clear and unambiguous, to the effect that the jalkar which was subject-matter of the settlement was situate in mauza Nariar. But the Courts below, relying upon oral evidence mainly, have come to the conclusion that the disputed jalkar was generally known in the locality as situate in Nariar, as it is contiguous to the west of village Nariar. The Courts below have further found that, though from the thakbust map, the revenue survey map and the cadastral survey map it was clear that the jalkar in question was situate in village Morsandi, it was popularly believed, perhaps under a misapprehension of the true position, that the jalkar was situate in village Nariar. They have further found that the Motipur concern took a lease of the jalkar from the proprietor of the Kanti concern, which included the Nariar concern, under the misapprehension that it appertained to village Nariar. Mr. Bose contended on that finding that it could not be the basis for a claim by adverse possession because both parties were under a misapprehension that the jalkar in question appertained, as a matter of fact, to village Nariar. Reliance was placed in this connection on the decision of a single Judge of this Court in *Kamakhya Narayan Singh v. Chairman, Hazaribagh Municipality* AIR 1939 Pat. 499. But in that case the learned Judge was concerned with deciding as to whether the defendant Raj was estopped from denying the title of the landlords, the municipal corporation. In that case it had been found, as a matter of fact, that for more than 50 years the Raj went on paying rent to the municipality under the misapprehension that the bungalow in question was situate on land belonging to the municipal corporation, though, as a matter of fact, it was the property of the defendant himself. In those circumstances, his Lordship held that a tenancy in that case could not have been created because the land did not belong to the so-called lessor, and that there was no estoppel. It is apparent from the decision in that case that the question of, adverse possession was not mooted. On the main question of the construction of the document of 1881, the Courts below have referred to evidence, mainly oral, showing that there was no such lake (mun) as is referred to in that document in village Nariar itself, and that the lake in dispute in this case was popularly called the Nariar mun. On these findings, it is clear that Section 94, Evidence Act, cannot be pressed in aid of the appellants, inasmuch as the language used in the document of 1881 does not apply accurately to existing facts; on the other hand, Section 95, Evidence Act, may be relied upon on behalf of the respondents in view of the findings of fact referred to above. Though the language in that document is plain in itself, it would be unmeaning in reference to the facts existing at the time, and, therefore, evidence was admissible to show that that language was used with reference to the notorious facts, and the illustration to Section 95 makes the intention of the section clearer still. Hence, in my opinion, there is no substance in the first contention raised on behalf of the appellants.

11. As regards the second contention, the trial Court, as already indicated held that, though the documents of title in favour of the plaintiffs did not specifically refer to the fishery right in dispute in this case as all the properties of the Nariar

Concern were intended to be transferred to them, the fishery rights also must be deemed to have been included in the sale deed under which the plaintiffs claim. The point does not appear to have been specifically raised before the lower appellate Court, and, therefore, the learned Additional District Judge has not recorded a distinct finding on this question. If this were the only point arising for decision in this appeal, I would have been inclined to take the view that this point was not specifically urged before the lower appellate Court; but as, it will presently appear, the case has got to be remanded for a fresh decision on certain points to be indicated hereinafter, this contention also may be the subject-matter of a finding by the lower appellate Court after remand. Mr. L.K. Jha contended that the question was not very material in view of the fact that, even apart from their predecessors' title by adverse possession, the plaintiffs themselves have independently, acquired the right by prescription. This contentions would have been well-founded, if the findings of the learned Subordinate Judge had been confirmed in their entirety by the lower appellate Court; but, as shown above, the lower appellate Court came to the conclusion that there was no such adverse possession as would entitle the plaintiffs' predecessors-in-title to claim the fishery in dispute by prescription before the year 1900 nor has it found that the adverse possession continued after 1922; in other words, the lower appellate Court held that the plaintiffs and their predecessors-in-title had acquired title by adverse possession for more than twelve years between the years 1900 and 1922. But the plaintiffs claim the property by the sale deed of 1912 which in terms does not refer to the fishery in question. The plaintiffs, therefore, had been in adverse possession in their own rights between 1912 and 1922 which period is not enough to lead to the acquisition of rights by adverse possession. Hence, this question cannot be said to be altogether immaterial. In this connection the further question which has not been discussed in this case by the lower appellate Court would be whether the plaintiffs could tack on their adverse possession to that of their predecessors-in-title.

12. The most important point raised on behalf of the appellants by Mr. Bose is whether adverse possession against the Motipur Concern, who were in possession of village Morsandi in their several capacities of part-proprietors, lessees in respect of a portion of the village and sub-lessees in respect of the rest, could be adverse possession against the proprietors themselves who are defendants third party to the suit and are also some of the appellants in this Court. Mr. L.K. Jha on behalf of the respondents contended that this question had not been raised by the appellants in the Court below, and, therefore, could not be raised in this Court for the first time not because as pure question of law it could not be raised at the second appeal stage but because, he contended, there was no finding upon which this argument could be founded. Mr. Bose, on the other hand, has contended that there is a finding in the judgment of the lower appellate Court, and that this point was raised there, but that the learned Judge has not recorded any finding on this question of law, though in the beginning of his judgment he set out to do so. It appears to me that it was admitted in the

plaint read as a whole that the Motipur Concern, before their transfer in favour of the defendants first party in 1927, were in possession of village Morsandi in those several capacities. The plaintiffs were interested to make that assertion with a view to showing that the Motipur Concern were representing all the interest in the village against which the adverse possession of the plaintiffs and their predecessors-in-title operated. Though in the beginning of his judgment, the learned Additional District Judge sets out the fact that the decision of the question of adverse possession had become complicated in view of the fact" that the Motipur Concern were occupying different capacities in relation to the village Morsandi, he does not deal with the question of whether adverse possession against the lessees would be adverse to the lessors, that is to say, the proprietors represented by the defendants third party. It would, therefore, appear that; though the foundation was there, or least there was room for the contention, the learned Judge did not decide that question because it was not raised in that lucid form. The judgment of the learned Additional District Judge is unnecessarily long and involved, and it is not very easy to make out what he actually started to decide and what exactly his findings were. Were it not a fact that he was a Judge who had just started his career as such, I would have been reluctant to make the order of remand which I propose to do in this case. It is not clearly found as to when the Motipur Concern acquired their proprietary interest in village Morsandi to the extent of seven annas. Mr. Bose informed us with reference to the sale deed (EX. A2), which is the document of title in favour of the defendants first party, that the concern acquired six and a half annas share in the proprietary interest as late as 1920, and that it had acquired only six pies share in the proprietary interest in 1894. The record or rights finally published in 1897 shows the Kanti Concern as the lessees of village Morsandi and the Motipur Concern as the sub-lessees. But that does not indicate as to when the interest of Kanti Concern as lessees of village Morsandi arose for the first time. The learned Additional District Judge has referred to the evidence of a very old man over ninety years in age, who, by word of mouth, has purported to disclose that that interest arose in or about the year 1893. How far that call testimony can be trusted is not for us to say sitting in second appeal. But the lower "appellate Court after remand will have to look into that matter also. In spite of all this vagueness in the findings of the learned Additional District Judge, one thing appears to be clear that the Motipur Concern, for the most part of the years 1900 and 1922, occupied the position of lease-holders, either directly or indirectly, in respect of the major portion of the village Morsandi. Hence, it becomes very relevant to consider whether the adverse possession of the plaintiffs and their predecessors-in-interest during that period could be adverse to the proprietors represented by the defendants third party. In this connection I may notice another contention raised on behalf of the respondents by Mr. Jha, namely, that all the proprietors, defendants third party, were not appellants either in the lower appellate Court or in this Court. It was, therefore, claimed by Mr. Jha that this contention could avail only those of the proprietors who actually figured as appellants in this Court or in the Court below. Mr. Bose referred to the

provisions of Order 41, Rule 4, and contended that it was open to any one of these proprietors to appeal from the whole decree, as the decision proceeds on a ground common to all of them, namely, acquisition of title by adverse possession. In my opinion, this contention is well founded. In this connection Mr. Jha referred to the decision of this Court in Mahendra Koer Vs. Sat Narain Lal, . On the basis of that decision he contended that, as the defendants third party had defined interests in aliquot portions of the zamindray in village Morsandi, their interests were separable, and, therefore, the dictum of their Lordships in the case referred to above should be applied to the facts of the present case. In that case the head-note runs as follows:

An order in appeal by one of several defendants enures to the benefit of the other defendants only if the interests of the latter are inseparable from the interest of the defendant appellant.

13. Those observations must be read with reference to the facts of that particular case. That was a mortgage action in which there were several items of properties mortgaged. One of the parties had purchased one of the mortgaged properties at a revenue sale, and on his appeal the appellate Court exonerated his property from liability under the mortgage. In those circumstances, their Lordships held that the benefit of that judgment could not be available to the other defendants who were either the mortgagors or puisne mortgagees. It is, therefore, clear that that decision is of no advantage to the respondents in so far as the applicability of Rule 4 of Order 41, Civil P.C. is concerned. It was next contended on behalf of the respondents that the Motipur Concern having surrendered their lessees' interest in respect of the fishery in favour of the plaintiffs, the defendants could not challenge the plaintiffs' title. But that argument can avail only against defendants first party and not against the defendants third party who are the proprietors, because the Motipur Concern, in surrendering those rights, were acting in their capacity Of the lessees under the deed of 1881.

14. From what has been said above, it is clear that the question of whether adverse possession against the lessees would be adverse against the proprietors of village Morsandi is a very vital one for the purposes of this case. Mr. Bose relied upon the decision of a Division Bench of this Court in Bankey Behari Lal v. Gudu Chaudhary AIR 1930 Pat. 476. In that case it was laid down that possession taken by a trespasser during the currency of an ijara lease does not become adverse to the lessor until upon expiration of the term. Reliance was placed upon the decisions of the Calcutta High Court in Sharat Sundari v. Bhobo Pershad (86) 13 Cal. 101 and Gossain Mahendra Gir v. Rajani Kant Das 1 C.W.N. 246. The ruling reported in Sharat Sundari v. Bhobo Pershad (86) 13 Cal. 101 is a clear authority for the proposition that the dispossession of the ijaradar was not the dispossession of the zamindar. But it would appear from the following observations of their Lordships of the Calcutta High Court that there was a conflict of decisions, and that they preferred to follow the latest decision then reported in Krishna Govind Dhur v. Hari Churn Dhur (83) 9 Cal. 367:

Various rulings of this Court have been cited before us. It appears that there is a conflict of decisions in this Court on this point. The latest ruling, *Krishna Govind Dhur v. Hari Churn Dhur* (83) 9 Cal. 367 is in favour of the view taken by the lower Courts. It follows an earlier ruling *Woomesh Chandra Gpto v. Raj Narain Roy* (68) 10 W.R. 15. Having considered these and the other cases to which we were referred, we are of opinion that the view taken by the lower Court on this point is correct. For the reasons given in *Krishna Govind Dhur v. Hari Churn Dhur* (83) 9 Cal. 367 we are of opinion that the present case is governed by Article 144, Limitation Act, and that as the adverse possession of the defendant against the plaintiff commenced only on the termination of the *ijara* lease, within twelve years of the suit, the suit is not barred.

Their Lordships of the Calcutta High Court (Wilson and Field JJ.), who decided the earlier case reported in *Krishna Govind Dhur v. Hari Churn Dhur* (83) 9 Cal. 367 referred with approval to the decision in *Woomesh Chandra Gpto v. Raj Narain Roy* (68) 10 W.R. 15, and held that possession adverse to the *ijaradars* was not possession adverse to the *proprietors*.

15. But Mr. Jha on behalf of the respondents very strongly relied upon an earlier decision of the Calcutta High Court in *Prosunnomoyi Dasi v. Kali Das Roy* (82) 9 C.L.R. 347 in which a Division Bench, consisting of Prinsep and Field JJ. laid it down that adverse possession against the lessee is adverse to the lessor also. They refer to the earlier decisions of the Calcutta High Court in *Brindabnn Chander v. Bhoopal Chnnder* (72) 17 W.B. 377 and *Lekraj Roy v. Court of Wards* (70) 14 W.B. 395. They also observe that, according to the law of other countries, possession adverse to a lessee is also adverse to his lessor, but do not specifically refer to any such authority. They, conclude their ratio decidendi by making the following observations:

In England, it is an ordinary covenant in a lease that the lessee will protect the property leased from encroachment so as to hand back the property to his lessor upon the expiry of the lease in the same state in which he had received it. But it is unnecessary for us in the present case to decide this point specifically, although we believe that it may be laid down as a general principle of law that it is incumbent upon every lessee to protect his lessor's property from encroachment or unlawful eviction; and that if he fails to do so, he exposes himself to an action for damages by his landlord.

16. It would appear from the quotation given above from their judgment that their Lordships made those observations which were in the nature of *obiter dicta*. One thing is clear from the judgment that the decision of their Lordships of the Calcutta High Court in *Woomesh Chandra Gpto v. Raj Narain Roy* (68) 10 W.B. 15 was not brought to their notice. It is also significant that Field J. was a party to the decision in the case reported in *Krishna Govind Dhur v. Hari Churn Dhur* (83) 9 Cal. 367. It is further clear that the Calcutta High Court, on different occasions, took conflicting views on the question, and their Lordships, on different occasions, chose their own view of the matter in preference to the view

taken by another Division Bench of the same Court. In such circumstances, perhaps the better course would have been to refer the matter to a larger Bench for settling the controversy more authoritatively. Be that as it may, it is also clear that there is no later decision than the one reported in *Sharat Sundari v. Bhobo Pershad* (86) 18 Cal. 101, taking a different view to that propounded in the last mentioned case. On the other hand, we have a later decision of the same Court in the case in *Gossain Mahendra Gir v. Rajani Kant Das* 1 C.W.N. 246 in which the principle laid down in *Sharat Sundari v. Bhobo Pershad* (86) 18 Cal. 101 was not dissented from; but their Lordships distinguished that case, and observed as follows:

In the case of an estate granted in *ijara* if the *ijaradar* goes on paying the *ijara* rent to the proprietor, though a third person might dispossess the *ijadar*, still there will be no interference with the possession of the proprietor; but whereas in this case an estate is in that occupation of ordinary tenants and the defendant has been in possession of the estate, which ordinarily would mean that he is in possession by receipt of rent from those tenants, it is difficult to understand how the proprietor can still say that he is in possession, or that his possession has not been interfered with, unless he is able to show that the tenants had been paying rent to him all the while. Therefore, in a case like the present, before it can be determined whether the suit is barred or not it must be found upon the evidence whether the tenants who were in occupation of the land had been paying rent to the plaintiffs or to the defendants. If they had been paying rent to the defendants and not to the plaintiffs, possession must be held to have been with the defendants, and a complete cause of action must be deemed to have arisen to the plaintiffs. On the other hand, if the plaintiffs had been in receipt of rent from the tenants, and if such receipt of rent extended to a period within twelve years before the date of the institution of the suit, the suit should not be held as barred by limitation.

17. But Mr. Jha referred us to the decision in *Govinda Nath v. surja Kanta* (99) 26 Cal. 460. In that case, as would appear from the head-note itself, the land in dispute had been let out in *patni* and *darpatni* leasea by the predecessor. In interest of the plaintiffs. During the continuance of those leases, the land in dispute was taken possession of and held adversely by the defendants or their predecessors. On the relinquishment of the *patni* and *darpatni* leases by the lessees in favour of the plaintiffs on June 1891, the plaintiffs brought a suit for recovery of possession of the disputed land from the defendants in June 1898. The Court accepted the plea of limitation raised by the defendants, who had been found to be in possession for more than twelve years before the institution of the suit on the ground that, under Article 144, Limitation Act, adverse possession began to run from the date the defendants came in possession of the property in question, and not from the date that the plaintiffs came in possession as a result of the relinquishment. The earlier decisions of the same Court in *Sharat Sundari v. Bhobo Pershad* (86) 13 Cal. 101, *Gunga Kumar Mitter T. Asutosh* (96) 23 Cal. 883 and *Nufier Chandra Pal v. Bajendra* (98) 25 Cal. 167 as also *Ohinto v. Janki*

(94) 18 Bom. 51 which had been relied upon on behalf of the plaintiff-appellant, were distinguished by the Court on the ground that the plaintiffs before them derived their right to sue for khas possession through the patnidars and darpatnidars who were entitled to khas possession and who, had relinquished such a right in the plaintiffs' favour. They further held that such a relinquishment operated only as a transfer of the tenure not only as a matter of general principle but also on the express terms of Section 12 of Regulation VIII of 1819. They further observed that in *Sharat Sundari v. Bhubo Pershad* (86) 18 Cal. 101 the position was different, because the zamindar became entitled to possession in his own rights upon the expiry of the term of the ijara, and not through the ijaradar. On the other hand, in the case before them the plaintiffs became entitled to khas possession by the relinquishment of the patnidars and darpatnidars, and therefore, they were affected by the adverse possession against the patnidars and darpatnidars whose rights they had acquired through their voluntary relinquishment. Hence, it must be held that the ruling in *Govinda Nath v. Surja Kanta* (99) 26 Cal. 460 does not lay down any proposition contrary to that in *Sharat Sundari v. Bhubo Pershad* (86) 18 Cal. 101. Hence, so far as the Calcutta High Court is concerned, the latest decision of that Court is in favour of the view that adverse possession against the lessee in possession is not adverse to the lessor.

18. So far as the other High Courts are concerned, a Division Bench of the Allahabad High Court in the case in *Thamman Pande v. Maharaja of Vizianagaram* (57) 29 ALL. 593 followed the principle laid down in *Sharat Sundari v. Bhubo Pershad* (86) 13 Cal. 101 and in the earlier decisions of the Calcutta High Court referred to above as also in an earlier decision of their own Court in *Mnhomeed Hussain v. Mulohand* (05) 27 ALL. 395. On the other hand, the several decisions of the Calcutta High Court relied upon by Mr. Jha on behalf of the respondents, namely the cases in *Lekraj Roy v. Court of Wards* (70) 14 W.R. 395, *Brindabnn Chander v. Bhoopal Chnnder* (72) 17 W.R. 877 *Prosunnomoyi Dasi v. Kali Das Roy* (82) 9 C.L.R. 347 and *Govinda Nath v. Surja Kanta* (99) 26 Cal. 460 were not followed. Their Lordships have quoted with approval the classical observations of Markby J. in *Bejoy Chunder Banerjee v. Kally Prosonno* (79) 4 Cal. 327:

By adverse possession I understand to be meant possession by a person holding the land on his own behalf or some person other than the true owner, the true owner having a right to immediate possession.

They also approved of the dictum, and applied the same to the case of a lessee that possession" during the period of usufructuary mortgage is not adverse to the true owner. The same view appears to have been taken by a Division Bench of the Bombay High Court in *Krishnadixit Baldixit Vs. Baldixit Wamandixit*, .

19. A further development of the case-law on the subject which was not placed before us during the argument at the bar makes it clear that adverse possession against the lessee does not become adverse to the lessor. It appears that a

litigation which came up to the Calcutta High Court before a Division Bench involved the question now under discussion, though not directly. The suits in those cases were for arrears of rent in respect of a permanent lease, and the tenant claimed abatement of rent on the ground that a large portion of the leasehold property had gone out of the tenure by adverse possession acquired by a third party. In that connection the question was mooted whether adverse possession against the lessee could be adverse to the lessor so as to make it obligatory upon him to recognise the position that the area of the original tenure had decreased as a result of title having been acquired by a third party. by adverse possession. On this question, Woodroffe J. took the view that the adverse possession affected the landlord also; on the other hand, Cuming J. took the contrary view. Their decisions are reported in *Katani Debi v. Uday Kumar Das* AIR 1922 Cal. 348. On Letters-Patent appeal, the Bench consisting of Mookerjee, Newbould and Pearson JJ. took the view that the possession of a trespasser, during the continuance of a lease, does not become adverse, against the lessor, as the lessor is in possession by receipt of rent from the lessee, and that so long as such rent is not intercepted by a trespasser he cannot be said to have been dispossessed. Mookerjee J. elaborately reviewed all the relevant authorities, both Indian and English, on the subject in the course of his judgment: *Uday Kumar Das v. Katani Debi* AIR 1922 Cal. 87. The matter was carried, to their Lordships of the Judicial Committee of the Privy Council. Their Lordships' decision is reported in AIR 1925 97 (Privy Council) which affirmed the decision of the High Court in *Uday Kumar Das v. Katani Debi* AIR 1922 Cal. 87. In the course of his judgment, Lord. Salvesen made the following observations:

It was argued that the lessor had a title to eject the trespasser and that, if he did not do so, the trespasser obtained a title by limitation against him as well as against the tenant and that, as the latter is now deprived of the possession of the lands, she is entitled, in a question with the landlord, to an abatement of rent. There is a long and consistent body of authority to the opposite effect in India, and although the matter has not been made the subject of direct decision by this Board their Lordships see no ground for doubting the soundness of the decisions referred to in the judgment of the High Court.

20. It would, therefore, appear that the course of decisions relied upon on behalf of the appellants has been approved by their Lordships of the Judicial Committee, and it must, therefore, be taken that they have disapproved the line of decisions of the Calcutta High Court to the contrary effect on which Mr. Jha greatly relied on behalf of the respondents. We reserved judgment in this case in order to consider the conflicting view points raised on behalf of the parties as they appeared to have been supported by high authority on either side. On further consideration of the matter, and particularly after discovering the opinion of their Lordships of the Judicial Committee in the case referred to above, it is perfectly clear that the view of this Court in *Bankey Behari Lal v. Gudu Chaudhary* AIR 1930 Pat. 476 is the correct one, and that Mr. Jha was wrong in contending that that decision" had not taken the correct view of the legal

position.

21. Having come to the decisive conclusion that adverse possession against the Motipur Concern in this case could not in law be adverse to the proprietors of village Morsandi, there should have been no difficulty in allowing the appeal and dismissing the suit but for the fact that the lower appellate Court has not recorded clear findings of fact on the questions involved in this case, as already indicated. If the lower appellate Court had not confused the two view points, namely, of the lessees and of the proprietors, and had it recorded clear findings as to the capacity in which the Motipur Concern was in possession of village Morsandi during the critical years 1900 to 1922, during which period the plaintiffs have been found by the lower appellate Court to have acquired title to the fishery in dispute by adverse possession, I would have no difficulty in disposing of the appeal here. But, in my opinion, it is necessary that the lower appellate Court should review the evidence bearing on the question of adverse possession from the point of view of the proprietors as distinguished from that of the lessees, the Motipur Concern.

22. As a result of these considerations, I would set aside the judgments and decrees passed by the Courts below, and remit the case for a fresh decision by the lower appellate Court on the evidence already on record. The lower appellate Court after remand will have to decide specifically the question of whether during the period 1900 to 1922 the plaintiffs' possession was or was not adverse to the proprietors of village Morsandi. The other questions, more or less of subsidiary character already indicated in the course of this judgment, will also require the consideration of the lower appellate Court. The appeal is accordingly allowed. Costs here and in the Courts below both before and after remand will abide the result, and, will be disposed of by the lower appellate Court.

Bennett, J.

23. I agree.