

(1958) 11 AP CK 0018

In the Andhra Pradesh High Court

Case No : Second Appeal No's. 1172 and 1179 of 1954

Ravipudi Abbayya

APPELLANT

Vs

State of Andhra Pradesh and Others

RESPONDENT

Date of Decision : 04-11-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Limitation Act, 1908 — Article 149

Citation : AIR 1960 AP 134

Hon'ble Judges : Sanjeeva Row Nayudu, J

Bench : Single Bench

Advocate : G. Venkatrama Sastri, for the Appellant; Govt. Pleader and P. Rama Rao, for the Respondent

Final Decision : Allowed

Judgement

Sanjeeva Row Nayudu, J.—Section A. No. 1172 of 1954 is directed against the judgment of the learned Subordinate Judge, Bapatla, in A. Section No. 90 of 1953 reversing the judgment of the learned District Munsif of Bapatla in O. Section No. 309 of 1951. Section A. No. 1179 of 1954 is directed against the judgment of the learned Subordinate Judge, Bapatla in A. Section No. 91 of 1953 reversing the judgment of the learned District Munsif of Bapatla in O. Section No. 313 of 1951.

2. The plaintiffs in both the suits are brothers. The 1st defendant in both the suits was the State of Madras. These two suits were brought for a declaration of the title of the respective plaintiffs in the suits and for an injunction restraining the defendants from interfering with the plaintiffs' enjoyment and possession of the lands in each of the suits. Both the suits were tried together as common questions of law and fact were involved and were accordingly disposed of by a common judgment. The appeals against the judgment and decree in each of these suits were also heard together by the learned Subordinate Judge, Bapatla, and were disposed of by him in a common judgment.

3. Defendants 2 and 3 in each of the suits were political sufferers and claim to be

grantees of the lands in the suits from the Government by virtue of grants made in their favour in 1951. The 3rd defendant in O. Section No. 309 of 1951 figured as the find defendant in O. Section No. 313 of 1951. The contentions of the plaintiffs and the defendants in both the suits are the same. It is the case of the plaintiffs that they acquired the suit properties as heirs and successors to their maternal grand-father, Nallamuthu Venkatappa, who died some 40 years ago, that since then they had been in possession and enjoyment of the said properties, that prior to them their prede-cessor-in-title, their maternal grand-father and before him his predecessor-in-title, was in enjoyment of the suit properties from time immemorial, and, at any rate, for a period of 60 years.

It is claimed in the plaints that the suit-lands are patta lands, that the plaintiffs brought the same under cultivation after spending considerable sums of money as the lands were subject to inundation and filling up the pits, that sometime in the year 1946 or 1947 the Government, declaring the lands as assessed waste, served notices u/s 7 of the Land Encroachment Act and that no action was taken to evict the plaintiffs under the said Act. The plaintiffs claimed that they paid cists for the suit lands all along and produced the cist receipts for the period 1921 to 1951. On 10-2-1951, the Government issued a notice to quit, against which notice the plaintiffs appealed to the Collector under the Land Encroachment Act and went up in revision to the Board of Revenue who stayed eviction on 20-7-1951. The plaintiffs served notices u/s 80 CPC on the Government on 29-8-1951 and filed the present suits after the expiry of two months thereafter, on 30-11-1951.

4. The 1st defendant, that is the Government, did not contest the suits either by filing a written statement or submitting any arguments on their behalf. Defendants 2 and 3 in each of the suits pleaded that they were grantees from the Govern--ment, that the properties in the suits belong to the Government, that the Government had granted these lands to them as political sufferers by way of temporary assignments, that the plaintiffs had no legal title to the suit lands nor had they been in possession for a period of over 60 years necessary for acquiring any title against the Government by adverse possession, that the plaintiffs were being booked as encoachers under the Land Encroachment Act and were assessed to penal assessment and as such their continuance in possession could not be regarded as adverse to Government but merely permissive and that therefore they could not acquire any right to the suit properties so as to entitle them, either to the declaration or the injunction asked-for in the plaints,

5. The learned District Munsif who tried the suits came to the conclusion that the omission on the part of the 1st defendant -- Government -- to contest the suits lent support to the claim of the plaintiffs based on their long possession and enjoyment, that the plaintiffs continued to remain, in possession of the suit lands until the date of suit, that the plaintiffs had established possession and enjoyment of the suit properties for over 60 years, and had therefore established

possessory title to the same and that an action could lie on the strength of the possessory title which has to be safeguarded.

The learned District Munsif also held that the grants in favour of the 2nd and 3rd defendants in O. Section No. 309 of 1951 and the 2nd defendant in O. Section No. 313 of 1951 had been cancelled by the Government themselves, on 27-3-1953 under Exs. A-31 and A-32 and as such these defendants had thereafter no right of any kind to resist the suit for an injunction restraining them from disturbing the possession of the plaintiffs. So holding, the learned District Munsif granted a decree in each of the suits in the following terms:

"It is ordered and decreed declaring the plaintiffs right to the plaint scheduled property and that the defendants 2 and 3 be and hereby are restrained by a permanent injunction from interfering with plaintiff's possession and enjoyment thereof."

The decree also directed that defendants 2 and 3 should pay costs of the suit. The effect in law of the decree granted by the learned District Munsif is that a declaration had been given in favour of the plaintiff against defendants 1 to 3 in each of the suits, declaring the plaintiff's right to the suit properties and that a permanent injunction was issued only against defendants 2 and 3 and costs also were decreed only against defendants 2 and 3. Against these decrees, defendants 2 and 3 in each of the suits preferred appeals which, as already indicated, were numbered as A. Section Nos. 90 and 91 of 1953 on the file of the Subordinate Judge's Court, Bapatla.

6. The learned Subordinate Judge, who heard the appeals, held that the possession of the plaintiffs and their predecessors-in-title was not adverse to the Government, that the Government's conduct in not contesting the suits or the appeals before him was, not proper, that the plaintiffs had been evicted from the suit properties by D. W. 7, the Deputy Tahsildar, that possession of the suit properties had been, delivered to the contesting defendants and that even on the assumption that the plaintiffs had not been physically evicted from the suit lands, no injunction could be issued against the original owner or his assignees and, accordingly, dismissed the suits and allowed the appeals against defendants 2 and 3 in each case with costs.

7. It is contended before me that the learned Subordinate Judge approached the case from a totally wrong view-point, that before he reversed the findings arrived at by the learned District Munsif after a careful consideration of the facts and circumstances of the case, these should have been carefully examined by him and it is only after such an examination, if the learned Subordinate Judge is so satisfied, that he should reverse the findings of the learned District Munsif.

It is also contended that there was no justification for holding that the plaintiffs were not entitled to the declaration asked for by them when the finding of the learned District Munsif as to possession for over 60 years being in the plaintiffs and their predecessors had not been reversed by the learned Subordinate Judge,

that the lower appellate Court should have properly appraised the legal effect of the plaintiffs' continuous possession for over 60 years and that it was this failure that has resulted in the wrong judgment arrived at by the learned Subordinate Judge. It is further contended that the lower appellate Court was not justified in ignoring the legal effect and consequences of Exs. A-31 and A-32 which were the orders of the Collector cancelling the temporary grants in favour of defendants 2 and 3 in O. S. No. 309 of 1951 and defendant 2 in O. S. No. 313 of 1951.

It is also contended by the learned counsel for the appellants that the procedure prescribed under the Madras Land Encroachment Act for evicting a person who is stated to be in unauthorised occupation of Government land has not been followed in this case, that there has therefore been no eviction at all that the plaintiffs and their predecessor-in-title had been in possession of the suit properties in their own right as cultivating tenants, that they had been paying the normal land revenue as cist, that at no time was a penal assessment recovered from them, that the fact that they were paying such cists for a long period of time and that their possession was not in any way interrupted during this period was indicative of the fact that they were prescribing against the Government of the right to remain in possession of the land for purposes of cultivation, that by virtue of their long possession their position is exactly similar to that of a person who has a valid patta in his favour from the Government, that the payment of cist was only a recognition of the land-lord's right or the right of the Government to levy the cist and no more and that so far as the right to remain in possession was concerned, the conduct of the plaintiffs has definitely been assertive of their right and the Court must in law confirm their right to remain in possession and to lawfully resist any eviction from the suit lands.

It is further contended that it was because of this weakness in the case of the Government that the latter had rightly abstained from entering into the contest of the suit. It was for this reason that no written statement was filed and no arguments had been advanced either in the trial Court or in the lower appellate Court by the Government. It is also contended that as the Government themselves could not resist the claim of the plaintiffs to continue in possession, defendants 2 and 3 in each of the suits who could not have a right higher than that of the Government, could not in any way interfere with lands in question and any such interference, being invalid and illegal, should be properly restrained by the issue of an injunction.

8. At the outset, it is necessary to consider the matter in relation to the first defendant in both the suits, namely, the Government. The learned District Munsif granted a decree in favour of the plaintiff in each case declaring his right to the suit property against the Government as well as the other defendants. Against this decree, only defendants 2 and 3 appealed. The Government did not appeal. It must, therefore, be deemed in law that the decree of the trial Court became final so far as the Government was concerned, not having been appealed against.

In this connection, it was contended by the learned counsel for defendants 2 and

3 that they were fighting the battle for the Government as well, that consequently, their appeal must be regarded as an appeal by the Government also and that as the cause of action is one and the same both in respect of the Government as well as in respect of defendants 2 and 3 in the suits, the whole matter must be regarded as thrown open for consideration is appeal including the decree that has been given against the Government. In this connection, reliance was sought to be placed upon Order XLI, Rule 33 of CPC which is in these terms:

"The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.:

Provided that the appellate Court shall not make any order u/s 35-A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

ILLUSTRATION

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The appellate Court decides in favour of X. It has power to pass a decree against Y "

9. A careful reading of this rule makes it clear that the appellate Court has no power to set aside a decree against a party before it which had become final by reason of its not having been appealed against by that party. The extreme case that is covered by this rule is the one that is given in the illustration above. It related to a case by the plaintiffs who had asked for a decree for a sum of money in the trial Court against either X or Y. In other words, the plaintiff would be deemed to have been satisfied, if he got a decree for his money either against the one or against the other. He got a decree against X, X appealed against the decree and impleaded A and Y as respondents in the appeal.

In deciding the liability of X, the Court will necessarily have to go into the question again of the liability of both X and Y in the alternative to A as asked for by him in the plaint. The appellate Court may hold that the decree should have been rightly given against Y and not against X, in which event, it would have the power having regard to the illustration, to pass a decree against Y cancelling the decree against X. It would have been an entirely different thing, if A had asked for a decree in the first Court against X and Y. If in such a case the trial Court exonerated Y and granted a decree only against X and A did not appeal against the dismissal of his claim against Y which had therefore become final, the appellate Court would have no jurisdiction to pass a decree on appeal by X against Y.

I am clearly of opinion that in this case, as the declaration has been rightly or

wrongly given against the Government as well, in respect of the plaintiffs' right to the suit properties and at the Government did not appeal, the decree against the Government had therefore become final and binding and the mere fact that a declaration had been given against defendants 2 and 3 also and they had appealed, would not in any manner alter the case of the Government or affect the decree against the Government which had become final. In that view, the decree of the first court against the Government granting the declaration stands and must be deemed in law to have full legal force and effect.

10. In this connection the learned Government Pleader relied on the decision reported in *Venukuri Krishna Reddi and Another Vs. Kota Ramireddi and Others*, in support of the proposition that the appellate Court has power to pass a decree in favour of the party even though he had not filed an appeal or a cross-appeal. While making that general observation, their Lordships of the Madras High Court immediately thereafter took care to point out that the hard and fast rule could be laid down, and that however extensive this power may be, one principle can be taken to be well established, viz. that when a party having right to appeal fails to do so, the relief should ordinarily be refused him under Order 41, Rule 33.

Their Lordships also took care to refer to the cautionary observations of the Privy Council in AIR 1927 252 (Privy Council) that the right which the decree-holder has under a decree when the time for appealing against it has expired is a valuable one and Courts must act with considerable caution and reserve before depriving him of that right by invoking the power under Order 41 Rule 33. Their Lordships wound up the discussion of the case by making the following observation:

"Considering the question on principle that a decree is in substance, a combination of several decrees against several defendants, there is no reason why an appeal presented by one of the defendants to respect of his interest, should enure for the benefit of the other defendants with reference to their interest".

In my considered opinion this decision is authority for the conclusion reached by me above that in the case given in the illustration to the rule, Order 41, Rule 33 would not have been applicable had the claim of A been both against X and Y and not in the alternative. This apart, it must be pointed out that no such plea was raised before the appellate Court, nor was its jurisdiction sought to be invoked under Order 41 Rule 33. The fact remains that the appellate Court did not act under this rule and consequently and even otherwise the first court's decree against the Government stands final.

11. The only question that really falls to be considered in these appeals is whether the judgment and decree of the lower appellate Court in dismissing the plaintiffs suits against defendants 2 and 3 is sustainable in law.

12. It is contended by the learned counsel for the appellant that the exhibits Exs. A-1 to A 7 produced by him established that the Government rested on the suit

lands was being paid by the plaintiff during the entire period of 30 years and that what has been paid is land revenue and nothing more as may be seen from the cist receipts themselves. It is further pointed out that the oral evidence in the case adduced on behalf of the plaintiffs, particularly that of P. W. 2 who was aged 96 years when he gave his evidence and P. W. 10 who was aged 60 years in the year 1953, established that the suit lands had been in the possession of either the plaintiff or his predecessors-in-title for a period of 60 years and the evidence given by these witnesses was partly corroborated by the evidence given by the village karnarns P. Ws, 7 and 8.

Of these P. W. 8 was 71 years old in 1953 when he gave evidence and has known the lands in his capacity as karnam for the period of 20 years in which he held the office between 1904 and 1938. It is contended by the learned counsel for the appellants that the evidence of the plaintiff's witnesses taken with Exs. A-1 to A-7, the cist receipts, clearly establish the possession of the suit lands in the plaintiff or his predecessors-in-title in each case for a period of at least 60 years and that this was enough to entitle the plaintiff to acquire title to the suit lands by use and occupation. On a careful consideration of the evidence oral and documentary produced in this case, I am satisfied that the learned District Munsif's finding that the plaintiffs have established possession and enjoyment of the properties for over 60 years, is correct and I find accordingly.

13. It is further contended that even if the plaintiffs possession has not been proved for the full period of 60 years but for a period falling short of it, the doctrine of presumitur retro would apply and the plaintiffs title will be upheld in possession in them during the period of time prior to the date upto which possession had been established to be with the plaintiff. In support of this reliance has been placed on a decision of the Privy Council reported in *Anangamanjari Chowdhurani v. Tripura Sundari Chowdhurani* ILR Cal. 740 their Lordships of the Privy Conned observed as follows:

"When the state of possession for a long period of years has been satisfactorily proved, in the abseuce of evidence to the contrary, presumitur retro, in the present case there is evidence tending to prove possession by the plaintiffs for a considerable period antecedent to February, 1873. Whether it is sufficient to establish the plaintiffs" possession and whether, if established that possession is sufficient to warrant the inference of fact derived from it, are questions upon the merits of the case".

Reliance has also been placed on the decision reported in *Chelikani Ramarao v. Secy. of State for India* ILR 33 Mad 1 wherein their Lordships Ralph Benson, O. C. J. and Munro I., while holding that if the claimants in that case had to establish title by adverse possession they would have to prove such possession for 60 years before the notification by the Government proposing to form the land in question into a reserved forest, held also as follows:

"Though the title was originally in the Crown, still as the possession of the

claimants for 20 years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, that is, within 60 years before the notification....."

a conclusion which has been negated by the Privy Council on appeal in *Secy, of State for India v. Chelikani Ramarao* ILR Mad 617: (AIR 1916 PC 21). The apparent conflict between the two Privy Council decisions reported in ILR Cal 740, and this case may be resolved by noticing the difference on the facts. In ILR Cal 740 (Supra) the title of Government to the property in dispute was neither admitted nor proved whereas in the later case ILR 39 Mad 617 : (AIR 1916 PC 21) (Supra) the prior title of the Government is either admitted or taken for granted.

14. In *Krishna Aiyar v. Secy, of State for India* ILR Mad 173. Justice Munro and Justice Abdur Rahman observed as follows:

"It is found that the plaintiff has proved possession of item 1 in himself and his vendor for 30 years and of item 2 in himself for 40 years. The defendant, who is the Secretary of State for India in Council has failed to establish his title to the land or any possession within 60 years before suit. ... It may be regarded as settled law that in the circumstances like the present, the possession of the plaintiff throws upon the defendant the burden of proving that he has a subsisting title."

With these observations their Lordships found that on that particular case before them the Government has failed to establish the title. Their Lordships observed as follows:

"In the present case, the plaintiff's own possession of item 1 extends to 20 years and of item 2 to 40 years and such length of possession is sufficient to make out a title against any one including the Secretary of State, the latter having failed to prove a title or possession within 60 years. It is not contended that in order to prove his title against the Secretary of State, the Plaintiff is bound to prove 60 years possession and such a contention would be untenable. (Vide *Secy, of State for India v. Kota Bapanamma Garu* ILR Mad 165 and *Haider Khan v. Secy, of State for India* ILR Cal 1

Their Lordships accordingly granted a declaration as prayed for in respect of these items against the Government. The third case in the same volume, namely, *Venkatarama Iyer v. Secy, of State for India* ILR 33 Mad 362 is also relied on. It is observed therein at page 365 as follows:

"We think that the evidence on record points to the conclusion that the plaintiffs have been in possession and enjoyment of the tank adversely to Government for 30 or 40 years, and this is sufficient to shift to Government the onus of showing that the Government has been in possession at some time within 60 years prior to the suit. There is no evidence that the Government was ever in possession of

it. We must, therefore, hold that the plaintiffs' possession should be presumed to have continued for more than the statutory period and that they have established their title by prescription".

Their Lordships relied in coming to this conclusion on ILR Cal 740, ILR Mad 1 and ILR Mad 173. The next case on which reliance is placed by the learned counsel for the appellants is Narayan Pillai v. The Secretary of State for India in Council 23 M LJ 162 to support of the proposition that proof of possession for a sufficiently long period of time although short of the full period of 00 years was sufficient in the absence of proof on behalf of the Government, to enable a presumption to be drawn in his favour that he had prescribed title by possession for 60 years.

In that case there was only proof of plaintiff's possession for a period of 30 years prior to the suit and from such a possession their Lordships drew a presumption that the plaintiffs were in possession prior to that time also, in the absence of proof on behalf of the Government either that the land was unoccupied land or that the land was in occupation of the Government earlier or that the Government were the owners thereof. So holding their Lordships upheld the plaintiffs' claim and granted a declaration in their favour. This question is only of academic importance in view of the conclusion reached by me above that the plaintiffs had established possession and enjoyment for at least 60 years before suit.

15. It is contended by the learned Government Pleader that the possession of the plaintiff for the period in question could not be regarded as adverse to the rights of the Government, inasmuch as the plaintiff had been paying land revenue to the Government and that therefore his possession must be regarded as a possession in sufferance. The learned Government pleader further contended that the payment of cist was not as land revenue, but as an assessment u/s 3 of the Madras Land Encroachment Act and that for that reason also the possession of the plaintiff must be regarded as permissive.

At the outset it must be made clear that there is no proof placed in the case to establish that the payment of cist under Exs. A-1 to A-7 series was payment made in response to notices Issued under the Madras Land Encroachment Act. On the other hand the cist receipts clearly specify that what was being collected by the Government was land revenue on the suit land, and it is not disputed that the amount collected corresponds to the actual land revenue payable to the Government in respect of the suit properties. It is therefore unnecessary to consider the effect in law of making payments of assessment u/s 3 of the Land Encroachment Act.

The argument is sought to be based on the presence of the letter of the Telugu alphabet in some of the cist receipts, as indicating cultivation as Sivaijama and that Sivaijama cultivation must be regarded as unauthorised cultivation and therefore could not, according to the learned Government Pleader, confer any

rights On the plaintiff. In reply to this, the learned counsel for the appellant points out that it is not established that the presence of the letter in the cist receipts was proof positive of the cultivation being unauthorised. He further points out that even Sivaajama cultivation was cultivation with the knowledge of the Government and so long as such cultivation continued and the cultivator continued in possession of the land it would not, in any way, stand in the way of plaintiff acquiring title by virtue of that possession.

16. It is further pointed out by the learned Government Pleader that possession of land in the absence of patta would virtually amount to possession by the mercy of the Government and that, therefore, such possession could not enure to the benefit of the plaintiff. In support of this proposition reliance is placed by the learned Government Pleader on *Aleman Rama Rao Vs. The Secretary of State For India in Council*, ; *(Buddala) Gangayya and Others Vs. Vennavalli Satyanarayana and Others*, & *Subbareddi v. Secy, of State for India* 124 Ind Gas 607 (Mad). In the case reported in *Aleman Rama Rao Vs. The Secretary of State For India in Council*, their Lordships were dealing with the case of ryotwari lands and with a temporary grant, made on certain conditions.

It was therein held that the Government had uncontrolled power Over ryotwari lands so far as rate of assessment and the right to levy the same are concerned and that in the particular case before their Lordships the assignments in question which were temporary as already pointed out, did not amount to a promise to grant on certain contingencies, that the property in the soil did not vest in the plaintiff as it was distinctly made to understand at the time, that in the case the lands were acquired by railway he would have to surrender them without claiming compensation, that therefore, the plaintiff had not acquired any right to compel the defendant to grant him a patta.

In that connection their Lordships observed that in the case of land of the description mentioned in the case the assessment on which was collected under Sivaajama system, no property passed to the cultivator and the land continues to be at the absolute disposal of the Government. It is quite obvious from the above that the decision in *Aleman Rama Rao Vs. The Secretary of State For India in Council*, (Supra] has absolutely no application to the facts of the present case. Further there is also no proof in this case that the cultivation by the plaintiff was Sivaajama cultivation and not in his own right. The case reported in *(Buddala) Gangayya and Others Vs. Vennavalli Satyanarayana and Others*, is again a case of a person who trespassed into Government property and cultivated it.

In that connection His Lordship Justice Ramesam observed that any assessment imposed by the Government in such circumstances is Sivaajama assessment, which is somewhat heavier than the usual settlement assessment, and that levying of such assessment amounted to a condoning of the act of trespass, and did not amount to a recognition of any right or any undertaking on the part of the Government to permit the occupation for the future although such occupation may go on for years.

Similarly in the case reported in 124 Ind Cas 607 (Mad) (Supra) it was admitted that the land was Government ryotwari tract and an unassessed waste and both the Courts found that the Government have been enjoying the usufruct of the trees standing on the land by periodically selling the right to enjoy by auction. These being the facts it is clear that this case has absolutely no application to the facts of the present case. As I have already made it clear that in the instant case it has not been established either that the cist which the plaintiff has been paying was being paid PS assessment for Sivaijama cultivation or the assessment is being levied under the provisions of the Madras Land Encroachment Act.

On the other hand, the cist receipts issued from time to time and extending over a period of 30 years clearly show that what was being levied was nothing more than the land revenue normally payable by any pattadar on the suit lands in question and therefore the payment of assessment for a long period of years without any attempt on the part of the Government during that period to levy any penal assessment clearly indicates that the Government while being fully aware of the fact that the lands in question were in the occupation of the plaintiff collected the common land revenue from him in respect of the lands almost giving rise to the inference that the Government regarded the plaintiff as a pattadar in occupation, although no patta, as such, has been issued to the plaintiff.

It was to regularise the situation that we find in the evidence of P. W. 8 reference to the fact that during the Collectorship of Marjoi Banks in the years 1907 and 1908, the latter directed that these long standing encroachments should be demarcated and pattas issued to the occupiers, that they were accordingly surveyed by a special staff and pattas were granted on applications. It is not understood, nor has it been explained by the learned Government pleader, why similar pattas had not been granted to the plaintiff when pattas had been granted to all the others similarly placed.

17. On the question whether such occupation of the land and cultivation would constitute adverse possession, reliance has been placed by the learned counsel for the appellant on the decision of the Privy Council reported in (1934) 66 MLJ 134 (Privy Council) wherein their Lordships observed as follows:

"As to what constitutes adverse possession, a subject which formed the topic of discussion in the case, their Lordships adopt the language of Lord Robertson in delivering the judgment of the Board in *Radhamoni Debi v. Collector of Khulna* ILR Cal 943 at p. 930 where his Lordship said that:

"the possession required must be adequate in continuity, in publicity and in extent to show that it was possession adverse to the competitor".

The classical requirement is that the possession should be *nee vi nee clam nee precario* (openly, continuously and as of right), Mr. Dume for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown but in their Lordships' opinion, there is no

authority for this requirement. It is sufficient that the possession be overt without any attempt at concealment so that the person against whom time is running, and who, if he exercises due vigilance, be aware of what is happening. If the rights of the Crown have been openly usurped, it cannot be heard to plead that the fact was not brought to its notice. The Limitation Act is indulgent to the Crown in one respect only, namely, in requiring a much longer period of adverse possession than in the case of a subject; otherwise there is no discrimination in the Statute between the Crown and the "subject as regards the requisites of adverse possession".

In this case, however, there is abundant proof that the Government were fully aware of the possession of the plaintiff as can be seen from the evidence of the two karnams P. Ws. 7 and 8 in the case and also from the fact that the cist receipts produced for a period ranging from 1921 to 1951 showed the plaintiff as the cultivating ryot. Reliance has also been placed on Section 110 of the Indian Evidence Act which is as follows;

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner".

The plaintiff's possession over a period of time having been established in this case, the burden of proving that the plaintiff had no right to remain in possession by reason of the fact that the Government are owners would be on the Government, and this burden of proof has, in my opinion, not been discharged by the Government in this case.

18. There is one more aspect of the case which remains to be dealt with and that is the effect of the several attempts made on behalf of the Government to take action under the Madras Land Encroachment Act. At the outset it has to be pointed out that in this case there is no proof that any notices other than notices u/s 7 of the Madras Land Encroachment Act had been served on the plaintiff. Exs. A-9 to A-22 range from 25-2-1946 and end up with 26-8-1951. Madras Act No. III of 1905, that is the Madras Land Encroachment Act, 1905 was an Act to provide measures for checking unauthorised occupation of lands which are the property of Government. Section 3 of the Act provides for the levy of assessment on lands unauthorisedly occupied and is as follows:

"3. Any person who shall unauthorisedly occupy any land (which is the property of Government) shall be liable to pay by way of assessment;

i. If the land so occupied forms an assessed survey number or part thereof, the full assessment of such number for the whole period of his occupation or a part thereof proportionate to the area occupied, as the case may be, provided that, for special reasons, the Collector (or subject to his control, the Tahsildar or Deputy Tahsildar) may impose the full assessment of such number Or any lesser sum irrespective of the area occupied;

5. If the land so occupied be unassessed, an assessment on the area occupied calculated for the same period at the rate imposed on lands of a similar quality in the neighbourhood, or at the highest dry or wet rate of the village as the case may be, or when no such rates exist in such manner as may be prescribed in rules or orders u/s 8:

Provided that payment of assessment under this Section shall not confer any right of occupancy.

Explanation:-- For the purposes of this Section occupation for an incomplete portion of a fasli may be deemed to be occupation for a whole fasli". Section 5 of the Act declares that any person liable to assessment u/s 3 shall also be liable to penalty and is as follows:

"5. Any person liable to pay assessment u/s 3 shall also be liable to at the discretion of the Collector, (or subject to his control, the Tahsil-dar or Deputy Tahsildar) to pay in addition by way of penalty;

i. If the land be assessed land, a sum not exceeding five rupees or, when ten times the assessment payable for one year u/s 3 exceeds five rupees, a sum not exceeding ten times such assessment, provided that no penalty shall ordinarily be imposed in respect of the unauthorised occupation of such land for any period not exceeding one year;

iii. If the land be unassessed, a sum not exceeding ten rupees, or when twenty times the assessment payable for one year u/s 3 exceeds ten rupees, a sum not exceeding twenty times such assessment."

Section 6(1) of the Act declares the liability of a person unauthorisedly occupying Government land to summary eviction and Section 6(2) of the Act prescribes the procedure to be followed in evicting the person in unauthorised occupation. Section 7 provides for giving prior notice to the person in occupation before taking action u/s 6, which is as follows:

"7. Before taking proceedings u/s 5 or Section 6 the Collector (or Tahsildar, or Deputy Tahsildar, as the case may be) shall cause to be served on the person reputed to be in unauthorised occupation of land (being the property of Government) a notice specifying the land so occupied and calling on him to show cause before a certain date why he should not be proceeded against u/s 5 or Section 6.

Such notice shall be served in the manner prescribed in Section 25 of the Madras Revenue Recovery Act, 1964, or in such other manner as the (State Government) by rules or orders u/s 8 may direct."

It may be seen from the above provisions that the Government could take one or more of the three steps provided for in the above Sections: (1) levy of assessment u/s 3; (2) imposition of penal assessment u/s 5; and (3) eviction u/s 6(2). As has already been pointed out there is no proof in this case that either

assessment u/s 3 has been recovered from or that any penal assessment has at any time been levied on the plaintiff. I have therefore to consider whether any action by the Government against the plaintiff has been taken u/s 6 of the Act.

It is clear from the reading of sections 6 and 7 that the following conditions and steps of procedure have to be fulfilled and followed before a person could be legally evicted from the occupation of Government land. First the land must be shown to be Government property in which Government have a subsisting right on the date of the proposed eviction; (2) notice should issue u/s 7 and should be served on the person concerned to show cause before a date to be fixed why he should not be proceeded against u/s 6 of the Act, and (3) on service of such notice and if sufficient cause is not shown, serving a notice requiring him within such time as the Collector may deem reasonable to vacate the land and (4) if such notice is not obeyed directing removal of the person from the land and (5) if such person in occupation resists or obstructs, a summary enquiry by the Collector shall be held and only after the Collector is satisfied that the resistance or obstruction is without any just cause, he could issue a warrant for his arrest and on his appearance commit him to close custody.

19. In this case the learned counsel for the appellant contends that none of the steps laid down by the Act have been taken in this case excepting service of notices periodically u/s 7 of the Act, and that such service is ineffective and does not give rise to a cause of action. (Vide Secretary of State for India in Council v. Illikal Assan ILR Mad 727 : (AIR 1917 Mad 480 IFB). It is pointed out that any act or attempt at summary eviction without following the procedure is totally illegal and cannot be recognised as valid and that in this case according to the evidence of D W. 7 the so-called delivery of possession on 4-3-1951 has no legal effect whatsoever in view of the fact that the procedure under the Act had not been followed at all and that this so-called delivery of possession was in derogation of the stay order issued by the Collector of the District even in February, 1951 ordering stay of further proceedings and of delivery of possession, this order having been in force at least till 14-3-1951.

20. I am fully in agreement with the conclusions reached by the learned District Munsil which, in my opinion, are fully justified on the material placed on record in this case, that the so-called delivery of possession to the Village Munsif by the Deputy Tahsildar is both illegal and ineffective and cannot be given any recognition whatsoever and that the same cannot be regarded as eviction within the meaning of the Madras Land Encroachment Act. Even assuming that the so-called delivery said to have been effected by D. W. 7 is true, it cannot, in my opinion, affect the plaintiffs right to remain in possession of the suit properties, which right is based on long user extending over 60 years or thereabouts prior to 1951.

It is clear from the materials placed on record in this case that the plaintiff had been cultivating the suit lands throughout the year 1951 when the defendants 2 and 3 came on the scene by virtue of the temporary assignments in their favour

by the Government and continued in possession to date. I am satisfied on the evidence before me that there has been no interruption whatsoever to the possession by the plaintiffs, of the suit properties. Apparently being fully alive to the weakness of their case on the merits and also to the infructuous character of the action taken under the Madras Land Encroachment Act we find the Government maintaining an absolutely neutral and unconcerned attitude in this case, by not filing a written statement or taking part in the trial of the suit or in the argument both in the trial Court as well as in the lower appellate Court.

It is only here that the learned Government pleader submitted his arguments which had been adopted in toto by the counsel for the other defendants. Even before me, I may point out that the learned Government Pleader stated that so long as no relief of declaration of adverse possession against Government is given, he has no objection to the other reliefs prayed for being granted. On this point. as has already been pointed out, there is even now a declaratory decree standing against the Government in favour of the plaintiff declaring the plaintiff's right to the suit properties, which had become final.

21. In the light of the findings reached by me above and in view of the fact that defendants 2 and 3 in the suits claimed whatever right it be from the Government, they could not stand in any better position than the Government themselves.

22. In the result the appeals are allowed against defendants 2 and 3 i, e., respondents 2 and 3 in these appeals with costs throughout and the decrees of the lower appellate Court are set aside and those of the learned District Munsif are restored.

23. No leave.