

SUPREME COURT OF INDIA

Ambika Prasad Thakur

Vs.

Ram Ekbal Rai

C.A.Nos.435 to 437 of 1959

(K. Subba Rao, J. R. Mudholkar and R. S. Bachawat, JJ.)

08.09.1965

JUDGEMENT

BACHAWAT, J.:-

1. Civil Appeals Nos. 435 to 436 of 1959 are appeals, which arise out of Title Suit No. 10 of 1942 of the Court of the First Subordinate Judge of Arrah and F. A. Nos. 119 and 192 of 1948 of the High Court of Patna. The plaintiffs claim recovery of possession of lands measuring 614 bighas 12 kathas 16 dhurs in village Dubha Taufir appertaining to Bheria Mahal Tauzi No. 1298 in the District of Shahabad. The revisional survey of 1937 showed that the area of Dubha Taufir then was 738 bighas 17 dhurs. Two strips of Dubha Tanfir measuring about 35 and 77 bighas respectively are not the subject matter of the suit. The claim in this suit is in respect of the remaining portion of 614 bighas 12 kathas 12 dhurs.

2. Mahal Bheria consisted of 12 mauzas including Dubha, Ganguauli and Kharha Tanr lying to the west of the Ganges. The Mahal was a permanently settled estate, and the Dumraon Raja was its proprietor. The revenue-paying Mal land of the Mahal was measured in the 1845 revenue survey.

Part of the Mal land was then in the bed of the Ganges. Between 1845 and 1863 due to the recession of the Ganges to the east the submerged Mal land and considerable Taufir or excess land emerged from the bed of the river. The Tauf land was temporarily settled with the Maharaja by the Government under Regulation VII of 1822 read with Regulation IX of 1825. The area of Dubha Taufir settled with the Dumraon Raja was about 720 bighas in 1866, 514 bighas in or about 1907, 36 bighas in 1913. The causes of the fluctuations in the area were alluvion and dilution by the action of the river Ganges, declaration of part of the Taufir as Mal land in 1909 and erroneous treatment of a large portion of the Taufir in 1913 as an appurtenance to Sheopur Diara.

3. In Shahabad District, the general course of the river is from west to east, but near Dubha its course is from north to south. Nevertheless, in the description of the boundary of Dubha and Dubha Taufir in depositions, documents and orders, the Ganges is referred to as lying to the north of the village. The popular north is really the magnetic east.

4. From about 1900 onwards, there is a shifting stream of water called the Bhagar running through low-lying lands in Dubha Taufir. During 1920 to 1930, the Ganges receded further to the east, and the Bhagar dried up. The Ganges was the boundary between District Shahabad on the east and District Ballia on the west, but since the settlement survey of 1934-35, the 1882 line of the Ganges is the dividing line between the two Districts.

5. The plaintiffs and defendants 3rd and 4th parties are descendants of one Dihal Thakur. The defendant 5th party is the Maharaja of Dumraon. The defendants' 1st party are pattadars claiming to be tenants of 497 bighas of the disputed lands under the Maharaja. The defendant's 2nd and 4th parties are co-sharers of the defendants 1st party. The defendants 1st, 2nd, 4th and 5th parties contest the plaintiffs' claim.

6. The case of the plaintiffs finally put forward in this Court is that between 1845 and 1863 Dihal Thakur, the common ancestor of the plaintiffs and defendants 3rd party held all the frontier plots of village Dubha as occupancy tenants under Dumraon Raja and by Cl. (1) of S. 4 of Regulation XI of 1925 acquired occupancy tenancy rights in the entire Dubha Taufir accreted in front of his plots between 1845 and 1863 and thereafter, and his rights in the Taufir lands devolved upon the plaintiffs and the defendants 3rd party jointly. The plaintiffs claim exclusive title to occupancy rights in the entire Dubha Taufir under alleged oral arrangements with the Dumraon Raja. Though they disclaim title by adverse possession, they claim before us title as occupancy tenants by virtue of their alleged occupation of the Taufir lands. They allege dispossession on May 27, 1940 within 12 years of the suit. The contesting defendants dispute the plaintiffs' title, and also content that the suit is barred by limitation.

7. The Subordinate Judge held that the plaintiffs are occupancy tenants of the disputed lands and the suit is not barred by limitation. Unfortunately, he did not examine the basis of the plaintiffs' title. In

the High Court, counsel for the plaintiffs claimed that their ancestors were occupancy tenants of frontier plots of village Dubha before 1863 and by the first clause of S. 4 of Regulation XI of 1825, they acquired tenancy rights in all the Tanfir lands accreted in front of those plots. The High Court negated this claim and also the claim based upon the alleged oral arrangements with the Dumraon Raja, and held that the plaintiffs' title to the lands in suit was not established and the suit was barred by Art. 47 of the Indian Limitation Act. 1908.

8. The earliest documents on the record are the rent receipts. Exs. 5, 5 (c), A-3 (1), A-3 (II), B-3 (11) dating from 1293 false, showing that several Thakurs separately held as tenants several plots of land in Dubha. For purposes of the settlements of the Dubha Taufir with the Dumraon Raja, a Survey was made in 1892, and as more lands were brought under cultivation, a revised survey was made in 1895, and as more lands were brought under cultivation, a revised survey was made in 1895. A fresh survey was made in 1904. The settlement records disclose the following holdings of land in Dubha Taufir :

	1892	1895	1904
Ancestors of plaintiffs	28B-6K-12D	50B-8K	49B-3K-17D
Ancestors of defendants			
3rd party	38B-12-D	105B 5K-15-D	87B 13K-7D
Other parties	14B-17K-18D	13B 15K 3D	20B 7K-15D
Sandy area	533B-10K-ID	107B 10K-17D	356-B-15K-3D
	(Including Chhaur)		
Total	614B-15-K-3D	576B-19K-5D	514B - 2D

By 1907, the ancestors of the plaintiffs and defendants 3rd party were cultivating more alluvial lands in front of their holdings, and their claim of occupancy tenancy rights in the newly accreted lands under the first clause of S. 4 of Regulation XI of 1825 was upheld against the Dumraon Raja in Suits Nos. 22 to 31 and 139 of 1907. By 1909-1910, considerable Taufir lands were washed away, and moreover, a part of the Dubha Taufir was declared to be Mal land. The records of the cadastral survey of 1909-1910 disclose that only about 35 bighas of land were tenanted and the remaining area measuring 355 bighas was uncultivated sandy land. Most of the plots in the strip of 35 bighas were recorded in the names of the ancestors of the plaintiffs and defendants 3rd party. In 1909-1910, the channel of the Bhagar ran close to the strip of 35 bighas. In 1909 the Sheopur Babus as lessees of Sheopur Diara in Ballia District on the eastern bank of the Ganges claimed that

the entire land of Dubha Taufir between the Bhagar and the Ganges appertained to Sheopur Diara. On March 10, 1909, by an order under S. 145 of the Code of Criminal Procedure, the Sheopur Babus were declared to be entitled to possession of the disputed land. On October 12, 1909, the ancestors of the plaintiffs instituted a suit for declaration of their title against the Sheopur Babus. This suit was subsequently withdrawn, and on September 20, 1911, the ancestors of the plaintiffs and defendants 3rd party instituted Suit No. 247/10 of 1911/1913 against the Sheopur Babus. The plaint and the judgment of the trial Court show that the subject-matter of this suit was 244 bighas 11 kathas 12 dhurs of land between the Bhagar and the main stream of the Ganges and bounded on the west (popular south) by the Bhagar and thereafter Dubha Taufir. On June 28, 1913, the trial Court decreed the suit, and on November 8, 1913, the ancestors of the plaintiffs and defendants 3rd party obtained possession of the disputed land through Court. On June 17, 1915, the appellate Court set aside the decree of the trial Court, and dismissed the suit on the ground that the land did not appertain to Dubha Taufir and was not in possession of the ancestors of the plaintiffs and defendants 3rd Party and on November 30, 1915, the Sheopur Babus were restored to possession of the disputed land. The appellate decree was confirmed by the High Court.

9. In the meantime, another S. 145 case in respect of Gangauli Taufir and Kharha Tanr was decided in favour of the Sheopur Babus. In May 1916, Lal Mohar Tahkur, an ancestor of the plaintiffs, instituted Suit No. 198 of 1916, against the Sheopur Babus claiming title to Ganauli Taufir and Kharha Tanr Taufir and the Dumraon Raj instituted Suit No. 193 of 1916 against the Sheopur babus claiming title to 1000 bighas of lands in Dubha Taufir, Gangauli Taufir and Kharha Tanr Taufir. The subject-matter of Suit No. 193 of 1916 included the 244 bighas in dispute in Suit No. 247/10 of 1911/1913 lying between the Bhagar and the Ganges. The map of Misrilal exhibited in this suit purported to show that the bed of the Bhagar was about 500 yards away from the boundary of the 35 bigha strip. In agreement with the High Court, we think that Misrilal's map is incorrect. The Bhagar then ran close to the 35 bigha strip. On September 30, 1924, the trial Court decreed Suits Nos. 193 and 198 of 1916. The Court found that the 244 bighas appertained in Dubha Taufir. On April 30, 1925, in execution of the decree in Suit No. 193 of 1916, the Dumraon Raja obtained possession of the entire 1000 bighas of land including 244 bighas of Dubha Taufir. In execution of the decree in Suit No. 198 of 1916, Lal Mohar Thakur obtained possession of the lands in Gangauli Taufir and Kharha Tanr. There was a single warrant for delivery of possession of 1000 bighas in Suit No. 193 of 1916. In view of the fact that Lal Mohar Thakur was given actual possession of the lands of Ganguli Taufir and Kharha Tanr, the Dumraon Raj must have obtained only constructive possession of those lands. But the Thakurs had been dispossessed of the 244 bighas of land in Dubha Taufir in November 1915, and since then the Sheopur Babus were in khas possession of those lands. When the warrant for delivery of possession in Suit No. 193 of 1916 was executed, khas possession of the 244 bighas of land in Dubha Taufir was given to the Dumraon Raj. The Bhagar was now gradually drying up and 77 bighas of land on the northwest of Dubha Taufir became fit for cultivation. On May 27, 1925, an order under S. 145 confirmed the possession of one Dadul Thakur in respect of this strip of 77 bighas. The ancestors of defendants 3rd party instituted Suit No. 115 of 1925 against the ancestors of the plaintiffs for the recovery of the 77 bighas, but the suit was dismissed on May 31, 1927. On July 3, 1928, the ancestors of the defendants 3rd party instituted Suit No. 34/21 of 1930/1928 for partition of lands in Dubha Taufir. The suit was dismissed on August 18, 1930. The judgment and decree show that the subject-matter of the suit was the entire land of Dubha Taufir excluding 35 bighas surveyed in 1909. The entire land was said to measure about 325 bighas, of which 31 bighas roughly were identified with the 77 bighas (the subject-matter of Suit No. 115 of 1925 and the order under S. 145 dated May 27, 1925) and the balance land was assumed to be the

244 bighas (the subject-matter of Suit No. 247 of 1911). In fresh proceedings under S. 145 started on January 17, 1931, the S. D. O. attached lands of Dubha Taufir measuring 335 bighas. The orders passed in the proceedings show that the subject-matter of the dispute was the entire land of Dubha Taufir excluding the 35 bighas. By an order dated September 1, 1931, the S. D. O. excluded the 77 bighas from the proceedings, and declared the Dumraon Raj to be entitled to the remaining land of Dubha Taufir, measuring about 258 bighas and assumed to be identical with 244 bighas (the subject-matter of Suit No. 247 of 1911), and this order was confirmed by the High Court on March 18, 1933. It is to be noticed that the subject-matter of Suit No. 247 of 1911 was the land between the Ganges and the Bhagar, measuring about 244 bighas. The Bhagar was then alive and vigorous. In the 'twenties, the Bhagar gradually dried up, and the dried up bed of the Bhagar in addition to the land between the Bhagar and the Ganges said to measure in all about 244 or 258 bighas was the subject-matter of the partition suit and the S.145 case of 1931. The areas were given on a rough estimate and not by actual measurement. The area of Dubha Taufir was then in a state of flux and was gradually increasing. On November 18, 1931, the Dumraon Raj let 497 bighas of lands of Dubha Taufir to the defendants 1st party by 10 separate pattas. In the meantime, the Ganges was receding to the east and in May 1932 its area was 1,183 bighas. By an order dated May 2, 1932, the S. D. O. attached 848 bighas of land under S. 145 after excluding the 335 bighas (the subject-matter of the order dated September 1, 1931) and directed demarcation of the 335 bighas. On October 26, 1932, three persons were killed in a riot over the possession of the disturbed area. The Settlement Officer could not then identify the 335 bighas, and on July 25, 1933, the S. D. O. directed that proceedings should be drawn up under S. 145 in respect of the entire Dubha Taufir. By then, the area of Dubha Taufir had become 2,054 bighas, and the entire land was attached. In 1934-35, the 1882 line was fixed as the dividing line between Dubha Taufir and Sheopur Diara. By an order dated August 22, 1935, in Survey Objection Case No. 41/103-A, the Settlement Officer identified the two parcels of 77 and 258 bighas. By his order dated May 21, 1935 in Attestation Disputes Nos. 1 to 253 of Dubha Taufir the Settlement Officer had already directed that the 77 bighas should be recorded in the names of Ambica Thakur and other Thakurs and the 258 bighas together with an accretion of about 363 bighas should be recorded in the names of the defendants 1st party. Accordingly, the entire lands of Dubha Taufir excluding the parcels of 77 and 35 bighas were recorded in the names of the defendants 1st party in the record of rights finally published on June 26, 1937. In the mean time, by an order dated June 11, 1936 in the pending S. 145 proceedings the S. D. O. held that in view of the decision of the Settlement Officer which should be respected by the parties, there was no further possibility of breach of the peace, and he directed that the proceedings be dropped under S. 145 (5) and the property be released from attachment. However, on February 5, 1938 there was a violent riot in connection with the possession of Dubha Taufir and three persons were killed. On March 4, 1938, fresh proceeding under S. 145 with regard to the disturbed area was drawn up after excluding the parcels of 77 and 258 bighas, and by an order dated May 27, 1940, the S. D. O. declared the defendants 1st party to be entitled to the possession of the remaining area. On April 20, 1942, this suit was instituted.

10. The plaintiffs alleged that (1) before the institution of Suits Nos. 193 and 198 of 1916 the then ancestor of the plaintiffs and of the defendants 3rd party approached the then Maharaja of Dumraon, and there was a tripartite oral arrangement between the parties to the effect that the Maharaja would institute a suit against the Sheopur Babus for recovery of possession of 244 bighas of Dubha Taufir, the ancestors of the plaintiffs and defendants 3rd party would render the Maharaja every possible help and meet the litigation expenses and in case of a successful verdict in favour of the Maharaja, the 244 bighas would be allowed to remain in possession of the ancestors of the plaintiffs and

defendants third party as their tenancy land, (2) that the ancestor of the defendants 3rd party failed to observe the terms of this arrangement and the ancestor of the plaintiffs alone was compelled to give all assistance and to met the entire expenses, (3) that the ancestor of the defendants 3rd party having become disentitled to the benefit of the oral arrangement it was subsequently arranged between the Maharaja and the ancestors of the plaintiffs that the entire land should continue to be the latter's tenancy land, and (4) that on the successful termination of Suit No. 193 of 1916, the Maharaja recognised the ancestor of the plaintiffs to be the tenant of the land and the defendants 3rd party were dispossessed from it. The plaintiffs adduced oral evidence in support of this agreement. In agreement with the High Court, we think that the oral agreement is not established. The then Maharaja of Dumraon is now dead. It is not explained why these important oral arrangements were never reduced into writing. The alleged oral agreements were set up for the first time in 1937. The plaintiffs did not produce any document showing that their ancestor ever paid any monies to the Maharaja on account of the litigation expenses or that after the termination of Suit No. 193 of 1916 the Maharaja recognised their ancestor as the tenant.

11. We thus find that in 1909-1910 the ancestors of the plaintiffs and defendants 3rd party were in possession of their respective plots in the narrow 35 bighas strip on the western boundary of Dubha Taufir. The Bhagar then ran close to this narrow strip. The rest of the Dubha Taufir including the bed of the Bhagar was a sandy waste measuring about 355 bighas. The bed of the Bhagar occupied a considerable area. In 1909, there was a scramble for possession of the remaining land of the Dubha Taufir between the Bhagar and the Ganges. The Sheopur Babus were successful in obtaining possession of the land and from 1909 right up to 1925 barring an interval of two years between November 1913 and November 1915 the Sheopur Babus retained possession of the disputed land. The plaintiffs led oral evidence to show that they retained possession from 1909 to 1925, but we are not prepared to accept this testimony. On a rough measurement, the area of the disputed land was then given as 244 bighas and later 258 bighas. As a matter of fact, this disputed land represented practically the entire Daubha Taufir barring the narrow western strip of 35 bighas and the bed of Bhagar. We are not prepared to accept the plaintiffs case that a considerable distance separated the Bhagar from the strip of 35 bighas and that the plaintiffs were in possession of the intervening land. On April 30, 1925, Sheopur Babus lost possession and the Dumraon Raj obtained khas possession of the disputed land. The Dumraon Raj continued to be in khas possession of this disputed land as also of other newly accreted land until 1931. In the absence of the records of the Dumraon Raj, it is not possible to say that this land was then in the zerait cultivation of the Raj. But we are not prepared to accept the oral evidence led on behalf of the plaintiffs that they or their ancestors were in possession of the disputed land, or that the Raj recognised them as tenants. The Raj had recovered the land at considerable expense. The plaintiffs did not pay any nazrana or rent to the Raj, and it is not likely that in these circumstances, the Raj would recognise them as tenants or allow them to cultivate the lands. Thus, from 1909 to 1931 barring two year between 1913 and 1915, the plaintiffs and their ancestors were not in possession of any portion of the land between the Bhagai and the Ganges. As regards the bed of the Bhagar, the matter stood thus. By 1925, the Bhagar was drying up and the plaintiffs ancestors took possession of a strip of 77 bighas and successfully retained that strip. But the plaintiffs have failed to establish that they or their ancestors were in possession of any portion of the Dubha Taufir other than this strip of 77 bighas and their plots in the other 35 bighas strip. The effect of the order under S. 145, dated September 1, 1931 was that the Dumraon Raj was declared entitled to the possession of the entire Dubha Taufir barring the two strips of 35 and 77 bighas. In 1931 and thereafter, there were considerable accretions to the lands in the possession of the Dumraon Raj and the pattadars. Since 1931, the plaintiffs made several attempts for seizing

possession of those lands and the subsequent accretions, but those attempts were always unsuccessful. The plaintiffs were out of possession of the lands in suit continuously from November 30, 1915 up to May 27, 1925 and again from May 27, 1925 up to the date of the suit. The Dumraon Raj and the pattadars were in possession of the lands in suit continuously from May 27, 1925 upto the date of the suit. In the revisional survey of 1937, the defendants 1st party are shown to be in possession of these lands. The plaintiffs alleged possession and dispossession within 12 years. Assuming that Art. 47 does not apply, the suit is governed by Art. 142. The plaintiffs have failed to establish their possession within 12 years of the suit, and the suit is bared by Art 142 of the Indian Limitation Act.

12. But we think that the suit is barred by limitation under Art. 47. By a final order under S. 145, dated September 1, 1931, the Dumraon Raj was declared to be entitled to the possession of the lands measuring about 258 bighas on a rough estimate and lying within stated boundaries. The plaintiffs contend that this land cannot be identified and the order is incapable of affecting their rights and is void and limitation cannot run against the plaintiffs from the date of this order. This contention must be rejected. The land in dispute in the S. 145 case was an area of about 335 bighas which, according to Lal Mohar Thakur, consisted of two blocks. The boundary of Block II of 158 bighas as given by Lal Mohar was :

South-Surveyed Dubha Taufir.

North and Northeast - Bhagar, sand and then river Ganges.

East - Gangauli Taufir and Bhagar.

West and Northwest - 177 bighas of Block I.

The identity of Block II is established if we remember that the north in this boundary is the magnetic east and the south is the magnetic west. On this basis, there is also no difficulty in identifying Block I of 177 bighas of which Lal Mohar gave the following boundary:

South - Chhour.

West - Rajapur Mal and trijunction stone.

Northesat - River Ganges.

Northwest - Boundary of Rajapur Taufir. From the total area of 335 bighas the S. D. O. excluded the strip of 77 bighas belonging to the Thakurs and declared that the Dumraon Raj was entitled to the possession of the remaining 258 bighas of which he gave the following boundary:

South - Surveyed Dubha.

East - Bhagar and Gangauli Taufir.

Northeast - Bhagar, sand and river Ganges.

Northwest - Rajapur Taufir and 77 bighas.

As the identities of Blocks I and II and of the strips of 77 bighas are established, there is no difficulty in identifying the area of 258 bighas in the possession of the Dumraon Raj. The measurement of the area was given on an estimate. The southern (magnetic western) boundary of this area was the surveyed Dubha, i.e., the western strip of 35 bighas. We are satisfied that the effect of the order was that the Dumraon Raj was declared to be entitled to the possession of the entire Dubha Taufir then in existence, excluding the two strips of 35 and 77 bighas. The plaintiffs are bound by the order. The subject-matter of this suit is the land comprised in the order and the subsequent accretions thereto. As the order was made more than three years before the institution of the suit, the suit is barred by limitation under Art. 47 of the Indian Limitation Act.

13. 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 kashtra 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 right. 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.

14. 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.

15. 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 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 Chowdhri v.*

Tripura Soondari Chowdhriani, 14 Ind App 101 at p. 110 (PC), and England, see *Bristow v. Cormican* (1878) 3AC 641 at pp. 669, 670 *Doe v. Young* (1845) 8 QB 63: 115 ER 798. The broad observation in *Manmatha Nath v. Girish Chandra Roy*, 38 Cal WN 763 at p. 770; (AIR 1934 Cal 707 at p. 708) and *Hemendra Nath v. Jnanendra Prasanna*, 40 Cal WN 115 at p. 117: (AIR 1935 Cal 702 at p. 704), 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 presumption 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 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 land reformed between 1845 to 1863 were subject to annual inundation. It is well known that settlements of 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.

16. In Ex. L-1 (13), the Khatian of Mauza Dubha published on January 2, 1912, the tenancies of several 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 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 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 in 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 raised at this stage

17. 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 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 plaintiff's 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.

18. 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 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 not trace of this case in the pleadings and the judgment of the trial Court. This case was not made even in the High Court. On the contrary, the plaintiffs' 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 descendants 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, or that the branches of the plaintiffs and defendants-3rd party inherited their respective holdings from Dihal Thakur.

19. 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 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.

20. The plaintiffs have failed to prove their title based upon Cl. (1) of S. 4 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 in occupation of the disputed lands. Moreover, mere occupation does not confer tenancy rights.

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

22. Civil Appeal No. 437 of 1959 arises out of Title Suit No. 7 of 1941, wherein the Maharaja of Dumroan claimed a declaration of title to Rs. 26,286-1-6 realised on account of the lands attached in proceedings under S. 145 of the Code of Criminal Procedure and lying in deposit in the Court of the Sub-Divisional Officer, Buxar. The trial Court dismissed the suit. In F. A. No. 189 of 1948, the High Court decreed the suit. In view of our decision in Civil Appeals Nos. 435 and 436 of 1959, it is conceded that Civil Appeal No. 437 of 1959 must fail.

23. In the result, Civil Appeals Nos. 435 to 437 of 1959 are dismissed. The appellants must pay the costs to the appearing respondents. One set of hearing fee.

Appeals dismissed.