

(1935) 05 CAL CK 0016
In the Calcutta High Court

Surendra Kumar Roy Choudhury and Others	APPELLANT
Vs	
Ahmed Nawab Choudhury and Others	RESPONDENT

Date of Decision : 10-05-1935

Acts Referred:

Bengal Tenancy Act, 1885 — Section 103A

Citation : 163 Ind. Cas. 897

Hon'ble Judges : S.M. Ghose, J; Mukerji, J

Bench : Division Bench

Judgement

1. These four appeals have arisen out of as many suits which were instituted by the heirs of the late Nawab Mohammad Ali, Nawab Choudhri Khan Bahadur of Paschimgaon whose estate is now under the management of the Court of Wards. Appeal No. 226 of 1931 has arisen out of Suit No. 32, No. 227 of 1931 out of Suit No. 33, and No. 17 of 1933 out of Suit No. 34. These three suits were instituted in 1927, but were numbered in 1929 when they were given these numbers. The other Appeal No. 18 of 1933, has arisen out of another suit which was instituted in 1926 but was re-numbered as No. 35 of 1929 and tried along with the aforementioned three suits. The plaintiffs in all the four suits are the owners of Touzi No. 100 of the Tipperah Collectorate and the lands concerned therein are situate in a village named Mouzah Doulkhar within Pargana Homnabad in the District of Tipperah. The village appertains to two touzis, namely Nos. 100 and 315 between which its lands are divided.

2. It will be convenient, to take up the first three appeals first. The third party defendants in the suits out of which these three appeals have arisen are the owners in zemindari right of Touzi No. 315; the first party defendants are tenure-holders under the said zemindars: and the second party defendants are ryots holding under aid tenure-holders. The plaintiffs' case in these suits is that their predecessor-in-interest was in possession of village Doulkhar of Touzi No. 100 by realising rents from tenants and keeping some lands in khas patit; that in 1302 B.S. (wrongly stated in the complaints as 1301 B.S.), there was a survey made by

him of Touzi No. 100 by relaying and demarcating the boundaries of Thak Chaks and it was then found that the first party defendants or their predecessors were holding wrongful possession of the lands in suit through their tenants the second party defendants; that there upon the plaintiffs' predecessor" was about to take action for ejecting the wrongdoers but eventually the matter was amicably settled, the said first party defendants or their predecessor taking settlement of those lands by executing kabidiyats in his favour. It was alleged further that in the last District Survey and Settlement operations, the records whereof were finally published in 1920, the said lands were recorded in the miliki khatian of the plaintiffs' predecessor as appertaining to Touzi No. 100 up to the attestation stage, but subsequently owing to objections filed by the third party defendants u/s 103-A of the Bengal Tenancy Act, the entries were changed and the lands in suit were recorded as appertaining to Touzi No. 315 of the third party defendants and as included in the taluk of the first party defendants. The suits were filed as the said entries might adversely affect the plaintiffs' interest. The substantial prayers were 1st, declaration of the plaintiffs' zemindari right and right by adverse possession, 2nd, ejectment against the first party defendants on the ground that their tenures under the plaintiffs were forfeited, as they had in the objection cases u/s 103-A, Bengal Tenancy Act repudiated the plaintiffs' title and set up the title of the third party defendants ; and 3rd, khas possession by eviction of the second party defendants in case they put forward any plea against the plaintiffs' interest.

3. The third party defendants and the first party defendants filed written statements in these three suits. It is unnecessary to refer to these written statements in detail, because the scope of the controversy at the present stage has been very much reduced by reason of the fact that it is only one of the parties, namely, the third party defendants who have preferred these appeals and the ground on which the appeals have been pressed is also a limited one. The first party defendants in Suit No. 32 practically supported the plaintiffs, asserting that the hinds in that suit appertain to Touzi No. 100 and are in their possession as tenure-holder under the plaintiffs. The first party defendants of Suits NOS. 33 and 34 denied the plaintiffs' title to the lands in those suits, except as regards two of the plots concerned in the latter suit and alleged that they appertained to Touzi No. 315 of the third party defendants. In all the three suits the first party defendants denied that any forfeiture had been incurred.

4. The defence of the third party defendants, who are the appellants in these appeals, was that the lands in these suits did not appertain to Touzi No. 100 but to Touzi No. 315 of which the original maliks were Mohammad Roshan Chowdhury and others and were in the possession of the said proprietors as part of the said Touzi, that on the Bhadra 25, 1266, B.S. the predecessor-in-interest of the first party defendants obtained pui settlement of these and of her lands from the said proprietors ; that the said proprietors were thus in possession of the suit lands by realising rent from the first party defendants who in their turn took rents therefore, from, the tenants, the second party defendants ; and that

in 1912 the third party defendants became proprietors of Touzi No. 315 by purchase in execution of a mortgage decree. As the result of a local investigation held by a Commissioner in these three suits it has now been found, and that finding is no longer disputed, that 122.76 acres out of the lands of Suit No. 32, 95.34 acres out of the lands in Suit No. 33 and the whole of the lands i.e. 2.74 acres, of Suit No. 34 appertain to Touzi No. 100. The plaintiffs did not seriously claim any lands outside their Touzi No. 100; and the defence of the appellants, as pressed in the Court below, as regards such lands as lay outside their own Touzi No. 315 and fell within Touzi No. 100 was, as the Court below has stated, the following:

Between the third party defendants and their predecessors-in-interest they have been in possession of the lands in question for upwards of 70 years. The plaintiffs having been out of possession for this considerable period, their suits are barred by limitation as well. The kabuliyats alleged to have been executed by the first party defendants, in the plaints do not confer any right on the plaintiffs for they are collusive and colourable.

5. The Subordinate Judge has overruled this defence. He has referred to the evidence which the tenants, examined as witnesses on behalf of the appellants, have given, and has observed that their evidence showed that they were not sure under which touzi the lands held by them, lay. He has also observed that the tenants did not point out their lands to the Commissioner, when the Commissioner went to the locality. And he has observed further that it has not been satisfactorily proved that the proprietors of Touzi No. 100 had any knowledge that the lands which lay in their touzi were being adversely possessed by the tenants of the pataidars. On these grounds the learned Judge has decreed the three suits in favour of the plaintiffs declaring their zemindari right to such of the lands therein as tall within Touzi No. 100 and declaring further that they would be entitled to get fixed rentals in respect of the said lands (viz., Rs. 30 in Suit No. 32, Rs. 25 in Suit No. 33 and Rs.. 1-4-0 in Suit No. 34) from the first party defendants, but refusing their prayer as regards khas possession.

6. The principal contention which has been urged in these appeals is what is recited is the passage quoted above from the judgment of the Court below. To explain this contention it is necessary to state a few more facts. On Bhadra 21, 1236, B.S. (September 10, 1859) one Mohamed Ali and three other persons obtained a putni settlement of four kismats or villages, of which Doulkhar was one, from Muhammad Roshan Chowdhury on payment of selami of Rs. 3,039 and agreeing to pay an annual rent of Rs. 1,235 (Ex. M). It is not disputed that the interest thus acquired was a putni interest which appertains to Toizi No. 315 which was subsequently created The puni was sold at a Regulation sale for arrears of rent and purchased by one Moulvi Muhammad Nazim Talukdar on Bhadra 18, 1285 B.S. He subsequently sold off the patni in parts to five sets of persons during whose time, in 1900, there was another sale under the Regulation for arrears of rent. The purchasers who acquired the putni at that sale

subsequently sold their shares to the said five sets of persons or their heirs. These latter are the first party defendants in these suits. These first party defendants, as stated in the plaints in these suits executed kabuliats in favour of the plaintiffs predecessor in respect of the suit lands in 1306 B.S. on agreeing to pay rents to him therefore: kabuliat Ex. 1 for the lands in Suit No. 32, the rent fixed being Rs. 30; kabuliat Ex. 3 for the lands of Suit No. 33 with rent Rs. 25 and kabuliat Ex. 2 for the lands of Suit No. 34 with rent Rs. 1-4-0.

7. It is through the possession of the patnidars the first party defendants and their predecessors, that the appellants, the third party defendants, seek to establish their title to the lands which have been found to lie outside their own Touzi No. 315 and within the plaintiffs' Touzi No. 10". The putni kabuliat Ex. M of 1266 B.S. (1859) contains no boundaries. A mirash potta Ex. R, dated 1272 B.S. (1866) granted by a co-sharer putnidar Muhammad Ashgar is on the record, but it is not known whether it relates to any of these lands. Mr. Gupta on behalf of the appellants has relied principally on ten kabuliats which Moulvi Muhammad Nazim Talukdar took from tenants immediately after his purchase of the putni on Bhadra 18th, 12d5 B.S. These kabuliyats are Exs. P, Q, S. Z 94, Z 79, Z53, Z7Q, Z90, Z91 and Z69 and are dated Kartick to Magh 1285 B.S. The general nature of these kabuliats was that they were in respect of specific quantities of hasil and patit lands lying within specified boundaries but premising that they appertained to the putni as held under the third party defendants; and some of these kabuliats described the lands taken settlement of under them as being holdings of persons named who had previously been in occupation thereof as tenants. He has also referred to some other kabuliats dated later than 1285 B.S. similarly executed by tenants in favour of the putnidars (E.G. Ex. Z 88 dated 120 B.S. and Ex. 72 dated 1291 B.S.) which also show that well over 12 years before 1306 B.S. when the putnidars attorned to the plaintiffs the putnidars had been in possession of the lands covered by these documents. And he has formulated his contention, on which he takes his stand in these three appeals, in these words:

When a tenant encroaches upon the land of a neighboring owner and possesses the land as part of his tenancy, his adverse possession is on behalf of his own landlord, and after the requisite period of such possession it is that landlord who gets title to the land. It makes no difference if the tenant was not paying any additional rent for the land of which he is thus in adverse possession. Once title by adverse possession has already accrued to the said landlord in this way, that title will not be affected if the tenant then begins to pay rent to the true owner, that is to say the neighboring owner; the position being exactly the same as if the land was from the very beginning his own land of which the tenant had taken settlement.

8. Mr. Gupta has also drawn our attention to two other classes of documents: one class showing that in respect of the lands covered by nine out of the aforementioned ten kabuliats of 1285 B.S. the dealings of the putnidars as well as of their tenants were just the same as would be the ordinary course of dealing

with regard to real tenancies. (Such documents, e.g. are--Exhibits Z84 and Z82, re kabuliat Ex. Z53; Ex. Z69, Z68, Z15 and Z37 re kabuliat Ex. Z70; Exs. O, Z146, Z157, Z150, Z163, Z59 and Z29, re kibuliat Ex. P; Ex. Z16 re kibuliat Ex., 289 Exs. O and Wre kabuliat Ex. Q Exs. Z, Z161, V, Z1, Z25, Z148 and Z161, re kabuliat Ex. Section Exs. Z139, Z63, Z42 and Z51, re kabuliat Z9i Ex. Z142, Z138 and Z41, re kabuliat Ex. Z90; and Exs, Z54, Z92 and Z93 re kabuliat Es. Z97); and another class showing that even after attorning to the plaintiffs' predecessor the putnidars went on treating the lands as lands held by them under the plaintiffs' touzi (e.g. Ex. Z77, Z32, Z78, Z44, Z43, Z54 and O.)

9. Mr. Gupta has also argued that the kind of possession which the putnidars through their tenants exercised on the lands of Touzi No. 100 was sufficient in the eye of law to constitute such adverse possession as would reckon for the purpose of extinguishing the title of the true owner and of creating title in favour of the trespasser and that for that purpose it is not necessary that adverse possession should be exercised to the knowledge of the true owner. He has also contended that such evidence as there is of possession in these lands on the part of the plaintiffs and their predecessor, even after the attornment in their favour in 1306 B.S. was not of a character which could possibly affect the title which the appellants had already acquired, because the putnidars even after such attornment never repudiated the title of the appellants nor surrendered their leases, but on the other hand continued to assert their own right in the lands as though they were holding the lands under the appellants.

10. Mr. Gupta has attacked the kabuliais Exts. 1, 2 and 3 which were executed by the putnidars in 1316 B.S. as collusive and fraudulent; the trilling nature of the rents provided for therein being the chief factor relied upon in this connection. We can see no indication of fraud or of collusion in these kabuliais and the smallness of the rents provided for therein has been sufficiently explained by the learned Judge as being due to the uncertainty of the title of the plaintiffs' predecessor which the peculiar circumstances of the case had brought about in respect of these lands. It is not suggested that the putnidars, by executing these kabuliais, intended to deprive or succeeded in depriving the appellants of any rents which they were bound to pay for their patni for it was the putni rent nothing more than that they had been paying even though they were holding "these extra lands and realising in respect of them from the tenants who were occupying them. The learned Judge has found that at the survey that was held in 1302 B.S. the Officers of the proprietors of Touzi No. 315, that is to say of the appellants, were present; and this finding has been assailed.

11. The evidence on which this finding has been arrived at is not very clear and such evidence as is there on the point would not perhaps justify a positive finding that by the result of that survey the appellants became bound. But for the purposes of the questions we have to consider now the finding is immaterial.

12. Dr. Basak has taken great pains to establish that the kabuliais which the putnidars took from the tenants were more or less in the nature of paper

transactions and are of title value as evidence of possession on the part of the putnidars or of their tenants. He has pointed out that in the putni kabuliat Ex. M of 1266 B.S. there is reference to a chitta, and in other documents also some chittas are mentioned; and he has complained that none of these chittas has been produced by the appellants. He has taken us in detail through the documents which are meant to show actual realisation of rents by the putnidars and has shown us that such dakhilas and their counterfoils as have been produced on behalf of the appellants do not take us beyond 1294 B.S. and that then, again there is hardly anything showing that they related to the lands in these suits; that the earliest talabbakis produced are of the years 1295 and 1296 B.S. and the next one in point of date is of the year 1303 B.S., no explanation being offered as regards the omission to produce those for the intervening 5 years; that no jama kharach. of amdani or any other papers of any year prior to 1303 B.S. has been produced; and that there is really no certainty, regularity or continuity disclosed by the papers as regards the collections which the putnidars are alleged to have made from the tenants in respect of the lands. He has complained also that the decrement evidence which has been produced on behalf of the appellants to shew that the putnidars treated the kabuliats which they had taken from their tenants as having created real tenancies, e.g. by obtaining rent decrees, putting up the holdings to sale, re-settling the lands with the purchasers, etc., is evidence which related to only a few of the tenancies and "also evidence of not a very convincing description. We have carefully considered all these arguments of Dr. Basak and have examined the materials on which they are founded. But we must say that we are unable to accept the view which he contends for. Such materials as the appellants, who it should be noted only came in 1912 as purchasers of Touzi No. 315, have been able to produce do, in our judgment, suffice for the purpose of establishing that the putnidars transactions in respect of the suit land, in so far as they are covered by the ten kabuliats of 12-5, B.S. were such as would ordinarily be if the tenancies were real and bona fide tenancies and that the putnidars were in possession of the said lands by receipt of rents for the tenancies and otherwise just in the same way as any landlord would be in possession of lands in the occupation of tenants who hold real and bona fide tenancies under him.

13. Dr. Basak, however, has placed before us the documentary evidence, which the plaintiffs have adduced for the purpose of establishing that since 1306 B.S. when the putnidars attorney to them by executing the kabuliats Exs. 1, 2 and 3, the plaintiffs have been in possession of the suit lands. The more important of the evidence referred to in this connection consists of the amdanis (Ex. 7 series) for the years 1307 to 1330 B.S. talabbakis (Ex. 8 series) for 1307 to 1329 B.S. and the counterfoils (Ex 9 series) for, 1307 to 1328 B.S.; the period covered by these papers is an unbroken period commencing from the dates of the kabuliats and running right up to the institution of these suits. The learned Judge in his judgment has referred to certain other documents establishing the genuineness of the aforesaid papers, e.g. kabuliats Exs. 23 to 53; rent decree Ex. 54, Register

Ex. 55.

14. The transactions referred to on behalf of the appellants for the purpose of establishing that even after executing kabuliats Exs. 1, 2 and 3 in favour of the plaintiffs the putnidars went on dealing with the lands as held by them under their putni are relied upon by them for a double purpose; 1stly--For showing that by reason of these transactions the possession of the putnidars, and so their own possession too, in these lands continued uninterrupted notwithstanding the said three kabuliats; and 2ndly for establishing that the plaintiffs' possession was interrupted and consequently their title was affected, Dr. Basak has dealt with these documents in detail and has shown us that these transactions are by no means any new transactions effected by the putnidars in assertion of their rights as such, and that they are only such transactions as they were bound to report to in order to keep up the tenancies they had already, created before and to enforce their own rights in respect of those tenancies; and that one of these transactions at any rate covered some lands which admittedly belonged to Touzi No. 315. In our judgment these transactions are of no real importance; they add nothing to the weight of the materials on which the appellants' claim rests; and they detract nothing from the possession of the plaintiffs, for thereby the attornment the plaintiff's predecessor had obtained from the putnidars was not affected, nor was there any interruption of or interference with the plaintiffs' right to receive the rents under the three kabuliats which was all that title and possession any longer meant to them.

15. We find therefore, that the possession which the putnidars had in the lands of the ten kabuliats of 1285 B.S. referred to above was just the kind of possession which a tenant of a tenure would have when he has encroached upon lands, adjoining or near about his tenure, which belong not to his own landlord but to a stranger. The fact that the putnidars themselves were not in actual possession of the lands but were in possession of them through tenants makes no difference. We find also that they purported to take possession of the lands and settle them with tenants by taking kabuliats from them on the declaration that the lands appertained to their putni under the appellants' predecessors. We also find that such possession extended over a period well over twelve years. We find further that after that period was over and when as the result of the survey it was discovered that the lands fell outside the putni and belonged to the plaintiffs' predecessor they, in 1306 B.S. attorned to the Litter and that since then and up to the institution of the suit the plaintiffs' predecessor and thereafter the plaintiffs have been in possession of the lands through the said putnidars.

16. On these findings we have to consider, first, whether a title to the lands by adverse possession accrued to the putnidars, extinguishing the title of the plaintiffs' predecessor; and secondly, whether the appellants themselves, have acquired a title to the lands which can prevail over that of the plaintiffs.

17. Possession which the law regards as adverse possession sufficient for the

purpose has been explained in various cases, out of which a few of the leading ones will now be referred to. In the case of *Radhamoni Debi v. Collector of Khulna* 27 I.A. 136 : 27 C. 943 : 4 C.W.N. 597 : 2 B. L.R. 592 : 7 Sar. 714 (P.C.), Lord Robertson, said that the possession required must be adequate in continuity, in publicity and in extent. In *Basanta Kumar Roy v. Secretary of State for India* 44 I.A. 104 : 40 Ind. Cas. 337 : 44 C. 858 : 1 P.L.W. 593 : 32 M.L.J. 595 : 21 C.W.N. 642 : 15 A.L.J. 398 : 25 C.L.J. 487 : 19 B. L.R. 480 : (1917) M.W.N. 482 : 6 L.W. 117 : 22 M.L.T. 310 (P.C.), Lord Sumner observed:

It is impossible, says Lord Halsbury in *Marshall v. Taylor* (1895) 1 Ch. 641 : 64 L.J. Ch. 416 : 12 R. 310 : 72 L.T. 670 to speake with exact precesion about the degree of possession or dispossession that will do, unless you have regard, as Lord Justice Gotton said in *Leigh v. Jack* (1880) 5 Ex. D. 264 : 49 L.J. Ex. 220 : 28 W.R. 452 : 42 L.T. 463 : 44 J.P. 488, to the nature of the property.

18. In the case of *Secretary of State for India v. Krishnamoni Gupta* 19 I.A. 104 : 29 C. 518 : 4 B.L.R. 537 : 6 C.W.N. 617 : 8 Sar. 269 (P.C.). Lord Davey has pointed out that it would be contrary both to principle and authority to imply constructive possession in favour of a wrongdoer, when he has actually ceased to have possession of the subject-matter, so as to enable him to obtain a title by limitation, for when by submergence the subject-matter remains derelict the constructive possession of it is, if anywhere, in the true owner.

19. The doctrine that where a person without any colour of right wrongfully takes possession as a trespasser of the property of another, any title which he may acquire by adverse possession will be strictly limited to what he has actually so possessed is well established: *Nageshwar Bux Roy v. Bengal Coal Company* . And the applicability of this doctrine to minerals lying in different strata or seems (?) has been explained in AIR 1931 162 (Privy Council) .

20. It would also be profitable for the present purpose to quote on this part of the law a passage from the decision of the Judicial Committee in the case of *Secretary of State for India in Council v. Debendralal Khan* 61 I.A. 18 : 147 Ind. Cas. 657 : 6 R.P.C. 64 : AIR 1931 P.C. 17 : 11 O.W.N. 217 : (1934) M.W.N. 212 : 68 M.L.J. 239 : 39 L.W. 271 : 38 C.W.N. 337 : 12 R. 136 : 16 R.D. 107 : 59 C.L.J. 269 : 61 C. 262 (P.C.) a case of alleged acquisition of right by adverse possession to a fishery in a portion of a navigable river and so a case in which the requisite elements of such possession would have to be examined with the utmost; care and the doctrine that there can be no presumption of constructive possession in favour of the wrong-doer would have to be most rightly applied. Their Lordships after adopting the dictum of Lord Robertson in *Radhamoni Debi's* case 27 I.A. 136 : 27 C. 943 : 4 C.W.N. 597 : 2 B. L.R. 592 : 7 Sar. 714 (P.C.) observed thus:

The classical requirement is that thepossession should be nee vi nee clam nee precario. Mr. Dunne, for the Grown appeared to desiderate that the adverse possession should be shown to have been brought to the, knowledge of the

Grown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due diligence, to be aware of what is happening. If the rights of the Grown have been openly usurped, it cannot be heard to plead that the fact was not brought to its notice * * * It may be added that it is not necessary in order to establish adverse possession that the proof of acts of possession should cover every moment of the requisite period. Though the possession "be not proved to have continued every moment, month or year, yet ordinary possession will be sufficient ad Victoria cause although it be proposed in the terms of a continual possession, quia probat is extremis praesumuntur media, if the distance be not great" (Stair's Institution of the Law of Scotland IV 40, 20)." The fact of possession may be continuous though the several acts of possession create considerable intervals. How many such acts will infer the fact is a question of proof and presumption independent of prescription; Millar on Prescription p. 36. The nature of the requisite possession must necessarily vary with the nature of the subject possessed.

21. In Basanta Kumar Roy's case 44 I.A. 104, it was said by their Lordships:

An exclusive adverse possession for a sufficient period may be made out, inspite of occasional acts done by the former owner on the ground for a specific purpose from time to time.

22. But if the owner shows that he too has been exercising during the currency of his title, various acts of possession then the quality of these acts, even although they might have failed to constitute adverse possession as against another, maybe abundantly sufficient to destroy that adequacy or interrupt that exclusiveness and continuity which is demanded under the statute: Kuthali Moothavar v. Peringati Kunharan Kutty 48 I.A. 395 : 66 Ind. Cas. 451 : 44 M. 883 : 14 L.W. 721 : (1921) M.W.N. 847 : 41 M.L.J. 650 : 30 M.L.T. 42 : 26 C.W.N. 666 : 24 B.L.R. 669 : AIR 1922 P.C. 181 (P.C.).

23. The proposition that adverse possession need not be brought to the knowledge of the person against whom it is to operate has been reaffirmed in the case of AIR 1935 36 (Privy Council) , in which their Lordships have further pointed out that the proposition is nevertheless subject to the qualification that when the party claiming by adverse possession fails to show that the person possessed against by exercising due vigilance ought to have been aware of what was happening, his claim must fail, whether his possession be adequate in continuity or not. And in a later decision of the Judicial Committee in the case of Rjas Ali Quidioai v. The Special Manager, Court of Wards, Barampur Estate 61 C.L.J. 102 : 154 Ind. Cas. 27 : (1935) O.W.N. 178 : 1935 P.C. 53 : 41 L.W. 242: 68 M.L.J. 397 : (1935) A.L.J. 744, it has been observed that the principle of law is firmly established that the onus is on the person who bases his title on adverse possession to show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property

claimed.

24. Now, there is one point which has to be made perfectly plain at this stage. In this case it is not pretended that it can be maintained that the appellants themselves were in adverse possession as against the plaintiffs and their predecessor by remaining in possession through the putnidars with the result that thereby the title of the plaintiffs and their predecessor was lost and the appellants acquired title. Such a position could not possibly be maintained because there was no privity as between the appellants and the putnidars in respect of the possession which the latter had in the lands. There is no principle of agency or delegated authority which can possibly be invoked. And the doctrine that a tenant's possession is the possession of his landlord, which appears to have been carried rather too far in some old decisions, cannot, in our judgment, legitimately apply in cases of lands which do not in fact belong to the landlord. This is a case in which the appellants claim to have acquired title because the putnidars holding under them have acquired a title by adverse possession which the putnidars, it is said, must be held to have acquired for the benefit of the appellants. The first thing to be seen therefore, is whether the putnidar's possession was such as could in law create a title in their favour as against the plaintiffs. In such a case the doctrine applicable is that where a tenant holding under a particular landlord possesses lands belonging to another landlord, he can plead limitation against the latter only if he holds the lands against the latter and in denial of the latter's title. The putnidars, no doubt, were in possession of the lands through their tenants. But there were two distinctive features of their possession, neither of which should be overlooked. The first feature follows as a consequence of the doctrine that the adverseness of possession depends on the extent of the claim of right under which possession is obtained and kept. The claim of the putnidars was in assertion of a limited interest in the lands as being included under their patni, and their claim was thus restricted to a limited interest and so their possession was adverse to that extent only. If the lands belonged to the appellants but were outside the puini, the putnidars by holding the lands as such could never have, by efflux of time, acquired by adverse possession of their limited interest anything more than a right to hold the lands under the appellants. It is difficult to see how, because the lands belonged to the plaintiffs' predecessor, they can have, by their assertion of a limited interest, only acquired any absolute or proprietary title to the lands for the benefit of themselves or of the appellants. The second feature is that though possession itself is prima facie adverse and exclusive, there was not in the present case any indication that the putnidars, by declaring that the lands were included in their puini and remaining in possession of them through their tenants, did anything which amounted to a denial of the title of the plaintiffs' predecessor. There is an essential distinction between the declaration that they regarded the lands as belonging to the appellants and the denial that is necessary and which implies something more namely that they did not belong to the plaintiffs' predecessor.

25. The hostile character of the possession which is an essential condition for the

applicability of the doctrine referred to above is not established, unless it is established by clear and unequivocal evidence that there was an intention on the part of the putnidars to exclude the plaintiffs' predecessor even though he was the real owner. This ingredient, in our opinion, is entirely absent in the present case : and we may go further and say that the fact that the putnidars readily attorned to the plaintiffs' predecessor when as the result of the Survey in 1309 B.S. it was found that the lands fell within Touzi No. 100, goes a long way to prove the contrary. The true position in the eye of law, in our judgment, was this that the putnidars intended to hold the lands through their tenants in an interest subordinate to one set of persons, namely the appellants, under the belief that they were the real owners, and later on when they discovered that another person, namely the plaintiffs' predecessor was the real owner they began to hold under the latter. In such circumstances, in our opinion, neither any absolute title nor any limited interest, as against the plaintiffs or their predecessor could have accrued to the putnidars by reason of the possession they had.

26. In the view which we have just expressed, the second question namely whether by reason of acquisition of a title in the putnidars the appellants acquired a title in the lands, does not really arise. But as the proposition which Mr. Gupta has formulated and, or the correctness of which depends his clients claim of title to the lands falling within the plaintiffs' Touzi No. 100 has been argued before "us we propose to examine it. At the outset we may observe that if the proposition is accepted in its entirety it means nothing less than this that in a country like India where there is no end of gradation of interests, for every encroachment that an actual occupier of land makes on the lands of a neighbouring owner, a series of similar interests one above the other would be created in respect of the encroached lands, for the benefit of the actual occupier and if the successive holders of the interests superior to his own. In other words not merely would rights to the encroached lands be created in their favour but liabilities which are counterparts of such right would also accrue against them and to their prejudice. Mr Gupta saw the difficulties which the proposition, if accepted, would give rise to but his reply was that no such difficulties would arise in the present case. To test the correctness or otherwise of a proposed law, hypothetical or extreme cases may legitimately be taken into account. But apart from all this the question is, is the proposition correct? We have carefully examined the proposition and we are clearly of opinion that it is not correct.

27. Amongst the decisions of the Indian Courts which have been cited in support of the proposition, there are a few which have to be referred to in the first place. The first case is that of *Watson and Co. v. The Government* 3 W.R. 73. It is necessary to examine the facts of the case in order to see what exactly was laid down in it. Within the ambit of the putni meha of the plaintiffs there were certain ghatwali lands which were taken possession of by Government, and a separate jimma having been fixed on the Ghatwali tenure, it was recorded in the Collectorate as a distinct and separate estate; the ghatwa was not an encroaching upon the lands of the putni, on which proceedings being started in the Collect

orate the Deputy Collector included same of the lands within the boundaries of the Ghatwali tenure and prepared a map showing the same as such. The suit was instituted for the correction of the map and for the confirmation of the plaintiffs' mal right in the lands alleged to have been encroached upon. In that case the ghatival as well as the Government were defendants and they both separately pleaded limitation. It was held that the Government was entitled to take that plea. The proposition of law that was relied upon by the majority of the Full Bench in arriving at that conclusion, to take it from the judgment of one of the learned Judges, namely Lech, J., was enunciated thus:

If a talukdar paying a fixed jurnma to his zemindar, encroached upon the property of a neighbouring zemindar, he pays no increase of rent to his own landlord for lands so acquired: and if the injured zemindar sleep over his right and do not seek to recover possession within the period allowed by law the talukdar and the zemindar may effectually plead the law of limitation against him. Why should the ssme lute not be applicable to the case of these ghatwals? If a ghatival trespass, the party injured is bound to take steps to remedy the injury in proper time. If the sleep over his right why should he net lose his remedy as in ether ccases? The conduct of tie Ghaiwals may be reprehensible in appropriating the property of another, but it is no worse than that the talukdar, whom I have supposed under similar circumstances; and if the talukdar and his been indar could plead limitation against a arty seeking to recover possession, why should not the ghatwa I and Government his zemindar, be able to take the same plea?

28. And in the judgment of Shumbhoo Nath Pandit, J., there is a passage also which deserves to be quoted here.

Whether the lands in dispute are parts of the original ghatwali tenure or represent the encroachments of the ghatwals upon the zemindari lands it does not alter the state of things. Government can hold adversely to the plaintiff through the ghatwals, if they have held the lands as ghatwah".

29. All that this case lays down is that in such circumstances it is open to the encroaching tenant as well as his own landlord to plead in a suit by the injured landlord that the latter has lost his title; and that in certain circumstances (in that case, the ghatwals holding as ghatwals) it is open to the tenant's own landlord to assert that he himself has been in possession through his tenant. The case, in our opinion, does not go any further and lay clown that by reason of the title which may have accrued to the tenant by his adverse possession for the statutory period the proprietary right in defeasance of the title of the injured landlord must accrue to the tenants' own landlord.

30. In the case of Nuddyarchand Shaha v. Meajan 10 C. 820 Garth, C.J., Beverley, J., concurring, referred to the cases of Earl of Lisburne v. Davies (1866) 1 C.P. 259 : 1 H. & R. 172 : 35 L.J.C.P. 193 : 12 (N.S.) 340 : 13 L.T. 795 : 14 W.R. 333 and Whitman v. Humphries (1871) 7 C.P. 1 : 41 L.J.C.P. 43 : 25 L.T.

496 : 20 W.R. 79 as laying down that under the English Law an encroachment made by a tenant upon land adjoining to, or even in the neighbourhood of his holding is presumed, in the absence of strong evidence to the contrary, to be made for the benefit of the landlord, and. observed that this rule applies to all land so encroached upon, whether the landlord has any interest in it or not. And he then referred to the case of *Kingsmill v. Millard* (1855) 11 Ex. 313 : 3 C.L.R. 1022 : 105 R.R. 538, *Andrews v. Tlailes* (1853) 2 E. & B. 349 : 22 L.J.Q.B. 409 : 17 Jur. 621 : 95 R.R. 593 and *Gooroo Das Roy v. Issur Chunder Bose* 22 W.R. 246, and laid down that if a tenant during his tenancy encroaches upon the lands of a third person and holds it with his own tenure until the expiration of the tenancy, he is considered to have made the encroachment not for his own benefit but for that of his landlord; and if he has acquired a title against a third person by an adverse possession he has acquired it for his landlord and not for himself. In appreciating this last mentioned proposition of law which relates to a case of encroachment over lands of a stranger, the qualifying words therein "and holds it with his own tenure until the expiration of the tenancy" must not be overlooked. If these words are duly taken note of, it would be apparent that although the title which the tenant acquires over the lands of a stranger by encroachment is acquired by him for the benefit of his own landlord, the latter cannot avail of that benefit until the expiration of the tenancy. That this is so will appear clearly from the principles which the English authorities presently to be referred to, have laid down. Indeed the same principle appears to have been suggested by Markby, J., in the case of *Gooroo Das Roy v. Issur Chunder Base* 22 W.R. 246 which was referred to by Garth, C.J., as already observed, as being applicable also to a case of encroachment by the tenant on the lands of his own landlord. But as such a thing is obviously unjust, obliging, as it would do, the landlord to remain helpless till the termination of the tenancy, in the matter of seeking redress against the encroachment, the applicability of the principle to such a case was questioned by Garth, C.J., and he said in *Naddiyar Ghan'd Shako's* case 10 C. 820 (supra).

But we have consulted our brother Mitter (who was a party to the decision in *Gooroo Das Roy's* case 22 W.R. 246 (supra) as to this and we find it was by no means the intention of the Court in that case to lay down the rule thus broadly. It would indeed seem strange if, as a matter of law, a tenant were allowed without his landlord's permission, to appropriate, any land which adjoins his own tenure, and then when his landlord complained of the trespass and required him to give the land up, he were allowed to take advantage of his own wrong, and insist upon retaining possession of it, until the expiration of his tenure.

31. In the case of *Prohlad Teor v. Kedar Nath Bose* 25 C. 302 the remarks of Markby, J., in *Gooroo Das Roy's* case 22 W.R. 246 (supra) were referred to by Maclean, C. J., in these words:

I allude to the passage in which Mr. Justice Mark by says: "The true resumption as to encroachments made by a tenant during his tenancy upon the, adjoining"

lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding-continues and afterwards for the benefit of his landlord, unless it clearly appeared by some act done, at the time that the tenant made the encroachment for his own benefit" If that be intended to lay down the rule of English Law upon the point, I respectfully dissent.

The learned Chief Justice then said:

The rule as there laid down is applicable to cases where the encroachment is upon waste land or land of third parties, but I am not aware of any authority in the English Courts which lays down that rule as applicable to the case of encroachment by a tenant on other lands of his own landlord or that if an encroachment be made the tenant can by that encroachment constitute himself the tenant of his landlord of the land he has encroached upon.

32. It is, to our mind, clear upon the remarks quoted above that it is only if and when the tenancy of the putnidars would expire and they would "be called upon to give up the putni and at no time before then that the appellants would be entitled to claim the lands as their own and this the appellants would be entitled to do only if the title of the putnidars if any such title has been acquired by them, continues till then.

33. Turning to the authorities we find that the contrary opinion expressed by Lord Kenyon in *Doe v. Mulliner* (1795) 1 Esp. 460 : 5 R.R. 744, that it was a revolting idea that a tenant could by such encroachment make his landlord a trespasser, or by Lord Campbell in *Doe v. Massey* (1851) 17 Q.B.D. 373 : 20 L.J.Q.B. 434 : 15 Jur. 1031 : 85 R.R. 493, that it would be strange to say that the tenant steals for the benefit of his landlord, is no longer the law. In *Woodfall on Landlord and Tenant*, 22nd Edition p. 926 the law is stated thus:

Encroachments made by a tenant from the adjoining waste during the term are prima facie for the benefit of the tenant during the term and afterwards of his landlord unless it appear by some evidence that the tenant at the time they were made intended them for his own exclusive benefit, and not to hold them as he held the form to which they were adjacent.

34. In *Foa on Landlord and Tenant*, 6th Edn. p. 839 the proposition is thus expressed:

The above principle applies even to encroachments which terming no part of the lands as demised have been made by the tenant from waste lands adjoining them for as it is presumed that such encroachments are parts of the holding, he must render them as such at the end of the term where he has directly undertaken to do so or not.

35. In *Whitmore v. Humphries* (1871) 7 C.P. 1 : 41 L.J.C.P. 43 : 25 L.T. 496 : 20 W.R. 79, Willes, J. said:

By the rules of law applicable to this subject the landlord is entitled at the determination of the tenancy to recover from the tenant not only the land demised but also any land which the tenant may have added to it by encroachment from the waste such encroachment being deemed to be made by him as tenant as an addition to the holding and consequently for the benefit of his landlord unless it is made under circumstances which show an intention to hold it for his own benefit alone. End not as a part of his holding under the landlord * * * * It is not confined to cases where the encroachment is upon land to which the landlord is entitled, it applies to cases where the land encroached upon does not belong to the landlord. It is held in such cases that as between the landlord and the tenant the tenant must prima facie be deemed to have taken the additional land as part of his tenancy and for the benefit of his landlord * * * There is often great temptation and opportunity afforded to the tenant to take if adjoining land which may or may not be his landlord's and it is considered more convenient and more in accordance with the rights of property that the tenant who has availed himself of the opportunity afforded him by his tenancy to make encroachments should be presumed to have intended to make them for the benefit of the reversioner, except under circumstances pointing to an intention to take the land for his own benefit exclusively.

36. As regards the exact grounds of the doctrine there is a difference of opinion (see Per Thesiger, L.J. in *Attorney-General v. Tomline* (1880) 15 Ch. D. 150 : 43 L.T. 487. The judgment of Parke, B. in *Kingsmill v. Millard* (1855) 11 Ex. 313 : 3 C.L.R. 1022 : 105 R.R. 538, shows that he was inclined to discard the expression "for the benefit of the landlord" and to adopt Lord Campbell's definition in *Doe v. Massey* (1851) 17 Q.B.D. 373 : 20 L.J.Q.B. 434 : 15 Jur. 1031 : 85 R.R. 493, namely that the encroachment must be considered as annexed to the holding. There is an important observation of Parke, B. at p. 318 of the report which shows that if the tenant disclaims his landlord's title then from that point of time it will cease to be a part of the holding and limitation would run against the landlord. In the case of *Lord Hastings v. Saddler* (1898) 79 L.T. 355, the law has been further explained by Lord Russell, C.J. and Wills, J. There also the question arose after the tenancy had terminated.

37. In our judgment, there is no authority for the view put forward by Mr. Gupta. Indeed we think that the putnidars having openly and expressly attorned to the plaintiffs' predecessors and the latter having remained in possession of the lands through the putnidars in consequence of such attornment from 1306 B.S. up to the date of these suits, no question of the nature urged by Mr. Gupta really arises any longer and the plaintiffs' title is unassailable.

38. Finally Mr. Gupta has urged that the decrees that have been made in these three suits should be restricted to such lands of Touzi No. 100 as are covered by the kabuliats Ex. 1, 2 and 3; in other words, that the plaintiffs are not entitled to obtain the reliefs they have obtained in respect of such bits of land, which, though they appertain to their touzi are outside the said kabuliats. Such a

contention does not appear to have been taken in the memorandum of appeal in any of these appeals. Besides, the only decree which the plaintiffs have obtained to the prejudice of the appellants is a declaration of their title to the lands as appertaining to Touzi No. 100. That the lands appertain to that touzi is not disputed. And the title which the appellants put forward in respect of the lands not having been established, the plaintiffs' title must be subsisting. There can, therefore, be no bar conceivable to the plaintiffs obtaining the declaration. Were it a case of dispossession, necessitating a relief in the shape of recovery of possession, the plaintiffs would have been called upon to show their possession within the statutory period.

39. In Appeal No. 17 of 1933 arising out of Suit No. 34 there is a cross-objection, but it has not been passed.

40. We now take up Appeal No. 18 of 1933, which has arisen out of Suit No. 35. The plaintiffs in these suit were the same as in the other three suits. The plaintiffs case in this suit shortly stated, was the following: The first party defendant namely the defendant No. 1 one Rajjabali, executed a kabuliati in favour of the plaintiffs predecessor the Nawab Bahadur on the Falgoun 30, 1301, for the lands Schedule 1 of the plaint in this suit within (any) exception of two plots namely Plots Nos. 1855 and 1866 of the plaintiffs' chin a, agreeing to pay a rent of Rs. 56. The aforesaid two plots were separately held by Rajjabalirta jama of Rs. 4-10-0. Later on two jamas were amalgamated and became one tenancy at a rental of Rs. 60-10-0. Subsequently again Rajjabali executed a fresh kabuliati on Aswin 8, 1322, B.S. agreeing to an enhanced rental of Rs. 68-15-9. The plaintiffs' case was that at the District Survey and Settlement proceedings the jama of Rs. 60-10-0 as was recorded in the name of Rajjab Ali under their Touzi No. 100 but some of the lands of that jama namely those described in Schedule II of the plaint were excluded from it. These excluded lands, the plaintiffs alleged, were wrongly described in the said proceedings on being held in mirash and darmirash rights by Rajjabali under Touzi No. 315. It was also alleged that the lands of Schedule III of the plaint which were the plaintiffs' khas possession in Touzi No. 100 were also wrongly recorded in the said proceedings as held mirash right by Rajjabali under Touzi No. 315. The plaintiffs prayed that their title to and possession in the lands of Schedule II and III be declared, that it be also declared that the lands of Schedule II appertain to the ryoti holding of the defendant No. 1 under their Touzi No. 100, and that, the necessary correction be made in the khatians.

41. Written statements were filed in this suit on behalf of some of the defendants in this suit, including the defendant No. 1 and the appellants who were the fourth party defendants therein. The appellants are the same as in the other three appeals. The learned Judge has found that the kabuliats which Rajjabali executed in 1304 B.S. Ex. 4 : 1322 B.S. E. 14 were not extorted from him by pressure or coercion as was his defence. On the report of the Commissioner who held the local investigation he found that the lands of Schedules II and III fell within

Touzi No. 100 and not Touzi No. 315. As regards one of the plots, namely Dag No. 310, he found that it was already the subject-matter of Suit No. 33 and had been again included in this suit by mistake and so the plaintiff's claim in respect of this Dag should be dismissed. He held that there was no reliable evidence as regards the mirashi or durmirashi right which had been recorded in Rajjab Ali's favour. And so far as plaintiffs claimed that they were in khas possession of the lands of Schedule III he held that that claim was not made out.

42. On these findings the learned Judge has made a decree declaring, except as regards Dag No. 310, the plaintiffs' claim in respect of which he dismissed, the plaintiffs' zemindary right to the rest of the lands in this suit and also declaring that they should get a rent of Rs. 60-10-0 from the defendant No. 1 in respect of a jama comprised of the lands of Schedule I and II and that they should also get fair and equitable rent from the defendant No. 1 in respect of the lands of Schedule III their claim to khas possession in respect of the same being dismissed.

43. The only ground in support of this appeal is that the plaintiffs have not produced any paper in support of their claim as regards the lands outside the kabuliats Exs. 4 and 11. Now so far as these lands are concerned, the fact that they fall within Touzi No. 100 is concerned, is not disputed. The appellants' claim to the lands of Schedule I which was to the effect that those lands were part of Touzi No. 315 is no longer pressed. As regards the lands of Schedule II and III it was alleged in their written statement.

Long ago a predecessor-in-interest of these defendants granted a Nishkar right of the disputed lands except Plot No. 405-5 of the Settlement Khatian to a Mahomedan who in course of time sold his rights to a Hindu who made a gift of his rights to his wife Siva Sundari and who again sold the nishkar right of these lands to defendant No. 2 under whom the defendant No. 1 is now a mirasdar.

44. This nishkar right has not been established, and it is not suggested that there are any materials with the name which may support such a right. Plot No. 405/5 is the same as G.S. Plot No. 310 in respect of which the plaintiffs having got a decree in Suit No. 53 their claim "in the present suit in respect of that plot has been dismissed. The title of the plaintiffs having been found in the remaining plots concerned in the suit, and Eajjabali having been recorded as being in possession and no question of adverse possession having arisen, there is no reason why the decree such as it is, should be held to be wrong. We are unable to make out on what basis the rent was found but that question has not been raised before us.

45. The result is that the four decrees from which these four appeals have been taken are fit to be upheld. The Appeals Nos. 226 and 227 of 1931 and Nos. 17 and 18 of 1933 are accordingly dismissed with costs. The cross-appeal in Appeal No. 17 of 1933 is also dismissed. Hearing fee in Appeal No. 17 is assessed at one gold mohur and in Appeal No. 18 at three gold mohurs.