Gurdit Singh and Others

Vs

Munsha Singh and Others

Civil Appeal Nos. 1944 To 1946 of 1967

(CJI A. N. Ray, M. H. Beg, Jaswant Singh JJ)

29.11.1976

JUDGMENT

JASWANT SINGH J.

1. These three appeals 1944, 1945 and 1946 of 1967 by certificate which are directed against the common judgment and decree dated July 29, 1964 of a Division Bench of the High Court of Punjab and Haryana at Chandigarh involving a question of limitation shall be disposed of by this judgment.

2. The facts leading to these appeals are : As appears from the pedigree-table referred to in the judgment under appeal, Chuhar Singh, a descendant of Amrika, son of Har Lal, sold land admeasuring 167 kanals and 10 marlas situate in village Dhugga, tahsil Hoshiarpur, to Bhagwan Singh, the grandfather of defendants 1 to 6, for Rs. 2378 vide a registered sale deed dated June 20, 1885. After the aforesaid alienation, one Hamira, a collateral of Chuhar Singh, filed a suit for possession by preemption of 52 kanals, 13 marlas out of the aforesaid area which was decreed in his favour on April 29, 1889 on payment of Rs. 671. The mutation in respect of the remainder of the land admeasuring 114 kanals and 17 marlas was attested in favour of Bhagwan Singh on May 4, 1890. Hamira did not retain the property which he secured by preemption and sold it back to Bhagwan Singh on September 20, 1890, with the result that Bhagwan Singh again became the owner of the entire land which was originally sold to him by Chuhar Singh who died in 1896. On July 19, 1898, Jiwan, Bela, Jawahar and Jawala, descendants of Bharimian, another son of Har Lal, filed a representative suit for declaration to the effect that the aforesaid sale by Chuhar Singh in favour of Bhagwan Singh would not affect their reversionary rights as the aforesaid land was ancestral and the sale thereof was without consideration and legal necessity. A Division Bench of the Punjab Chief Court finally disposed of the said suit by judgment dated July 29, 1902 declaring that upon the death of Alla Singh, adopted son of Chuhar Singh, and extinction of his line, the aforesaid sale of 1885 would not affect the reversionary interests of Bela and Jawahar. This declaration was made subject to the condition that before these plaintiffs of their successors-in-interest would take possession of their share of the land sold, they would pay to Bhagwan Singh or his successors-in-interest a sum bearing the same proportion of Rs. 1611 (i.e., Rs. 2378 minus Rs. 767) as their share in the land sold bore to the whole area sold. On the death of Alla Singh, Kishan Singh, his only son, succeeded him. On December 18, 1945, Jawahar Singh and Bela Singh brought a suit for possession of land admeasuring 113 kanals and 18 marlas situate in village Dhugga alleging that Kishan Singh having died on August 15, 1945, and the line of Alla Singh having become extinct, they were entitled to possession of the land in accordance with the aforesaid decree of the Punjab Chief Court. This suit was followed by two more suits of identical nature for the remainder of the land by two other sets of collaterals of Bhagwan Singh, one by Waryam Singh and his three brothers who claimed half of the entire holding and the other by Khazan Singh and Jagat

Singh, who claimed one-fourth share of the holding. The trial Court consolidated all these three suits and proceeded to try them together. Eventually it decreed the first two suits in favour of the plaintiffs pursuant to the aforesaid decree of the Chief Court of Punjab holding that Kishan Singh had died on August 15, 1945. It, however, dismissed the suit brought by Khazan Singh and Jagat Singh on the ground that they being the successors-in-interest of Hamira, who had brought the aforesaid preemption suit, were estopped from claiming possession of the land. On appeal, the District Judge, Hoshiarpur, dismissed all the three suits as premature holding that the factum of Kishan Singh's death had not been established. The decision of the District Judge was affirmed in appeal by a single Judge of the Punjab High Court by his judgment and decree dated August 3, 1951. The plaintiffs in the last mentioned suits, viz., Waryam Singh and his three brothers, Jawahar Singh and Bela Singh, and Khazan Singh and Jagat Singh again instituted three separate suit (out of which the present appeals have arisen) on October 28, 1952, December 16, 1952 and May 12, 1953, respectively for the same relief which was sought by them in the previous suits. In these suits, the plaintiffs averred as follows with regard to the cause of action :

> 5. After Alla, adopted son of Chuhar Singh, deceased, his son Kishan Singh became his heir and representative. Now the whereabouts of Kishan Singh aforesaid, have not been traceable for more than seven years. Since August 15, 1945, no information or intimation that he is alive has been received by any of his relatives or any other concerned person. Hence, he is considered as dead and this suit is being filed. The line of Alla has become extinct. Under these circumstances, the plaintiffs being collaterals of Chuhar Singh, deceased vide the pedigreetable given above, are entitled to get possession of the land of half share, the sale of which has been cancelled vide the decree granted by the Chief Court, subject to payment of Rs. 805/8/- of their proportionate share. Hence, we have filed this suit. The parties are governed by the zamindara custom in the matters of succession.
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> 6. Prior to it, the plaintiffs had filed a suit for possession of this property (land) on December 18, 1945, in the Civil Court at Hoshiarpur, alleging that Kishan Singh, son of Alla who was the last man of the line of Alla, has died on August 15, 1945 . . . .
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> 7. The suit of the plaintiffs, detailed in para 6 above was based upon the factum of the death of Kishan Singh. The plaintiffs had no persona knowledge about this fact, rather it was based on mere hearsay, but this event of August 15, 1945, came out to be false and such a decision was passed in the previous suit between the parties and the parties are bound by the same. But the whereabouts of Kishan Singh, aforesaid, have not been traceable since August 15, 1945, according to the above facts mentioned in para 5. After August 15, 1952, (1945 ?) the event of his death is to be determined according to law (under Section 108) and facts (under Section 114) Evidence Act. Accordingly, Kishan Singh is to be considered as dead after August 15, 1952(?) and he is not alive. Two months prior to August 15, 1945, he had been residing some time at mauza Dhugga, district Hoshiarpur and some time at mauza Sonion, district Jullundur, permanently. Thereafter, he went outside towards Ahmedabad for searching some job and earning his livelihood. The last information about his presence in Ahmedabad was received on August 5, 1945 and since then his whereabouts have not been available.
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> 10. The right to sue has accrued against defendants 1 to 6 within the jurisdiction of this district after August 16, 1952, in the beginning of the months of October, 1952

> viz. after a period of seven years since the whereabouts of Kishan Singh have not been traceable and since he is considered to be dead according to law and so the civil court of this district is competent to try this suit..... At any rate, Kishan Singh died within a period of three years from the date of filling the suit and so this suit is within time. At any rate, the entire aforesaid period mentioned in para 6 from December 18, 1945 to August 3, 1951 is liable to be deducted according to law and facts.

3. These suits were resisted by the contesting defendants on a number of grounds, were eventually dismissed by the trial Court as timebarred with the finding that though Kishan Singh had not been heard for seven years before the institution of the suits, the actual date of his death had not been proved. The trial Court, however, held that the decree of the Punjab Chief Court enured for the benefit of the entire body of reversioners and not exclusively for the benefit of Jawahar Singh and Bela Singh. On appeal, the District Judge upheld the dismissal of the suits adding that Hamira having successfully brought a suit for preemption in respect of a portion of the sale precluded not only himself but his successors as well form acquiring the property. In this view of the matter, he opined that Jagat Singh and Khazan Singh were not entitled to any share at all in the land. On further appeal, a single Judge of the Punjab High Court decreed all the three suits by his judgment dated October 28, 1959, holding that Kishan Singh having been treated as alive by the High Court when it passed the pervious judgment dated August 3, 1951, the conclusion of the courts below that Kishan Singh had been dead seven years before the institution of the present suits could not be sustained. While computing the period of limitation, the single Judge also excluded the time spent on the previous litigation from 1945 to 1951 under Section 14(1) of the Limitation Act. It would be advantageous to reproduce the observations made in this behalf by the single Judge :

> Till August 3, 1951, when the judgment (of the High Court in the previous suits) was delivered, the position was that the death of Kishan Singh had not been established.

Admittedly, the whereabouts of Kishan Singh are still not known and, in my opinion, there can be no escape from the conclusion on these facts that the death of Kishan Singh must be presumed under Section 108 of the Indian Evidence Act as he had not been heard of for a period of seven years. The present suits were brought between October 28, 1952 and May 12, 1953. The correct approach to reach a solution of the present problem is to give allowance to the plaintiffs, if found necessary, for the period which they spent in previous litigation that is to say, from the years 1945 to 1951. Under sub-section (1) of Section 14 of the Indian Limitation Act, "the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a court of appeal, against the defendant, shall be excluded, where the proceeding is found upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it".... Both the previous litigation and the present are found on the same cause of action. The previous litigation ended with the judgment of the Punjab High Court in which it was held that the suit was premature, the plaintiffs having failed to establish the death of Kishan Singh....

> The plain fact of the matter is that no proof is forthcoming of Kishan Singh's continued existence since 1945. Since the judgment of the High Court in 1951, where is was held that the death of Kishan Singh had not been proved 8 years have elapsed. There can be no escape from the conclusion now that Kishan Singh's death must be presumed. The decision of the High Court in 1951 should provide a suitable ground for extension of time under provisions of Section 14 of the Indian Limitation Act.

> The whole basis of the judgment of the courts below, in my opinion, is erroneous. It is not a requirement of Section 108 of the Indian Evidence Act that the date of death of the person whose death is to be presumed must be established. All that is said is that if a person is not heard of for period of seven years, his death may be presumed.

4. The contesting defendants then took the matter in letters patent appeal to a Division Bench of the High Court which by its judgment dated July 29, 1964 set aside the aforesaid judgment and decree of the single Judge holding that the single Judge was in error in excluding the time spent on the previous litigation by the plaintiffs by applying Section 14(1) of the Limitation Act. Relying on the decision of the Full Bench of the Lahore High Court in Bhai Jai Kishan Singh v. People Bank of Northern India [AIR 1914 Lah 136 : ILR 1944 Lah 451], the Division Bench held that the words "or other cause of a like nature" occurring in Section 14(1) of the Limitation Act had to be read ejusdem gainers with the preceding words "relating to defect of jurisdiction" and that it was not possible to give the benefit of that provision to the plaintiffs as it could not be regarded that the court was unable to entertain the previous suits because of any defect of jurisdiction or other cause of a like nature merely because of the fact that the court came to the conclusion that the cause of action had not yet arisen. Aggrieved by this judgment, the plaintiffs have come up in appeal to this Court as already stated.

5. Before adverting to the contentions raised before us on behalf of the appellants, we must first dispose of the preliminary objection raised by Mr. Mehta, counsel for the contesting respondents, regarding the maintainability of the appeals. According to Mr. Mehta, the said appeals have been rendered untenable and have to be dismissed in view of the amendment introduced in Section 7 of the Punjab Custom (Power to Contest) Act, 1920 (Act 2 of 1920) by the Punjab Custom (Power to Contest) Amendment Act, 1973 (Act 12 of 1973) which has been given a retrospective operation by sub-section (2) of Section 1 of the Amending Act. This contention is, in our opinion, wholly misconceived and cannot be allowed to prevail as it overlooks the savings clause contained in Section 4 of the Punjab Custom (Power of Contest) Act, 1920 (Act 2 of 1920) which has been left untouched by the Punjab Custom (Power to Contest) Amendment Act, 1973 (Act 12 of 1973), and runs thus :

> 4. Savings. - This Act shall not affect and right to contest any alienation or appointment of an heir made before the date on which this Act comes into force.

6. The alienation in question was admittedly made by Chuhar Singh in favour of Bhagwan Singh in 1885 i.e. long before May 28, 1920 - the date on which the Punjab Custom (Power to Contest) Act, 1920 (Act 2 of 1920) came into force. It was, therefore, not at all affected by Act 2 of 1920. In this view of the matter, it is not necessary to go into the other contention raised by Mr. Sethi, counsel for the appellants, to the effect that in any event the preliminary objection raised by Mr. Mehta is not tenable as the Punjab Custom (Power to Contest) Amendment Act, 1973 (Act 12 of 1973) has not the effect of abrogating the declaratory decree already obtained by predecessors-in-interest of his clients prior to the coming into force of the Amending Act.

7. Having disposed of the preliminary objection, we now proceed to consider the contentions that have been pressed for our consideration by Mr. Sethi, counsel for the appellants. He has strenuously urged that Section 14(1) of the Limitation Act was applicable to the facts and circumstances of the present case and that the Division Bench of the High Court has grossly erred in not giving the benefit of the provision to the appellants which would have entitled them to the exclusion of the time from October 10, 1945 to August 3, 1951 spent in prosecution with due diligence and in good

faith the previous suits in the court of first instance and in the courts of appeal which expressed their inability to entertain the suits on the ground that they were premature. There is no force in these contentions.

8. It cannot be and has not been disputed that the present suits are governed by Article 2 of the schedule annexed to the Punjab Limitation (Customs) Act, 1920 (Act 1 of 1920) which provides as follows :

> #----------Description of suit Period of Time from which period limitation begins to run----------2. A suit for possessionof ancestral immovableproperty which has beenalienated on the groundthat the alienation isnot binding on theplaintiff accordingto custom -(a) if no declaratory 6 years First : It the alienationdecree of the nature is by a registered deed,referred to in Article 1 the date of registrationis obtained. of such deed. Secondly : It the alienation is not by a registered deed - (a) if an entry regarding the alienation in the Register of Mutation has been attested by a Revenue Officer under the Punjab Land Revenue Act, 1887, the date on which the entry is attested; (b) if such entry has not been attested, the date on which the alienee takes physical possession of the whole or part of the property alienated in pursuance of such alienation. (c) in all other cases, the date on the which the alienation comes to the knowledge of the plaintiff.(b) if such declaratory 3 years The date on which thedecree is obtained. right to sue accrues or the date on which declaratory decree is obtained, whichever is later.----------##

9. As the plaintiffs had already obtained a declaratory decree, they had to, in order to be able to succeed, bring their suits within three years of the accrual of the right to sue (which according to the well settled judicial opinion means the accrual of the right to seek relief) viz. within three years of the death of Kishan Singh when the line of Alla Singh became extinct. They had to prove affirmatively that the death of Kishan Singh took place within three years of the institution of the suits. The contention of counsel for the plaintiffs is, however, that Kishan Singh not having been heard of for more than seven years since August 15, 1945, a presumption of the factum of his death has to be drawn at the expiration of seven years from that date in terms of Section 108 of the Evidence Act. We find it difficult to accept this contention. Granting that Kishan Singh has to be presumed to be dead, it cannot be overlooked that under Section 108 of the Evidence Act, the precise time of the death is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within seven years lies upon the person who claims a right for the establishment of which the proof of that fact is essential. The plaintiffs had not only, therefore, to prove that Kishan Singh had not been heard of for a period of seven years and was to be taken to be dead, but it also lay heavily on them to prove the particular point of time within seven years when Kishan Singh's death occurred. This they have miserably failed to prove. In the absence of such proof, it cannot be held that the present suits had been brought within three years of the accrual of the right to sue. We are supported in this view by a catena of authorities. In Nepean v. Doe d. Knight [(1837) 2 M & W 894 : 7 LJ Ex 335 : 150 ER Exch 1021], Lord Denman delivering the judgment of the court observed :

> The doctrine laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it

> be important to anyone to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of. Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances.

10. This case was followed by a Division Bench of the Bombay High Court as far back as 1916 in Jayawant Jivanrao Deshpande v. Ramchandra Narayan Joshi [AIR 1916 Bom 300 : ILR 40 Bom 239].

11. A similar view was taken by the Privy Council in Lalchand Marwari v. Ramrup Gir [53 IA 24 : AIR 1926 PC 9] where it was observed :

> Under the Indian Evidence Act, 1872, Section 108, when the court has to determine the date of the death of a person who had not been heard of for a period of more than seven years, there is no presumption that he died at the end of the first seven years, or at any particular date.

12. Another case in point is Jiwan Singh v. Kuar Reoti Singh [AIR 1930 All 427 : 1930 ALJ 469], where it was held :

> The presumption raised by Section 108 is confined to the factum of death and not the exact time when death may have occurred. Where a party affirms that a certain person died on or before a particular date, that fact has to be established by positive evidence.

13. Similar view was expressed in Kottapalli Venkataswarlu v. Kottapalli Bapayya [AIR 1957 AP 380 : (1957) 1 Andh WR 55].

14. In Punjab v. Natha [AIR 1931 Lah 582 : ILR 12 Lah 718 (FB)], a Full Bench of the Lahore High Court observed :

> Where a person has not been heard of for seven years when a suit is instituted, Section 108 comes into operation and raises a presumption that at the institution of the suit he was dead, but no presumption arise as to the date of his death, which has to be proved in the same way as any other relevant fact in the case.

15. Again in Ram Kali v. Narain Singh [AIR 1934 Cudh 298 : 11 OWN 794 (FB)] it was laid down :

> If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.

16. In the instant cases, assuming that Kishan Singh died within seven years of the institution of the suits out of which the present appeals have arisen, even then the benefit of the Section 14 cannot be allowed to the appellants. This provision in so far as it is material of our purpose runs as follows :

> 14. (1) In computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a court of appeal, against the defendant shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction, or other of a like nature, is unable to entertain it. . . .

17. It would be noticed that three important conditions have to be satisfied before the section can be pressed into service. These three conditions are : (1) that the plaintiff must have prosecuted the earlier civil proceeding with due diligence; (2) the former proceeding must have been prosecuted in good faith in a court which from defect of jurisdiction or other cause of a like nature was unable to entertain it, and (3) the earlier proceeding and the later proceeding must be based on the same cause of action.

18. Now the words "or other cause of a like nature" which follow the words "defect of jurisdiction" in the abovequoted provision are very important. Their scope has to be determined according to the rule of ejusdem generis. According to that rule, they take their colour from the preceding words "defect of jurisdiction" which means that the defect must have been of an analogous character barring the court from entertaining the previous suit. A Full Bench of the Lahore High Court consisting of Harries, C.J., Abdur Rehman, J. and Mahajan, J. (as he then was) expressed a similar view in Bhai Jai Kishan Singh v. People Bank of Northern India (supra).

19. In the instant cases, it is not denied by the plaintiffs that the Court which tried the previous suits was not precluded from entertaining them because of any defect of jurisdiction. We have, therefore, only to see whether the said court was unable to entertain the former suits on account of any defect of an analogous character. Even a most liberal approach to the question does not impel us to hold that the court trying the earlier suits was unable to entertain them on any ground analogous to the defect of jurisdiction. In Dwarkanath Chakravarti v. Atul Chandra Chakravarti [ILR 46 Cal 870 : 29 CLJ 465] where the court trying the previous suit has refused to entertain a claim for rent because it was premature, it was held that in a subsequent suit for the aforesaid rent, the plaintiff could not rely upon the provisions of Section 14(1) of the Limitation Act and say that the time did not run against him while those proceedings were being prosecuted. Again in Palla Pattabhiramayya v. Velaga Narayana Rao [AIR 1960 AP 625 : (1960) 2 Andh WR 229] it was held that the fact that the previous suit was dismissed as the plaintiff had no cause of action was not a ground which was covered by Section 14(1). Thus it could not be held that the court which tried the previous suits but eventually threw them out as premature suffered from inability or incapacity to entertain the suits on the ground of lack of jurisdiction or any other defect of the like character. According the exclusion of the period from December 18, 1945 to August 3, 1951 sought by the appellants cannot be legitimately allowed to them while computing the period of limitation.

20. There is also another factor which prevents us from granting the benefit of Section 14(1) of the Limitation Act to the appellants. It would be seen that in the previous suits, the plaintiffs had averred that the cause of action accrued to them on the death of Kishan Singh which has occurred on August 15, 1945. The have, however, as already indicated by reference to the averments made in paragraphs 5, 6, 8, 9 and 10 of the petition of plaint based the present suits on a different cause of action. It is however, not necessary to dilate upon this aspect of the matter in view of our categoric finding that the earlier suits did not suffer from any defect of jurisdiction or any other defect of the like character which could have precluded the court from entertaining them.

21. It is also significant that the protection of Section 14(1) of the Limitation Act was not claimed by the plaintiffs either in the trial Court or in the first appellate Court.

22. Assuming, therefore, that Kishan Singh died within seven years of the institution of the suits out of which the present appeals have arisen even then the protection of Section 14(1) cannot be allowed to the appellants and the suits have to be dismissed as timebarred in terms of Section 5 of the Punjab Limitation (Customs) Act, 1920 (Act 1 of 1920) which is reproduced below for facility of reference :

> 5. Dismissal of suits of the description specified in the act if instituted after the period of limitation herein prescribed has expired. - Subject to the provisions contained in Sections 4 to 25 (inclusive) of the Indian Limitation Act, 1908, and notwithstanding anything to the contrary contained in the First Schedule of the said Act, every suit, of any description specified in the schedule annexed to this Act, instituted after the period of limitation prescribed therefor in the schedule shall be dismissed, although limitation has not been set up as a defence.

23. As a result of the foregoing discussion, the appeals fail and are hereby dismissed. In view, however, of the circumstances of the case, the parties are left to pay and bear their own costs in these appeals.

BEG, J. (dissenting) -

The question before us is : were the three suits, the first instituted on October 21, 1952, the second on December 18, 1952, and the third on May 5, 1953, tried and heard together, out of which the three appeals before us arise, filed within time, and, if they were filed beyond time, whether the plaintiffs in each suit were entitled to the benefit of Section 14 of the Limitation Act ?

25. Plaintiffs, in the three suits instituted in circumstances explained fully by my learned brother Jaswant Singh, included all those persons who could sue as reversioners of Kishan Singh if it was proved that he was dead or presumed to be dead; and, they are all appellants before us. It is evident from a bare statement of the case set up in each of the identically similar plaints in the suits now before us that, as three previous suits filed by these very plaintiffs in 1945 for the same reliefs had failed against the same defendants for want of proof of date of death of Kishan Singh, the suits now before us were based on somewhat different allegations setting up a new cause of action. Otherwise, obviously, they would have been barred by res judicata. As the learned single Judge, before whom the three cases now before us first came up in the High Court, had pointed out, the earlier suits had failed because they were held to be premature so far as the cause of action now before us is concerned and for want of proof of the date of death of Kishan Singh so far as the actual cause of action set up there was concerned. He also indicted, quite clearly, how the causes of action in the earlier and later sets of litigation were quite different, and why the new cause of action arose within three years before the filing of the suits.

26. Considerable confusion seems to have been caused by the prolixity of pleadings in the case so that, although the plaintiffs asserted clearly the accrual of a new cause of action, with the aid of a presumption they were saddled with the responsibility to discharge another onus tied to the proof of a particular date which had been abandoned by them after their dismal failure in the earlier litigation to prove the actual date of death of Kishan Singh who had disappeared. Could they fail again for the same reason although the cause of action they set up is fresh and different and arose within three

years before filing of the suits ? That is the real question we have to answer. Perhaps the way in which I look at the question and have stated it makes an answer in the affirmative unavoidable. Hence, my inability, with grate respect, to concur with another view put forward by my learned brother Jaswant Singh.

27. In think that the learned single Judge, dealing with the question of limitation in the High Court, had correctly summarised the whole position and found and follows even without going into the question of burden of proof of date of death of Kishan Singh :

> All the three sets of plaintiffs have come up in second appeal to this Court and Mr. M. L. Sethi had addressed a very persuasive argument on the question of limitation which in really is now the only substantial matter in dispute. He has pointedly brought to my notice the anomalous and baffling situation in which the plaintiffs have been placed. According to the judgment of the High Court of August 3, 1951, it was found that the death of Kishan Singh had not been proved. In other words, Kishan Singh was deemed to have been alive at the time when the High Court decree was passed on August 3, 1951. If that position is accepted, as indeed it must, the conclusion of the courts below, that Kishan Singh had been dead seven years before the institution of the present suits, cannot be sustained. To this position there is the added complication of the defendant's own admission that Kishan Singh was alive at the time when the statement was made by their counsel Milkhi Ram on April 27, 1953. I find myself unable to assent to the proposition on which both the courts below have founded their conclusions that suits must be regards as barred by time as the date of death of Kishan Singh had not been proved. The District Judge has arrived at his conclusion because in the previous suits it was asserted that Kishan Singh had died on August 15, 1945. As the death of Kishan Singh had not been proved, the suits were dismissed up to the High Court being premature. It passes my comprehension how it can now be said that Kishan Singh died sometime before 1945 and the suits having been brought more than three years after his death are now barred by statute. The previous suits filed by the three different sets of plaintiffs were founded on the allegation that Kishan Singh has died in Ahmedabad somewhere in August 1945. A good deal of oral and documentary evidence was led in support of Kishan Singh's death. The conclusion of the learned District Judge (Mr. Chhakan Lal) was that the plaintiffs had not succeeded in establishing the death of Kishan Singh and it could not, there, be held that the line of Alla had become extinct. In the judgment, in second appeal, of Harnam Singh, J., the only question which was discussed was whether the death of Kishan Singh had been proved. It is pertinent to observe that in the High Court it was common ground between both the parties that the case did not fall under Section 108 of the Indian Evidence Act. Like the District Judge, Harnam Singh, J. discussed the oral and documentary evidence which had been adduced by the parties and agreed with the findings of the lower appellate Court. Till August 3, 1951, when the judgment (of the H.C. in the previous suits) was delivered, the position was that the death of Kishan Singh had not established.

28. It seems to me that the learned single Judge had sufficiently indicated that the cause of action in the previous litigation was different from the one now before us inasmuch as the facts now proved indisputably, showing that Kishan Singh must be presumed to be dead, could not be and were not set up in the earlier suits. In 1945, this cause of action had not accrued. As the learned single Judge held, the effect of the judgment in the former suits was that those suits were premature. This could

not be said of the suits now before us in appeal.

29. It is true that the learned single Judge had thought that, alternatively, Section 14 of the Limitation Act could apply inasmuch as the causes of action in the previous litigation as well as in the present litigation were identical. In so far as the learned single Judge postulated though for a limited purpose, an identity of causes of action of the previous and the present sets of suits, the assumption was inconsistent with his own emphatically expressed opinion revealing the difference in the causes of action. The plaints in the suits before us set out the history of the whole litigation and clearly set up a case founded on new facts, not in existence at the time of the earlier litigation, and expressly state why the plaintiffs now rely on the presumption of death of Kishan Singh.

30. The identically similar plaints of the plaintiffs now before us were not based upon any assertion or plea of their own dispossession. For such suits the period of limitation was given in Article 2 in the schedule of the Punjab Limitation (Customs) Act of 1920. The provisions are set out in the judgment of my learned brother Jaswant Singh. The period of limitation for such suits is three years from "the date on which right to sue accrues of the date on which declaratory decree is obtained, whichever is later". If the previous suits were dismissed, as it seems to me that they were, on the ground inter alia, that they were premature, the cause of action could only be said to have accrued after their institution.

31. It seems to me that the learned District Judge, the final court of facts in the suits now before us, had failed to determine the question whether Section 108 of the Evidence Act could come to the aid of the plaintiffs on the erroneous assumption that, in any case, the plaintiffs' suits would be barred by time as the plaintiffs had not proved when Kishan Singh had died. The learned District Judge seemed to hold the view that not only would the plaintiffs' suits be barred by limitation, because the plaintiffs could not prove the actual date of Kishan Singh's death, but also that the resumption under Section 108 itself will not be available to a party which could not prove the date of death of the person to be presumed to be dead. At any rate, the learned District Judge was far from clear on the question whether Section 108 would apply to the case. He recorded his conclusion as follows :

> So, it is clear from the above discussion that the plaintiffs/appellants have failed to show that their suits are within time from the date of the death of Kishan Singh. No doubt the presumption is there that Kishan Singh is not heard of for the last 7 years but the date of death was very necessary to be proved and this has not been done by any of the witnesses.

32. If the date of death of Kishan Singh had to be proved by the plaintiffs, no question of invoking the aid of a presumption to prove death could arise. Proof of death would dispense with the need to rely on any mere presumption of death. The result of the District Judge's failure was that the single Judge of the Punjab High Court had to record essential findings of fact on this crucial question of availability of the presumption of death. These indicated, beyond the shadow of doubt, that the plaintiffs were entitled to the benefit of the presumption laid down by Section 108 of the Evidence Act. This meant that, on new facts asserted and proved, Kishan Singh could be presumed to be dead when the suits now before us were instituted in 1952 and 1953. And, this presumption of the death of Kishan Singh having become available to the plaintiffs within three years of the suits and not before, no occasion for applying Section 14, Limitation Act could arise.

33. The defendants, while pleading the bar of limitation to the suits had, quite inconsistently, also tried to suggest that Kishan Singh was either alive or must be assumed to be alive. The plaintiffs

could not be expected, on their plea that, proof of date of death of Kishan Singh being absent, they were relying only on the presumption of death, to lead evidence of any date of death. All that could be reasonably expected from them was to show that the presumption became available to them within three years before the filing of their suits. The learned single Judge of the High Court had, in my opinion correctly, recorded the following finding which made the presumption of death of Kishan Singh available to the plaintiffs :

> The plain fact of the matter is that no proof is forthcoming of Kishan Singh's continued existence since 1945. Since the judgment of the High Court in 1951, where it was held that the death of Kishan Singh had not been proved, 8 years have elapsed. There can be no escape from the conclusion now that Kishan Singh's death must be presumed.

34. The learned single Judge had also observed :

> The decision of the High Court in 1951 should provide a suitable ground for extension of time under provisions of Section 14 of the Indian Limitation Act. The whole basis of the judgment of the courts below, in my opinion, is erroneous. It is not a requirement of Section 108 of the Indian Evidence Act that the date of death of the person whose death is presumed must be established. All that is said is that if a person is not heard of for a period of seven years, his death may be presumed. There is no presumption as to the time of death at any particular time within that period.

As I have already indicated, there was no need here to seek the aid of the provisions of Section 14, Limitation Act.

35. In Mohd. Khalil Khan v. Mohboob Ali Mian [AIR 1949 PC 78, 86 : 75 IA 121], it was laid down :

> A rough test, although not a conclusive one, as to whether the cause of action in a subsequent suit is the same as that in the former suit, is to see whether the same evidence will sustain both suits, and regard should be had to the allegations in the two suits and not the facts found by the court in the former suit.

On the facts of the cases before us, we find the evidence sought to be given in the previous suits was that Kishan Singh had died on a particular date (i.e., August 15, 1945), but, the evidence in the subsequent suits (now before us for decision) was not that he had died on a particular date but that he had not been heard of from August 15, 1945, upto the time of the filing of new suits. This evidence could not be given in the previous suits. Hence, the above test is satisfied.

36. In Smt. Mahadevi v. Kaliji Birajman [1969 All LJ 896], it was held that, if certain additional facts had to be proved for the success of the subsequent suit the causes of action would differ. It did not matter if there is a certain common ground to be covered by the evidence in both sets of cases. This test would also be satisfied in cases before us now because the additional facts show that Kishan Singh had not been heard of by those who would have otherwise heard of him in the course of seven years. This evidence could not be led at all in the previous suits as they were filed very soon after the alleged date of death of Kishan Singh.

37. If causes of action differ from suit to suit, the accrual of the cause of action can also not be tied down to a particular kind of fact such as the date of actual death of the holder of the property. Once

it is held that the causes of action differ for purposes of their accrual, their accrual could not be made to depend on facts of one type only. Facts denoting their accrual must differ from case to case. Of course, proof of date of actual death is conclusive. But, where the basis of the right to sue is presumption of death the date of accrual of the right is the date on which that presumption matures.

38. I have set out above the reasoning which appeals to me and makes the decision of this Court in Indian Electric Works Ltd. v. James Mantosh [(1971) 2 SCR 397 : (1971) 1 SCC 24], applicable to the cases now before us. In that case, the appellant before this Court was a defendant tenant in a suit for recovery of damages with interest and costs. In a previous suit the predecessor-in-interest of the plaintiff had sued the defendant for ejectment, but, the defendant had continued in occupation of the premises as the suit was compromised. The accommodation was requisitioned on February 2, 1945. After the accommodation was released by the government on November 21, 1945, the plaintiff filed two suits against defendant; one for the recovery of damages upto February 1, 1944, and another for damages from November 22, 1945, upto the date of recovery of possession although there was no suit for possession. When the matter came up before the High Court in appeal, the High Court disallowed the claim for future mesne profits on the ground that it "was a pure money suit and not a suit for recovery of possession of immovable property and for mesne profits under Order 20, Rule 12, Civil Procedure Code". The plaintiff then filed a third suit on November 5, 1956, for recovery of Rs. 28,650 as damages with interest thereon for a period from November 22, 1948, to November 5, 1956. The benefit of Section 14 of the Limitation Act was claimed for the amount claimed for the period beyond three years. Two of the learned Judges of this Court, Shah and Grover, JJ. held that, although the claim for future mesne profits, not having been satisfied by the money suit of 1948, in which the decree of the trial Court was set aside on June 30, 1955, by the High Court, a fresh cause of action arose from June 30, 1955, yet, it was unnecessary to decide the case on that principle because the court was satisfied that, in any event, Section 14(1) of the Limitation Act, which had to be construed liberally, would cover the period for which the claim was said to be barred by limitation. Though, the third learned Judges, Hegde, J., seemed to be of the opinion that Section 14(1) of the Limitation Act could not help the plaintiff, yet, following the decision of the Judicial Committee in Mst. Ranee Surno Moyee v. Shooshee Mokhee Burmonla [12 MIA 244], which had covered later decisions of the Privy Council and various High Courts a new cause of action, arising within the period of limitation, would ensure to the benefit of the plaintiffs.

39. It seems to me that the lines on which the case of India Electric Works was decided enables us to correctly decided whether a new cause of action has accrued in favour of the plaintiffs in the suits before us, which were filed within three years of the accrual of this cause of action, as well as on the question whether, if this be not the correct position, Section 14(1) of the Limitation Act could be invoked by plaintiffs. Indeed, the view accepted by the three judges of this Court, that it is enough to institute proceedings within the prescribed period from the accrual of the fresh cause of action, appears to me to provide the common view we cannot reject. This view would apply if we agree, as my learned brother Jaswant Singh does, that a fresh cause of action had arisen here.

40. In State of Madras v. V. P. Agencies [AIR 1960 SC 1309, 1310], Das, C.J. referred to various expositions of the meanings of the term "cause of action", including that by Lord Watson, in Mst. Chand Kour v. Partab Singh [15 IA 156], where we find (at p. 1310) :

> Now the cause of action, has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the paint as the cause of action, or, in other words, to the media upon which the plaintiff asks the court to

arrive at a conclusion in his favour.

41. The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff must fail in his suit. Now, whether we use the expression in the narrower or in the wider sense, in the case before us, the death of Kishan Singh was certainly an essential part of the cause of action. It had to be proved to enable the plaintiffs to put forward their claims to succeed at all. But, proof of the date of death was not essential or indispensable for that purpose. It could only become material in deciding whether the right which had accrued had been extinguished by the law of limitation. Both the narrower and the wider sense of the term "cause of action" would certainly include all those facts and circumstances on the strength of which the plaintiffs urged that they were entitled to the benefit of the obligatory presumption to law contained in Section 108 of the Evidence Act. As these were not available to the plaintiffs before the expiry of seven years from August 5, 1945, it does not seem to be possible to urge that this cause of action had arisen more than three years before the filing of the suits now before us. Applying the tests stated above, the causes of action in the earlier and later litigations would, in my opinion, be materially different. We could only hold that no cause of action had arisen at all if we assume that Kishan Singh had not died at all. And, how could we assume that without disregarding Section 108, Evidence Act ? If we cannot do that, the cause of action could only accrue when we could presume that he is dead. And, the date of its accrual could not possibly lie a day earlier than 7 years after August 15, 1945, when Kishan Singh was last heard of.

42. As indicated above, the identity of the relief asked for in the earlier and later suits does not matter. It also does not matter that the defendant in both sets of suits have attempted to suggest that Kishan Singh is still alive. It is they who had asserted that the plaintiff's rights were extinguished by the operation of the law of limitation. Therefore, strictly speaking, it appears to me that it was for the defendants to establish, if they could, that Kishan Singh was either alive or had died more than three years before the suits were filed. There is no proof of either of these here. The presumption under Section 107 of the Evident Act could not come to the aid of the defendants when the plaintiffs had established facts necessary to raise the presumption under Section 108 of the Evidence Act. There seemed to be irrefutable evidence that, after a letter of Kishan Singh, received at Ahmedabad on August 5, 1945, nothing had been heard or was known about him. Hence, the plaintiffs relied on the presumption under Section 108, Evidence Act because they could not prove the actual date of death which had a bearing only on the bar of limitation set up by the defendants. As has been pointed out sometimes, the function of a presumption is to fill a gap in evidence. In these circumstances, it seems to me that the defendants should have been called upon to show, before relying upon the bar of limitation, how the death of Kishan Singh took place on a date beyond three years of the filing of the suit before the question of applying Section 14, Limitation Act could arise at all.

43. The plaintiffs could only be required to show the accrual of their cause of action within the prescribed period of limitation. They had, obviously, discharged that burden. If the "media", to use the term employed by Lord Watson, quoted earlier, upon which the plaintiffs rest their cases, are different in the previous and subsequent litigations, the causes of action are different, as held by my learned brother Jaswant Singh also. And, if the two causes of action are different, each with a different date of accrual - that being the basic difference between the two sets of suits - we have only to determine the date of accrual of the second cause of action. If the alleged date of death of

Kishan Singh was the date of accrual of the previous cause of action, the date of accrual of the second could only be something other than this date of death of Kishan Singh. It could not possibly be the same. And, that other date of accrual could only be subsequent to August 15, 1945, because, as indicated above, it was held in the previous suit that the suit was premature on the ground that seven years since Kishan Singh was last heard of on August 15, 1945, had not elapsed then. Since the evidence was that he was last heard of at Ahmedabad on August 15, 1945, the only possible date of accrual of the subsequent cause of action here could be seven years after that (i.e. August 16, 1952). The suits before us were filed within three years of that date. Therefore, I fail to see how the suits before us could possibly be held to be barred by limitation.

44. We must not forget that Article 2 of schedule to the Punjab Limitation (Customs) Act 1 of 1920, lays down that limitation for a suit for possession, which applies to the case before us, commenced from "the date on which the right to sue accrues" and not from the date of death of the holder of property. The term "right to sue" must, I think, be equated with "cause of action", unless the context indicated otherwise. The choice of words used must be presumed to be deliberate. I do not think that we can substitute "the date of death" for the date of accrual of "the right to sue". In the Limitation Act, as well as in other statues, the accrual when intended to be tied to the date of some event, is specified as the date of that event. Here, it is not so. We cannot, without an obvious inconsistency with our findings that the causes of action in the previous and subsequent limitations were different, hold that the date of accrual in both sets of suits is one and the same, that is to say, the actual date of death. Such a view could, I think, be contrary also to the plaintiffs' pleadings where the difference in the causes of action must be found. The solution to the difficulty before us emerges automatically if we answer two questions correctly : What was the difference between the two causes of action ? What is the effect of that difference upon the date of accrual of the subsequent and different cause of action ?

45. It is well established that it is not in every suit for possession that the commencement of date of dispossession must be established by the plaintiff. It is only in a suit for possession, based on the allegation by the plaintiff of his own dispossession, that the burden has been held to be governed by Article 142 of the repealed Limitation Act (See Ram Gharib v. Bindhiyachal [AIR 1934 All 993 : 1934 ALJ 973 (FB)]), and the plaintiff is required to prove the date of his dispossession within limitation. Its equivalent, the present Article 64 of the Limitation Act of 1963, places the position beyond the region of every conceivable doubt :

> #64. For possession of Twelve years The date ofimmovable property based dispossession.on previous possession andnot on title, when theplaintiff while in possessionof the property has beendispossessed.##

Objects and Reasons

Articles 142 and 144 of the existing Act have given rise to a good deal of confusion with respect to suits for possession by owners of property. Article 64 as proposed replaces Article 142, but is restricted to suits based on possessory title so that an owner of property does not lose his right to the property unless the defendant in possession is able to prove adverse possession. (See : Chitaley & Rao : The Limitation Act, 1908, Vol. II)

46. There is no suggestion whatsoever in the suits before us that the plaintiffs were ever in possession so that no question of their dispossession could possibly arise. It was a pure and simple suit for possession on the basis of title against which the defendants had not even alleged adverse

possession. Hence, there was, it seems to me, no room here for bringing in the actual date of death, constructively, as the date of some presumed dispossession or adverse possession which has not been asserted anywhere. As pointed out earlier, the defendants seem to have cleverly drafted their pleadings so that a Division Bench of the High Court, which had erroneously allowed the defendant's appeals, had been misled into placing a burden upon the plaintiffs which, according to law, as I see it, could not rest there at all. The Division Bench applied decisions on Section 14 of the Limitation Act when this provision could not, as explained below, be invoked at all.

47. The plain and simple question which arose on the pleadings was whether seven years had elapsed since Kishan Singh was last heard of by those who would, in the natural course of events, have heard from or about him if he was alive, and if so, did this happen within three years before the filing of the suits ? The plaintiffs have asserted and proved that this period of seven years had elapsed. According to them, their cause of action matured within three years of their suits. Even if, by some stretch of imagination, the concept of adverse possession of the defendants were to be introduced in this litigation, when neither the plaintiffs nor the defendants have pleaded it, it is abundantly clear that the legal position is that the possession of defendants could not conceivably be adverse to Kishan Singh's reversioners even before Kishan Singh could be presumed to be dead. Indeed, the defendants had themselves set up the plea that he must be still deemed to be alive. On these pleadings, the plaintiffs could only be required to prove Kishan Singh's death but not the date of his death or the date of the plaintiff's dispossession which can occur only after a previous possession of the plaintiffs followed by the adverse possession of the defendants. Neither cases dealing with recovery of possession on the plaintiff's allegation of his own dispossession nor those where proof of date of death was a necessary part of either the cause of action or the plaintiff's statutory duty, for showing that the suit was within time, are really applicable here. We have a simple case before us where the cause of action seems to me to have clearly been shown to have arisen within three years before the filing of the suits. Nevertheless, I will deal here with some authorities which are relied upon by my learned brother Jaswant Singh.

48. The first of these is : Nepean v. Deo D. Knight (supra). In this case, an action for ejectment was brought, apparently on an allegation of dispossession of the plaintiff by the defendants. It was pointed out here that the terms of a statute, applicable in the case, having done away with the doctrine of "adverse possession", except in certain cases specially provided for, the question of adverse possession was unimportant. It was, however, held that there was a statutory duty cast upon the plaintiff to bring his suit within twenty years of the accrual of the right of entry. The date of this accrual, therefore, became essential to prove as a statutory duty. On the terms of statutory provisions to be construed and the facts of the particular case, Denman, C.J. said (at p. 1029) :

> It is true, the law presumes that a person shewn to be alive at a given time remains alive until the contrary be shewn, for which reason the onus of shewing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shewn the death by proving the absence of Matthew Knight, and his not having been heard of for seven years, whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive; but the onus is also cast on the lessor of the plaintiff of shewing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of Matthew Knight.

This was really a case in which it was not enough to invoke the presumption of death, but, the right to sue itself depended on commencing the suit within 20 years of the date of accrual of the right to entry which was held to be the actual date of death of Matthew Knight who had disappeared. In the

case before us, I think that the accrual of the right to sue arises only seven years after Kishan Singh was last heard of. If Nepena's case could or did lay down anything applicable to the cases before us, I am unable, with great respect, to accept it as correct law which we could follow. In my opinion, the facts as well as the applicable provisions of law in the case before us are very different from those in Nepean's case which could, in any event, not be more than an authority of some persuasive value in this Court.

49. In Jayawant Jivanrao v. Ramchandra Narayan Joshi (supra), in a suit governed by Article 141, Limitation Act, it was held (at p. 301) :

> Article 141, Limitation Act, is merely an extension of Article 140, with special reference to persons succeeding to an estate as reversioners upon the cessation of the peculiar estate of a Hindu widow. But the plaintiff's case under each article rests upon the same principle. The doctrine of non-adverse possession does not obtain in regard to such suits and the plaintiff suing in ejectment must prove, whether it be that he sues as a remainderman in the English sense or as a reversioners in the Hindu sense, that he sues within 12 years of the estate falling into possession, and that onus is in no way removed by any presumption which can be drawn according to the terms of Section 108, Evidence Act. The exact point for the purpose of Article 140, and also, in our opinion, of Article 141, has been decided many years ago in England soon after the passing of the English Law of Limitation regarding real property in Nepean v. Deo d. Knight (supra).

50. It is evident that here the cause of action laid down by the statute itself arisen from actual date of death. This case, like the previous one, turns on the special meaning of the statutory provisions prescribing a person's actual death as the point of time from which the period of limitation is to commence. In the cases before us the statute explicitly makes a different provision. We are not concerned at all here with anything more than an accrual of a right to sue which must be shown to arise within the prescribed period. No question of any actual of a right of reentry or one arising from adverse possession or the date on which such rights could conceivably arise is before us at all.

51. In Lal Chand Marwari v. Mahant Ramrup Gir (supra) the suit seems to have been based on an allegation by the plaintiff of his own dispossession by the defendant. Hence, it was governed by Article 142 of the former Limitation Act, the equivalent of which is Article 64 of the Limitation Act of 1963. It seems to me that Article 144 of the old Limitation Act is mentioned by mistake in the body of the judgment here. In any event, the statement of facts showed that the plaintiff had pleaded his own dispossession, or, at least, the plaint could be so construed as to imply that. Hence, a case of this type is distinguishable.

52. In Jiwan Singh v. Kuar Reoti Singh (supra), a decreed in a previous suit brought against a person alleged to be instance as well as not heard of for more than seven years had been assailed on several grounds : that, the defendant was insane; that, the defendant was unheard of for more than seven years, and, therefore, should have been deemed to be dead; that, the decree was obtained by fraud. As the High Court upheld the plea of fraud, it did not consider it necessary to decide on other grounds. Nevertheless, it pointed out, quite correctly, that the presumption under Section 108 of the Evidence Act only enables the court to presume the factum of death but not the date of death. No question of limitation arose at all in this case.

53. In Kottapalli Venkateswarlu v. Kottapalli Bapayya (supra), reliance was placed, inter alia, on

Punjab v. Natha (supra) which, in my opinion, was wrongly decided. Venkateswarlu's case, however, arose on facts and circumstances in which the proof of date of death was necessary to determine as the question was whether a legatee had survived the testator. In such a case, proof of date of death is necessarily a part of the cause of action.

54. In Ram Kali v. Narain Singh (supra), it was held that (at pp. 299-300) :

> Before the plaintiff can succeed in proving himself to be the nearest reversionary heir, he must prove in sequence that Harpal Singh and after him Pahalwan Singh and after him Sheo Ghulam Singh and after him Kali Singh predeceased Ram Lal. The exact date of Ram Lal's death is important from the point of view of the success of the plaintiff's case, because it was only then that succession opened out, and it is only by proving the exact date of Ram Lal's death that the plaintiff can succeed in establishing his claim to be the nearest reversionary heir of Ram Lal.

This, in my opinion, is the type of case in which the date of death is an essential part of the plaintiff's cause of action so that the failure to prove it would involve the failure of the plaintiff's suit. Incidentally, it may be observed that this also seemed to be a case in which the plaintiff appears to have come to the court with a suit for possession on the allegation of his own dispossession. Hence, it became necessary for the plaintiff to prove the date of commencement of the defendant's adverse interest. It seems to me that wherever the accrual of a right or commencement of a period of limitation, within which a suit must be shewn by the plaintiff to have been brought, can only be established by proving the date of a person's death that duty mast be discharged by the plaintiff or the suit will fail. But, to carry the doctrine beyond that and to lay down that the date of death must invariably be proved whenever the question of limitation is raised in such cases must result in stultifying or defeating legal rights and wiping out the effects of a statutory presumption. An accrual of a cause of action based on untraceability of the owner cannot be said to depend at all on proof of either actual death or the date of the actual death of the owner. It accrues as soon as death can be presumed and not a day earlier.

55. I may point out that the rule laid down in Re Phene's Trusts [5 Chancery Appeal Cases 139, 144], which has been repeatedly followed by the Privy Council and by our High Courts, was enunciated in the circumstances of a case in which it was absolutely essential for the success of the claim before the court that a legatee claimant must be shown to have survived a testator. It was a case in which there was a competition between claimants which could only be resolved by a decision of the question as to who died first. It is in such circumstances that the onus of proving the date of death also would properly and squarely lie upon the plaintiff claimant. The general principles were thus enunciated in this case (at p. 144) :

> First : that the law presumes a person who has not been heard of for seven years to be dead, but in the absence of special circumstances drawn no presumption from that fact as to the particular period at which he died. Secondly : that a person alive at a certain period of time is, according to the ordinary presumption of law, to be presumed to be alive at the expiration of any reasonably period afterwards. And, thirdly : that the onus of proving death at any particular period within the seven years lies with the party alleging death of such particular period.

56. It is neither a part of the case of any plaintiff before us nor necessary for the success of his case to prove that Kishan Singh died on a particular date or that Kishan Singh died before or after

somebody else. I, therefore, fail to see, with great respect, how the plaintiffs can be saddled with the responsibility to prove this date in the suits now before us. It was nobody's case that Kishan Singh died long ago and that the defendants have been in open hostile adverse possession against Kishan Singh and whoever may be his heirs or reversioners. In the earliest litigation, the defendants claimed as transferees of the rights of Kishan Singh. The declaratory decree restricted their rights to the lifetime of Kishan Singh. Their rights could not extend beyond the point of time when Kishan Singh must be presumed to be dead. That is the farthest limit of their rights. They knew this after the litigation which terminated in 1902. That is why, in the suits now before us, they took up the alternative case, though rather obliquely, that Kishan Singh must be or at last deemed to be alive, so that they may benefit from the declaration in 1902 that their rights were limited to the lifetime of Kishan Singh.

57. If, even after litigating for such a long period, the plaintiffs are still to be denied their rights to Kishan Singh's property, to which they were declared entitled to succeed, they would be really deprived of the benefit of the presumption under Section 108 of the Evidence Act on the ground that they could not prove the date of his death when they have been asserting repeatedly that the basis of their present claim is that although the actual date of death of Kishan Singh cannot be proved, yet, he has not been heard of for seven years and that they had to wait seven years more for this claim to mature. That it could and did mature in 1952 follows logically from the judgment of the High Court in 1951 which is binding inter parties. The plaintiffs are, in my opinion, on the actual basis of their claims, entitled to succeed. That basis having emerged within three years before the filing of the suits, their suits could not possibly be barred by time. If the right to sue had not been proved to have accrued at all, due to want of proof of date of death of Kishan Singh, the suits could perhaps, more logically be held to be still premature or infructuous. But, I fail to see how, even on such a view, we could hold them to be barred by time. If the cause of action itself does not arise no question of its extinguishment by the law of limitation could emerge.

58. If, for some reason, we could still hold that the plaintiff's claims were made beyond the period of limitation, I think that this would be a fit case in which Section 14(1) of the Limitation Act could come to the aid of the plaintiffs provided there as identity of issues to be tried. The previous suits did not fail for want of jurisdiction. Nevertheless, the provision has to be liberally construed as this Court held in the case of India Electric Works. The delay in bringing the present suits was certainly due to the fact that no court could decree the claim before the cause of action matured. This was, certainly beyond the control of the plaintiffs. Therefore, a cause of "like nature" to a defect of jurisdiction seems to me to be there. Indeed, it could be urged that it is a stronger ground in equity than a lack of jurisdiction which can be foreseen with sufficient diligence. It is far more difficult to predict the outcome of a suit depending largely on oral evidence. The defect revealed by the evidence in the earlier litigation was that the suits did not lie at all as they were "premature". This was, in my opinion, a defect reasonably comparable to a want of jurisdiction.

59. I, however, find it very difficult to attempt to apply Section 14, Limitation Act to the cases before us for two reasons. Firstly, there has to be period of time, shewn to have elapsed since the expiry of the period of limitation, which could be excluded under Section 14. If the cause of action does not accrue at all there is not point of time from which any period of limitation could run. Hence, if no cause of action could accrue at all unless and until the date of actual death of Kishan Singh is established, there could be no commencement of a period of limitation. If that be the correct position, where is the question of excluding any time in computing it ? The only possible point from which limitation could start running here is the date on which seven years expired from the date on which Kishan Singh was last heard of. This was within three years before filing of the

suits as pointed out above. Secondly, Section 14 provides that the time to be excluded spent in proceedings prosecuted in good faith must relate to "the same matter" as is "in issue" in the subsequent proceeding. It seems to me that the issue in the earlier litigation was whether Kishan Singh was actually shewn to have died on a particular date. This was quite different from the issue decided in the cases now before us. This is whether Kishan Singh's whereabouts had remained unknown for seven years so that he could be presumed to be dead. I, therefore, rest my judgment solely on the ground that, the causes of action in the previous litigation and the litigation now before us being different, and the subsequent cause of action having arisen within three years before the filing of the suits before us, the suits were not barred by limitation.

60. The Division Bench of the Punjab High Court and proceeded on the obviously erroneous assumption that the learned single Judge had decided the appeals only by giving the appellants the benefit of Section 14, sub-section (1) of the Limitation Act. It had overlooked completely the very first ground of decision of the learned single Judge and also the condition imposed by the learned Judge on the application of Section 14 by using the words : "if found necessary". The learned Judge had held :

> Admittedly, the whereabouts of Kishan Singh are still not known and, in my opinion, there can be no escape from the conclusion on these facts that the death of Kishan Singh must be presumed under Section 108 of the Indian Evidence Act as he had not been heard of for a period of seven years. The present suits were brought between October 21, 1952 and May 5, 1953. The correct approach to reach a solution of the present problem is to give allowances to the plaintiffs, if found necessary, for the period which they spent in previous litigation that is to say, from the year 1945 to 1951.

61. The Division Bench had thus completely ignored the effect of the finding of a new cause of action arising within three years before the filing of the plaintiff's suits. In my opinion, this finding of the learned single Judge was enough to dispose of these appeals. And, as I have pointed out above, questions of either a time bar or its removal by resorting to Section 14(1), Limitation Act postulate that a point of time from which limitation can run has been ascertained. As that point, on the findings of every court, including this Court, could not be the date of Kishan Singh's death, which is unknown, the suits could not possibly be dismissed on that ground. They could conceivably be dismissed on the finding that the date of death of Kishan Singh, being an indispensable part of the cause of action, the plaints do not disclose a cause of action at all, and, therefore, should have been rejected. But, the defendants have not taken any such plea directly. Now was this argued on their behalf.

62. For the reasons given above, I regret to have to respectfully differ from the view adopted by my learned brother Jaswant Singh. I am unable to accept an interpretation of the relevant provision prescribing limitation which would confine the accrual of a cause of action only to causes of direct proof of death, on a particular date. Such a view implies that suits based on a presumption of death are devoid of a cause of action which could support a suit by a reversioners. I do not think that the provision we have to interpret was meant to define or restrict a right of suit or a cause of action in this fashion at all. The object of a "statute of repose" is only to extinguish rights of the indolent but not to demolish the causes of action of those who have not been shewn lacking in vigilance in any way whatsoever.

63. Consequently, I would allow these appeals, set aside the judgment and decrees of the Division

Bench of the High Court and restore those of the learned single Judge and leave parties to bear their own costs throughout.

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