Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mohima Chunder Mozoomdar and others v. *Mohesh Chunder Neogi and others from the High Court of Judicature at Fort William in Bengal; delivered November 20th*, 1888.

Present:

LORD FITZGERALD.
LORD HOBHOUSE.
SIR RICHARD COUCH.
MR. STEPHEN WOULFE FLANAGAN.

[*Delivered by Mr. Stephen Woulfe Flanagan.*]

THIS is an Appeal from a decree of the High Court of Bengal dated the 6th March 1886 reversing a decree of the lower Court of the 10th June 1884. The action in this case was brought to recover possession of certain lands which need not be particularly described. It is sufficient to say that they are lands in the possession of the Respondents. A great deal of evidence has been given on the one side and the other as to the original title to these lands which were claimed by the Plaintiffs as part of "Rajapore," and by the Defendants as part of "Machuakandi." It appears to be unnecessary to go into that title. The question is whether, assuming the Plaintiffs to have been at some time lawfully in possession, the plaint which was filed on the 30th July 1883, was filed within 12 years as required by the 142nd article of the Limitation Act of 1877 from the date of their dispossession or discontinuance of possession.

It is conceded by the Plaintiffs that in fact they were dispossessed, or their possession was

A 56449. 125.—12/88. Wt. 2331. E. & S. A

discontinued from the year 1875, a period of eight or nine years prior to the bringing of this suit, and that the Defendants have ever since been in undisturbed possession; but they allege that they were in possession within four years or more immediately prior to that date.

Now, the only question in this case being one of fact with reference to the Limitation Act, it will be well to turn to the judgement of the Judge of the lower Court and see upon what grounds he based his decision in favour of the Plaintiffs and to contrast these with the reasons of the High Court reversing his decision. After referring to certain chittas, (which in their Lordships' opinion are not evidence of possession within the time in question) he goes to the substantial question upon which his decision is based. He says:—"It is also to be "observed that the title of the Defendants "Nos. 1, 3, 4, and 5, to the mouzah Machua- "kandi was created just after the agrarian "disturbance in this district. This circumstance "alone is sufficient to lead me to believe that "the Defendants took the advantage of the "opportunity to revive their lost right to "the mouzah Machuakandi by inducing the ryots "of the chur Rajapore to admit them as their "landlords." Then he says:—"It was argued "by the Defendants' pleader, that the Plaintiffs "failed to prove collection of rent from their "alleged tenants, as they did not file any "collection papers, and their loss is not properly "accounted for. It is proved by the Plaintiff "No. 1, and the Plaintiffs' witnesses, that in "1279 the Plaintiffs' cutchery house was blown "down by rain and storm, and greater part of "the papers were lost, and the Defendants' "witness No. 1 deposed that occasionally he and "his brother Kali Komul used to take papers "from their ijmali serishta, and he made over

" certain papers to his co-sharers at the time of " instituting this suit."

Now, merely making a short comment on the first passage which has been just read, it appears to their Lordships that the question for decision is not whether or not the title of the Defendants was created just after the disturbance or otherwise, but when were the Plaintiffs dispossessed or when did they discontinue possession ? The Plaintiffs by their own witnesses have admitted in fact, that their possession was discontinued, at all events, in July 1875. By one of their witnesses, their principal witness, Gomashta Panaulla, it appears that in fact they were dispossessed in the year 1873. Many witnesses were examined on behalf of the Plaintiffs in this case, to prove their possession within the four years prior to 1875, but it is not necessary to go through their evidence in detail. These witnesses may be grouped in fact into two classes : witnesses who either are or have been in the employment of the Plaintiffs, or witnesses who have been tenants upon the lands—witnesses who in fact had been dispossessed by the Respondents, whose evidence therefore, when it has to be balanced against other evidence of a contrary tendency, is subject to the remark that it is in accordance with their interests. It is a very singular fact in this case that there appears to be no documentary evidence whatsoever in support of the case which has been made by the Plaintiffs here, to show their possession or their receipt of rent for a period within 12 years before the time when the action was brought. Many documents were proved in support of their title to the lands some years previous to that date, but none to prove their possession. The statement by the witnesses in reference to the cyclone in the year 1872 and the destruction of their house and the place where they alleged all the papers were

kept, and the scattering of those papers, is certainly one which cannot be relied on in a case of this kind as proving that documentary evidence of value in support of their possession had ever existed, nor as affording a sufficient reason for its non-production. It is also a singular circumstance in reference to the destruction of their cutcherry house by the cyclone in the year 1872 that all the earlier papers, namely, the papers which were referred to at great length in the case as proving the title of the Plaintiffs as distinguished from their possession are all forthcoming. How it is that they were not destroyed with all the other papers in that cyclone is not explained, but it is a remarkable thing and throws the greatest possible doubt and suspicion on the allegation in reference to the destruction of the papers, that papers of that class should be all forthcoming and that the material papers, those relating to possession, are not produced at all. Bearing in mind that the lands are all cultivated and in the possession of tenants, there is also another class of papers which certainly ought to have been produced, and have been either in the possession of the Plaintiffs, if they really existed, or in the possession of their tenants, but which have not been produced. These papers are, amongst others, the receipts for the rents alleged by the Plaintiffs and their tenants to have been paid for the years between the cyclone of 1872 and the year 1875, when they allege their possession first determined; these, although alleged to exist, were not produced. The learned Judge then says:—
"When I showed above that the Plaintiffs are
" the rightful owners of the disputed land, it is
" for the ryot defendants to show that they are
" entitled to retain possession of these lands."
That, as a proposition of law, is one which hardly meets with the approval of their Lordships.

This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the Defendants are admittedly in possession, and *a fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the Plaintiff to prove his own title. The Plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that in this case, the onus is thrown upon the Plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within 12 years before the commencement of the suit, namely, for the two or three years prior to the year 1875, or 1874, and that it does not lie upon the Defendants to show that in fact the Plaintiffs were so dispossessed.

Now, turning from the judgement of the Judge of the Court below, to the reasons which were given by the Judges of the High Court for the decree they made reversing the decision of the Court below and dismissing the Plaintiffs' suit with costs, the Court says in reference to the Law of Limitation, "This suit was instituted in the "month of Srabun 1290, and it was therefore "for the Plaintiffs to show that they had been "in possession of the land in suit since Srabun "1278. Now, admittedly, according to the "Plaintiffs, they were ousted in the year 1282; "that is, eight years before the institution of "the suit. And we find from the evidence, "and particularly from the evidence of their "gomashta Panaulla, that virtually they admit "having been dispossessed so far back as "1280." That would be the year 1873. "In "that year, according to the evidence for the "Plaintiffs, their tenants first grew refractory, "and it does not appear that the Plaintiffs ever "collected rent, or were in possession after that

" year. That being so, it appears to us that a " very heavy onus lay upon them to prove that " they were in possession during the two years " previous, that is, from 1278." With that observation their Lordships entirely concur, " and we are further of opinion that they have not succeeded in proving this." In that observation their Lordships also concur. " The only " documentary evidence adduced on this point is " a chitta of the year 1280. This chitta " purports to have been prepared by one Tamiz " Sircar, who though alive, has not been called." What its contents may have been it is impossible from the record here to collect, but, at all events, this chitta having been prepared by Tamiz Sircar, who appears to be alive, Tamiz Sircar was not produced. " His signature on " the paper has been proved by the gomashta " Panaulla. But whether the chitta was really " prepared by Tamiz Sircar and under what " circumstances, and how far it would be evi- " dence of possession, are matters upon which " there is really no evidence. This being so, it " may be said that, practically, there is no " documentary evidence whatever of the Plain- " tiffs' possession." Then the Court goes on to say: " No dakhilas, kabuliyats, or pottahs have been put in." Their Lordships have already made a comment as to the non-production of some of these documents. " The only evidence on the " question of possession consists of certain oral " statements made by the servants and tenants " of the Plaintiffs. These tenants admit that " they are now holding the lands of *usli* Raja- " pore, and that they would benefit if the " Plaintiffs succeed in this suit. We think that " very little reliance can be placed upon the evi- " dence of such witnesses, unsupported as they " are by a single scrap of documentary evi- " dence." Then the learned Judges, commenting

on the manner in which the absence of documentary evidence is attempted to be accounted for, namely by a reference to the cyclone and the suggestion that one of the Defendants having become a lunatic, he had got possession of some material papers; but why the papers, whether in his possession or that of his family, if the papers ever got in his possession, should not have been produced and proved has not been accounted for or explained in any way, say:—"We think that "neither of these reasons is satisfactory; and in "the absence of better evidence, we think the "Plaintiffs have not discharged the onus that lay "upon them." Then the Judges of the High Court go on to say:—"Now it is quite true that, "as regards the small piece of land, measuring "ten or fifteen pakhis, which was the subject of "the proceedings under Section 530 Code of "Criminal Procedure, the Plaintiffs' claim would "not be barred, and if those proceedings had "been put in, or if there was any evidence to "show where these ten or fifteen pakhis were "situated, the Plaintiffs would be entitled to "a decree for that quantity of land. There "is however no such evidence, and the mere "fact that the Plaintiffs retained possession "of an insignificant portion of the land, "will not save their claim as regards the "rest from being barred." It appears to their Lordships that the High Court in making that observation in reference to the criminal proceedings must have mistaken the decision of the magistrates, because so far as appears from the judgement in that case, it would seem that in point of fact the magistrate finds that for a period of at least four years prior to the institution of those proceedings there had been peaceable possession on the part of the owners or ryots or tenants of the land of Mouzah Machuakandi, and this finding, so far

from being in support of any contention that these particular lands, whatever they may have been, were in the possession of the tenants or ryots of Rajapore, is distinctly to the contrary. Upon the whole, in this case, their Lordships, without going further into the matter, or considering the Defendants' evidence which is, however, cogent to show that they have in fact been in possession for more than 12 years prior to the filing of the plaint, are of opinion that the appeal from the decision of the High Court of Bengal should be dismissed, and the decree appealed from affirmed, and they will humbly advise Her Majesty accordingly. The Appellants will pay the costs of the appeal.