AMBIKA PRASAD THAKUR AND ORS.

v.

MAHARAJ KUMAR KAMAL SINGH AND ORS.

September 8, 1965

[K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.]

Evidence Act (1 *of* 1872), *s.* 114—*Existence of state of things proved—Inference of continuity backwards—Whether permissible.*

The appellants claimed title to the lands in dispute on the basis of s. 4(1) of the Bengal Alluvion and Deluvion Regulation XI of 1825. To establish their claim based upon the clause, the appellants had to prove that the lands were gained by gradual accession from the recess of the river and that the lands were accretions to plots in the possession of the appellants or their ancestors. Since the survey records from 1892 to 1909 showed that appellants' ancestors held some of the frontier plots, the High Court was asked to draw the inference that they held those plots during 1845 to 1863 when the lands in dispute accreted. The High Court refused to draw the inference.

In appeal to this Court,

HELD : If a thing or a state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and, in appropriate cases, backwards, may be drawn under s. 114, Evidence Act. But it was not safe to assume in the present case that a state of things during 1892 to 1909 existed during 1845 to 1863 since the interval of time was too long. [760 H]

Anangamanjari Chowdhrani v. *Tripura Sundari Chowdhrani,* (1887) L.R. 14 I.A. 101, 110, approved.

Observation contra in *Manmath Nath Haldar,* v. *Girish Chandra Roy,* (1934) 38 C.W.N. 763, 770 and *Hemendra Nath Roy Chowdhury* v. *Jnendra Prasanna Bhaduri,* (1935) 40 C.W.N. 115, 117, disapproved.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 435 to 437 of 1959.

Appeals from the judgment and decree dated April 24, 1953 of the Patna High Court in First Appeals Nos. 119, 192 and 189 of 1948 respectively.

S. T. Desai, U. P. Singh and *D. Goburdhan,* for the appellants.

G. S. Pathak, B. Dutta & K. K. Singh, for the respondents Nos. 2, 3(a), 3(d), 4(a) to 4(c), 5, 6, 7(a), 8 to 14, 15(a) to 15(c), 16, 18 to 20, 21(a), 21(b), 22, 23, 25 to 32, 33(a), 33(b), 34 to 38, 39(a) to 39(d), 40 to 42, 44, 45, 46(a) to 46(d), 47, 48, 49, 74 to 79 and legal representatives of respondent No. 1 (in C. As. Nos. 435 and 436 of 1959) and respondents Nos. 14

to 16, 18(a), 18(d), 19(a) to 19(c), 21, 23, 25, 26 and legal representatives of respondent No. 1 (in C.A. No. 437 of 1959).

Sarjoo Prasad, Kanhaiyaji and *A. G. Ratnaparkhi*, for respondent No. 80 (in C.As. Nos. 435 and 436/1959) and respondent No. 1 (in C.A. No. 437 of 1959).

D. P. Singh, for respondent No. 81 (in C.As. Nos. 435 and 436 of 1959).

The Judgment of the Court was delivered by

Bachawat J. After stating the facts of the case and discussing the evidence his Lordship proceeded :]

On the question of title also, the plaintiffs must fail. In the plaint, the basis of their claim of title was (a) occupation of 426 bighas 18 kathas and 9 dhurs of Dubha Taufir by their ancestor Naurang Thakur as occupancy tenant and the record of his rights in the survey papers of 1892 and (b) the oral arrangement with the Dumraon Raj. The first branch of this claim is obviously incorrect. The survey papers of 1892 do not record occupancy tenancy rights of Naurang Thakur in 426 bighas 18 kathas and 9 dhurs. In the High Court, counsel for the plaintiffs conceded that in the Khasra of 1892-1893 survey the plaintiffs' branch was recorded as tenant for about 19 bighas only. The oral arrangement is not established, and the second branch of this claim also fails. The Subordinate Judge did not examine the basis of the plaintiffs' claim of title. His finding in favour of the plaintiffs' title was based chiefly on (1) oral evidence, (2) depositions of witnesses in previous litigations, (3) possession, (4) an admission of the Maharaja. The oral evidence on the point is not convincing. The claim is not supported by the documentary evidence. The survey papers of 1892, 1895, 1904, 1909 and 1937 do not support the plaintiffs' claim of occupancy rights in the lands in suit. The depositions of witnesses in other litigations do not carry the matter further. The deposition of defendant No. 11, Ram Dass Rai, in Suit No. 217 of 1911 is of weak evidentiary value. Though admissible against him as an admission, it is not admissible against the other defendants. The other depositions relied upon do not satisfy the test of s. 33 of the Indian Evidence Act, and are not admissible in evidence. We have already found that the plaintiffs and their ancestors were not in possession of the disputed land since 1909. The oral evidence as to their possession before 1909 is not convincing, and we are not inclined to accept it. The documentary evidence does not support the story of their possession before 1909. With

regard to the admission of the Maharaja in Suit No. 247/10 of 1913 relating to the plaintiffs' title to 244 bighas, we find that in his written statement the Maharaja asserted his *khas zeraiti* rights and denied the alleged *guzashta kastha* rights of the plaintiffs' ancestors. It seems that in Bihar *'guzashta kasht'* means a holding on a rent not liable to enhancement. Later, on June 10, 1913, a petition was filed on his behalf stating that the plaintiffs' ancestors were tenants in occupation of the disputed land having *guzashta kasht* rights. The Maharaja was interested in the success of the suit, and it was necessary for him in his own interest to make this admission. The admission was made under somewhat suspicious circumstances at the end of the trial of the case when the arguments had begun. Though this petition was filed, the written statement of the Maharaja was never formally amended. In the circumstances, this admission has weak evidentiary value. In this suit, the plaintiffs do not claim tenancy right either by express grant or by adverse possession. Title cannot pass by mere admission. The plaintiffs now claim title under cl. (1) of s. 4 of Regulation XI of 1825. The evidence on the record does not establish this claim.

The claim of title based upon cl. (1) of s. 4 of Regulation XI of 1825 was not clearly made in the pleading. It was clearly put forward for the first time in the High Court. It was contended that the decision in Suits Nos. 22 to 31 and 199 of 1937 conclusively established this claim. The High Court rightly pointed out that those suits did not relate to any portion of the subject-matter in the present suit, and the decision in those suits cannot operate as *res-judicata*. The plaintiffs now contend that the judgment is admissible to show that the plaintiffs' ancestors asserted title to other Taufir lands as an accretion to frontier Dubha Mal plots under the Regulation and their claim was recognised. But the plaintiffs' ancestors did not consistently assert such a title. In Attestation Dispute Cases Nos. 1 to 253 of village Dubha they claimed title to the lands in suit as an accretion to their 77 bighas, and this claim was negatived.

The survey records of 1892, 1895, 1904 and 1909 disclose that the ancestors of the plaintiffs held some of the frontier plots of Dubha Mal. The High Court was, therefore, asked to draw the inference that their ancestors held those plots during 1845 to 1863 when the Taufir lands accreted. The question is whether such an inference should be drawn. Now, if a thing or a state of things is shown to exist, an inference of its continuity within a reasonably proximate time both forwards and backwards may sometimes be drawn. The presumption of future continuance is noticed in Illustration (d) to s. 114 of the Indian Evidence Act, 1872. In

A appropriate cases, an inference of the continuity of a thing or state of things backwards may be drawn under this section, though on this point the section does not give a separate illustration. The rule that the presumption of continuance may operate retrospectively has been recognised both in India, see *Anangamanjari Chowdhrani* v. *Tripura Soondari Chowdhrani* (1) and England, see *Bristow* B v. *Cormican*(2), *Deo* v. *Young*(3). The broad observation in *Manmatha Nath Haldar* v. *Girish Chandra Roy*(4) and *Hemendra Nath Roy Chowdhury* v. *Jnanendra Prasanna Bhaduri*(5) that there is no rule of evidence by which one can presume the continuity of things backwards cannot be supported. The presumption of continuity weakens with the passage of time. How far the presump- C tion may be drawn both backwards and forwards depends upon the nature of the thing and the surrounding circumstances. In the present case, the High Court rightly refused to draw the inference from the state of things during 1892 to 1909 that the ancestors of the plaintiffs held frontier plots of Dubha Mal in 1863. The High D Court pointed out that even during 1894 to 1905 the ownership of some of the plots had changed, and also that the frontier Mal plots and the corresponding Taufir plots were not always held by the same person. In 1845, part of the Mal lands was under water. The frontier Mal lands reformed between 1845 to 1863 were subject to annual inundation. It is well-known that settlements of E char lands are seasonal and temporary. There is a considerable gap of time between 1892 and 1845. It is not safe to assume that the state of things during 1894 to 1905 existed during 1845 to 1863.

In Ex. L-1(13), the Khatian of Mauza Dubha published on F January 2, 1912, the tenancies of serveral plots held by the ancestors of the plaintiffs are described as *Sharah Moaiyan* (at fixed rate of rent). The plaintiffs contend that this record read in conjunction with s. 50(2) of the Bengal Tenancy Act, 1885 shows that the ancestors of the plaintiffs must have held those plots from the time of the Permanent Settlement. The contention is based on G fallacious reasoning. Section 50(2) of the Bengal Tenancy Act, 1885 raises in a suit or proceeding under the Act a presumption that a raiyat has held at the same rate of rent since the Permanent Settlement, if it is shown that the rate of rent has not been changed during the last 20 years. Fixity of rent may arise not only from this presumption but also from express grant. An entry in the

H

1. (1887) L.R. 14 I.A. 101, 110.
2. (1878) L.R. 3 A.C. 641, 669, 670.
3. (1845) 8 Q.B. 63, 115 E.R. 798.
4. (1934) 38 C.W.N. 763, 770.
5. (1935) 40 C.W.N. 115, 117.

record of rights showing that the tenancy was at a fixed rate of rent does not necessarily mean that the tenant was holding the land from the time of the Permanent Settlement. The point based on the entries in Ex. L-1(13) was not taken in the Courts below, and the circumstances under which they came to be made and the question whether they relate to the frontier plots of Dubha have not been investigated. We think that this new point ought not to be allowed to be raised at this stage.

The suit as framed must fail, even if we presume that the ancestors of the plaintiffs' branch held some of the frontier plots in Dubha Mal between 1845 and 1863, when the Taufir lands accreted. The ancestors of the defendants—third party's branch also held numerous frontier plots of Dubha Mal between 1892 and 1909, and making the same presumption in their favour, it would appear that they also held numerous frontier plots of Dubha Mal between 1845 and 1863. The ancestors of the plaintiffs' branch and defendants—3rd party's branch separately held and enjoyed the several frontier plots of Dubha Mal, and on the plaintiffs' own case, the ancestors of the plaintiffs' branch would be entitled to the alluvial accretions in front of their plots and similarly, the ancestors of the defendants—3rd party's branch would be entitled to the alluvial accretions in front of their plots. The alluvial accretions of each plot must be apportioned by drawing perpendicular lines from its boundary points to the new course of the Ganges, so that each plot acquires a new river frontage in proportion to its old river frontage. The plaintiffs could claim no more than the alluvial accretions to the plots, held by the ancestors of their branch. In the Courts below, no attempt was made by the plaintiffs to apportion the accretions amongst the several frontier plots. Without further investigation, the alluvial accretions in respect of each plot cannot be ascertained. This is not a fit case for remand at this late stage. The further case of the plaintiffs that the defendants—3rd party lost their title to their portion of the Taufir lands is not established. It is neither alleged nor proved that the plaintiffs and the defendants—3rd party jointly owned and possessed the Taufir lands. In the absence of pleading and proof of joint title and possession, the plaintiffs' claim for recovery of the entire Taufir lands must fail.

Realising this difficulty, counsel for the plaintiffs made an entirely new case before us. He submitted that Dihal Thakur, the common ancestor of the plaintiffs and defendants—3rd party owned all the frontier plots of Dubha Mal between 1845 and

A 1863 and consequently acquired occupancy rights in all the Taufir lands accreted in front of his plots, those rights have now devolved jointly upon the plaintiffs and defendants—3rd party, and the plaintiffs and defendants—3rd party are jointly entitled to the entire Taufir lands. There is no trace of this case in the pleadings and the judgment of the trial Court. This case was not B made even in the High Court. On the contrary, the plaintiffs' case all along has been that the branches of the plaintiffs and defendants—3rd party separately possessed and enjoyed their respective plots. Moreover, we are not inclined to draw the presumption that Dihal Thakur owned all the frontier plots of Dubha Mal between 1845 and 1863. Even if we assume that the des- C cendants of Dihal Thakur owned the frontier plots in 1892 or even in 1882, we are unable to infer that Dihal Thakur held them between 1845 and 1863. The case is made here for the first time, and was not the subject-matter of an enquiry in the Courts below. There is neither pleading nor proof that Dihal Thakur held any of the frontier plots of Dubha Mal at any time, D or that the branches of the plaintiffs and defendants—3rd party inherited their respective holding from Dihal Thakur.

To establish their claim based upon cl. (1) of s. 4 of Regulation XI of 1825, the plaintiffs must also prove that the Taufir lands were gained by gradual accession from the recess of the E river. Having regard to our conclusions on the other points, we do not wish to express any opinion on this question. Even if the Taufir lands were gained by gradual accession, this gain did not accrue for the benefit of the plaintiffs. The plaintiffs have failed to establish that they or their ancestors held any plot or plots to which the accretions were annexed.

F

The plaintiffs have failed to prove their title based upon cl. (1) of s. 4 of Regulation XI of 1825. They have also failed to establish their claim of title based upon oral arrangements. Their claim of title based upon occupation of the disputed lands is also not established. They have failed to prove that they were G in occupation of the disputed lands. Moreover, mere occupation does not confer tenancy rights.

The result is that Civil Appeals Nos. 435 and 436 of 1959 must fail.

C. A. Nos. 435 *to* 437 *dismissed.*