CALCUTTA HIGH COURT

Sarat Chandra Maiti

Vs.

Bibhabati Debi

(Asutosh Mookerjee and Panton, JJ.)

22.08.1921

JUDGMENT

Asutosh Mookerjee , J.

1. The subject-matter of the litigation which has resulted in this appeal is a large tract of what is called Jalpai laud of the abolished Salt Department, situated in the district of Midnapur within the Zamindari of the Raja of Mahisadal. On the 8th July 1864 one Sunder Narain Maiti obtained a settlement from the Zemindar in respect of an estimated area of 400 bighas within specified boundaries. After the death of the original grantee, his son Taraprosad Maiti, on the 10th November 1874, took a confirmatory lease of 513 bighas, approximately, for the benefit of the family whereof he was the senior member. The relationship of the members of this family may be gathered from the following genealogical table:

> Sundar Narain Maiti Haimabati defendant No. 6, M. Sibnarain. Taraprosad, Ratmnarain, Lachminarain, Haraprosad, died 1897, defendant defendant (dead) m. Anand- No. 1, No. 2, m. Bimola moyee, died m. Surno- m. (1) (dead). 1893 moyee, Reshmoni, defendant defendant No. 10. No. 9, m. (2) Matangini alias Tarangini, defendant No. 8. Asutosh, Sarat, Snehabala, Died 1915 defendant defendant No. 3. m. Satis in 1899 Birendra Rajendra, Defendant defendant No. 4. No. 5.

2. The Maitis defaulted to pay rent, with the result that on the 20th August 1903 the Zamindars obtained a decree for rent against them. The decree was put into execution, and at the auction-sale whish followed, the landlords became the purchasers on the 16th January 1904 The sale was confirmed on the 18th February 1904 and possession was delivered on the 10th April 1904. On the 30th January 1909 the plaintiff obtained settlement from the Raja, The defendant, however, disputed her right to take possession. This led to the institution of proceedings under Sections 107 and 145 of the Criminal Procedure Code whish terminated in an order made on the 28th September 1912 for attachment of the disputed lands under Section 146 of the Criminal Procedure Code, The plaintiff, thereupon instituted the present suit on the 9th October 1917 for declaration of her title to the attached land under the base granted to her on the 30th January 1999 and to the sums of money held by the Collector as Receiver from the date of his, appointment. There were two sets of defendants to the suit, namely, defendants Nos. 1 to 5 and

defendants Nos. 7 to 12, The first set repudiated the claim on the ground that it was barred by limitation and that the decree for rent did not affect their rights under the lease of the 10th November 1874, The second set urged that they held tenancies subordinate to the lease of the 10th November 1874 and were consequently entitled to remain in occupation, notwithstanding the sale held on the 16th January 1904 in execution of the decree for arrears of rent. The Subordinate Judge overruled these contentions and declared the right of the plaintiff to direct possession of the disputed lands; the decree also made a consequential order as to the amounts held in deposit in the treasury. The defendants have appealed against this decree, and Separate arguments have been addressed to the Court on behalf of the two sets of defendants who have united in one appeal. The grounds which emerge for consideration may be formulated as follows: first, that the Bait is barred by limitation; secondly, that the decree for rent made on the 26th August 1903 did not operate as a valid rent decree, as three of the parson interested in the tenancy created under the lease of the 10th November 1874 were not represented before the Court in the rent suit; and, thirdly, that the tenancies set up by the second set of defendants were real and not fictitious as held by the Subordinate Judge.

3. As regards the first point, we are of opinion that the plea of limitation cannot prevail, in view of the decision of this Court in *Brojendra Kishore Roy v. Bharat Chandra Roy [Abdul Razac[1]]* That case is an authority for the proposition that when a property is attached under Section 146 of the Criminal Procedure Code, it passes into legal custody, and during the continuance of the attachment, sash custody is for the benefit of the true owner. If the true owner was in fast in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrong doer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession, and from the mom rot of attachment the possession of the rightful owner revived in the eye of the law. These results are deducible from the decisions of the Judicial Committee in *Trustees and Agency Company v. Short[2] Secretary of State v. Krishnamani Gupta[3]* and *Basanta Roy v. Secretary of State for India[4],* The intervention of the public authorities for the preservation of peace, operates in the same way as the vis major of the floods, and the constructive possession of the land is thereafter, if anywhere, in the true owner. While the Collector bolds possession for the benefit of the rightful owner, no possession on the part of the wrong doer, can, by legal fiction, be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner. From the standpoint, no question of limitation really arises, because less than twelve years elapsed between the confirmation of the rent sale on the 18th February 1604 and the attachment by the Magistrate on the 28th September 1912. If during the attachment, the seisin or legal possession is in the true owner, the attachment does not amount to either dispossession of the owner or the discontinuance of his possession. But it has been urged that this view cannot be reconciled with the decision in *Deo Narain v. Webb* (5). This may be conceded; it mast not be overlooked, however, that the decision in that case was pronounced in 1900, when the judgment of the Fail Bench in holly *Churn Sahoo v. Secretary of State for India 6 C 725: 8 C. L. I. 90: 4 Shu L. R.90 : 3* Ind was still considered good law. That Full Bench decision was overruled by the

[1]31 Ind. Cas. 242 : 22 C. L. J. 283 : 20 C. W. N. 481

[2](1838) 13 App Cas. 793, 58 L. J. P. C. 4 : 59 L. T. 677 : 37 W. R. 433 : 53 J. P. 132

[3]29 I. A. 104 C. 58 : 6 C. W. N. 617 : 4 Bom. L. R. 537 : 8 Sar. P. C. J. 269 (P.C)

[4]40 Ind. Cas. 337 : 44 I. A. 104: 44 C. 858: 1 P. L. W. 593 : 32 M. L. J. 505 : 2 C. W. N. 612 : 15 A. L. J. 398 : 25 C. L. J. 487 : 19 Bom. L. R. 480; (1917) M. W. N. 482 : 6 L. W. 117 : 22 M. L. T. 310 (P.C)

judgment of the Judicial Committee in *Secretary of State v. Krishnamoni Gupta* (3), The substance of the matter is that the doctrine that that there can be no continuances of adverse

possession when the land is not capable of sure and enjoyment by the rightful owner, which is now regarded as an elementary proposition by reason of the successive decisions of the Judicial Committee in *Trustees and Agency Company v. Short* (2), *Secretary of State v. Krishnamoni Gupta* (3) and *Basanta Roy v. Secretary of State for India* (4) was by no means familiar when the case of *Deo Narain v. Webb* (5) was decided; that case cannot consequently be treated as binding authority, as it overlooks a fundamental principle enunciated by the Judicial Ccmmittee. We thus see no reason to depart from the decision in *Brojendra Kithore Roy v. Bharat Chandra Rcy [Abdul Bazac]* (I), and the first ground must be overruled as untenable.

4. As regards the second point, in has been urged that the decree for rent made on the 26th August 1903, did not operate as a valid rent decree, as three of the persons interested in the tenancy at that time were not represented before the Court in that suit. These three persons were Asutcah Maiti (the late father of the fourth and fifth defendants in this suit), Saratchandra Maiti (the third defendant in this suit), and Bimala (the widow of Harapsasad Maiti). As regards Asutosh, the objection taken is that at the date of the institution of the rent suit, be bad in reality attaired majority, but was miedescribed as a miner represented by his uncle and certificated guardian Ramnarayan Maiti (the first defendant in this suit). As regards Saratchandra, who was a minor at the date of commencement of the rent suit, the objection taken is that his uncle and certificated guardian Ramnarayan Maiti was appointed bis guardian for the suit without consent. As regards Bimala, the objection taken is that the was not joined as a party to the rent-suit, though the interest of her husband in the tenancy must have devolved on her by right of inheritance.

5. As regards the objection in respect of Asutosh Maiti, a question baa been raised regarding the admissibility of the recital in the guardianship certificate, of the date when be would attain majority. Reference fees been made to the decisions in *Sutis Chunder v. Mohendro Lal*[5] and *Gunjra Kuar v. Ablalh Panda*[6] to show that such evidence would not be admissible under Section 35 of the Indian Evidence Act. These cases were doubted in Monindra Mohan Rcy v.' Ram Krishna 28 Ind.Cas 595 : 21 C. L. J. 621. where the recital in a guardianship certificate was held admissible under Section 32 28 C. 86 : 5 C. W. N.160 on an interpretation of the section which receives support from the decision of the Judicial Committee in *Mahomed Syedol Ariffin v. Yeoh Ool Gark*[7] and conforms to the earlier decisions in *Ram Chandra Butt v. Jogeswar Narain Deo*[8] *Dhanmull v. Ram Chunder Ghose*[9] and *Oriental Government Security Life Assurance Company Limited v. Narasimha chari*[10] But we cannot overlcek the fast that in the present case the recital was based presumably on the statement of the applicant for guardianship, namely, Ramnarain Maiti, who is a party to the suit and could have beenexamined as a witness in this litigation : *Achyutananda D s v. Jagannath Das*[11] There is, however, other evidence on the print, and we shall consequently proceed on the assumption that at the date of the

[5]17 C. 849 : 8 Ind. Doc. 1110
[6]18 A. 4 8 :(1893) A.W.N. 158 : 8 Ind. Dec 1025
[7]739 Ind Cas 401 : 4 I. A. 262 : 21 C. W. N. 257; (1017) M. W. N. 162 : 19 Bom. L. R. 167; (1916) 2 A. C. 575 : 86 L. J. P. V. 15 : 115 L. T. 564 : 32 T. L. R 678
[8]20 C. 768 : 10 Ind. Dec. 511
[9](12) 24 C. 167: L C. W. N, 270 : 12 Ind. Dec 844.
[10](13) 25 M. 183 : 11 M.L.I. 379
[11]27 Ind. cas 730: 21 C L J 96 : 20 C.W.N 122

institution of the rent said, Ashutosh had already attained majority and was misdescribed as a minor. It is indisputable that he had notice of the suit, because orders for the appointment of a guardian ad item are made only after notice to the alleged minor and the proposed guardian. In such circumstances, the principle of the decision in *Rimachari v. Duraisami Pitlai*[12] applie. In

that case, a defendant had been misdescribed as a minor and a guardian ad litem was appointed, although he had in fait attained majority. A suit subsequently instituted by him to set aside the decree was dismissed, on the ground that he was brand by the decree in the former suit, in as much, though aware of the suit and the execution proceeding which resulted in the sale, he still allowed his elder brother to conduct the defense and the proceedings on his behalf as guardian for the suit. This conclusion it manifestly well founded on reason and is supported by the decisions in *Gangi Ram v. Mihin Lal*[13] *Tanguturi Jagannadham v. Seshagiri Rio*[14] *Enuga Sundarama Reldi v. Bezwada Pattabhiramireddi*[15] and *Net Lall Sahoj v. Sheikh Kareem Bux*[16] We need not consider the effect of the institution of a suit by a person as the next friend of a plaintiff who is described as a minor, but is really a major. Upon that point, the Courts have been divided in opinion *Taqui Jan v. Cbaidulla*[17] and *Shanmnga Chitty v. Narayana Aiyar*[18] favor a liberal view and sanation the necessary amendments to validate the sail; *Sheorania v. Bharat Singh*[19] and *Saranvui v. Seshiyya (23) 28 M 396 : 1 M. L. T. 113*, adapt, on the other hand, a stricter view. In the case before as, there is abundant evidence that Asutosh was aware of the frent-suit and of the execution proceedings consequent on the decree made therein. He never took steps to challenge the propriety of the decree up to the time of his death, which took place in 1915. In cur judgment, the decree made against him was not invalidated by the circumstance that he was misdescribed as a minor when he had in fast already attained his majority. The objection fails in so far as it is based on the ground that Asutosh was not properly before the court in the rent suit.

6. As regards the objection in respect of Sarat Chandra Maiti, it has been urged that he was not properly represented 'in the rent suit, as Ram Narain Maiti, his certificated guardian, was appointed guardian for the suit, notwithstanding that, upon service of notice, he did not appear to signify his acceptance of (he office of guardian ad I tern. It may be stated at the outset that the order-sheet in the rent-suit is not available at this distance of time, and it is not possible, from an inspection of the record, to ascertain whether Ram Narain responded to the notice served upon him and whether the order for his appointment as guardian ad litem was made with his consent. The fact remains that the rent suit was decreed ex parte and there was no appearance on behalf of the defendants when the suit came up for final disposal on the 26th August 1913. This does not conclusively prove that there was no appearance on behalf of the defendants at an earlier stage, But let us assume that Ram Narain Maiti, the proposed guardain, did not appear in response to the notice served upon him and yet he was appointed guardian ad litem, of his nephew and ward, Sarat Chandra Maiti. The appellants contend that such appointment was void and inoperative and that, consequently, Sharat Chandra Maiti must be considered not to have been represented at all at the trial. The validity of this contention must be tested with reference to the provisions of the Civil Procedure Code of
1882 which was in force when the rent, suit was tried. Section 443 of the Code of 1882 provided as follows: Where the defendant to a snit is a minor, the Court, on being

[12](15) 21 M. 167:7 Ind. Dec. 474
[13](16) 28 A. 416 : 3 A. L. J. 187; (1906)A. W.N. 73
[16](19) 23 C. 636 : 12 lnd. Dec. (N.S) 456
[17](20) 21 C. 866 : 10 lnd. Dec. (N.S) 1209
[14]37 lnd. Cas. 387 : 20 M. h. T. 479
[15]42 lnd. Cas. 421; (1917) M. W. N. 495 : 6 U.W
[18]41 lnd. Cas. 510 : 40 M. 743
[19](22) 20 A. 90; (1837) A W.N. 203: 9 lnd. Dec. (N.S.) 417

eatis6ed of the fast of his minority shall appoint a proper person to be guardian for the suit for such minor and generally to act on his behalf in the conduct of the case,

7. This was an exact reproduction of Section 443 of the Civil Procedure Code of 1877. The

following paragraph was aided to Section 443 of the Code of 1882 by Section 53B of the Guardians and Wards Act, 1890: Where an authority competent in this behalf has appointed or declared a guardian or guardians of the person or property, or both, of the minor, the Court shall appoint him, or one of them, as the case may be, to be the guardian for the suit under this Section unless it considers, for reasons to be recorded by it, that some other person ought to be as appointed.

8. Sestion 443, in this enlarged form, has now been reproduced as Order 32, Rule 4, Sub-rule (2) of the Civil Procedure Code of 1908. In the Code of 1908, there is, in Order 32, Rule 4, Sub-rule (3), an additional provision to the effect that no person shall, without his consent, be appointed guardain for the suit. There was no such provision in the code of 1882; but it has been held in the case of *Jadow Mulji v. Chhogan Raichand*[20] which was followed in *Vasudev Morbhat Kale v. Krisknaji Ballal Gokhale*[21] that the Civil Procedure Code did not empower a Court to appoint, a person against his or her will to be a next friend or gardain ad litem of a minor. Sir Michael Westropp, C. J., observed that the words "no other person fit and willing to act as guardain for the suit" in Section 453 of the Code of 1877 (as amended by Section 73 of Act XII of 1879) indicated that the Legislature did not intend to force the office of guardain ad titem on any person in indium, The same words were reproduced in Section 456 of the Cods of 1882 and now find a place in Order 32, Rule 4, Sub-rule (4) of the Code of 1903, These remark, however, were made with referenda to the appointment of a person as guardain ad litem who was not a certificated guardain, conseqently, the observations cannot be asumed to have been intended to apply to a person who had, on bis own application, been appointed a guardian of the minor by competent authority." Indeed, in the case of *Issur chunder v. Nobo Kristo*[22] it was ruled, on the authority of the decisions in *Dhondiba v. Kusa*[23] *and Buba.i v. Maruli*[24] that as no order for appointment of a guardian ad litem shall issue without the consent of the party appointed, if no relative or friend of the minor san be found who is willing to take out a certificate and appear as guardian, the Judge should appoint an officer of Court or some respectable nomince of the minor. This proceeds on the assumption that a person who, on his own application, has been appointed guardian of the person or property of a minor will be willing to discharge his duties towards his ward by acceptance of the office of guardian for the suit. The position under the code of 1882, after its amendment in 1890, thus was that there was no specific prohibition against the appointment of a person as guardian for the suit without his consent though there were judicial decisions, such as those mentioned in Krishna chandra Mandal *[Narendra chandra] v. Jogendra Narain Rop*[25] which interpreted the Code to signify that a person who was not a certificated guardian should not be so appointed without his consent. Where the person proposed to be appointed was a certificated guardian, the Court was bound to appoint him unless it considered, for reasons to be recorded, that some other person ought to be so appointed, If no such reasons transpired on the application made by the plaintiff or on a

[20](24) 5 B. 306 : 3 Ind Dec. (n. s.) 202 [22](26) 7 C. L. R. 407 [24](28) 11 B. H. C. R. 182
[21](25) 20 B. 534 : 10 Ind Dec. (n. s.) 921 [23](27) 6 B.H. C. R. 219 [25]27 Ind. cas 139 : 20 C. L. J. 469 : 19 C.W.N. 537

representation made by the proposed guardian, the normal course for the court to follow would be to make the appointment. This view cannot be taken as regards the provisions of the Code of 1908, whish contains an express provision in Order 32, Rule 4, Sub-rule (3) that no parson shall without his consent be appointed guardian for the suit. This has been held to apply to all persons proposed to be appointed guardian ad litem, whether they he or be not certificated guardians of the minor; *Annada Prasad v. Upendra Nath Rey*[26] Second Appeal No. 2130 of 1919, decided by

Mookerjee and Panton, JJ., on the 5th August 1921, In the absence of a provision in the Code of 1832 corresponding to Order 32, Rule 4, Sub-rule (3) of the Code of 1908, we may reasonably hold that where a certificated guardian was proposed for appointment as guardian ad litem, the Court might, unless he declined the appointment, presume his consent. From this point of view Sarat Chandra mast be deemed to have been represented by his certificated guardian as guardian ad litem in the rent suit. This is clearly not a case like that of *Tekait Krishna Prasad v. Moti Chand*[27] where proceedings were taken in Court without notice to any one representing the minor. The decision in *Nursing Narain v. Jahi Mittry*[28] also is distinguishable. There the mother of the infant was proposed for appointment as guardian ad litem of her infant son ; she did not respond to the notice served upon her and yet the Court proceeded to appoint her, although the father was the, certificated guardian : see also *Raghubar Dyal Sahu v. Bhikya Lal*[29] and *Beni Prasad v. Laija Ram*[30] The objection against the decree in the rent-suit thus fails in so far as it is based on the ground that Sarat Chandra was not properly represented before the Court.

9. As regards the objection in respect of Bimala, there are no materials on the record to show whether she was in joint enjoyment of the interest of her husband in the leasehold property. The tenancy stood, as we have seen, in the name of Tara Prasad Maiti under the lease of the 10th November 1374. After his death in 1891", the landlord brought a suit for arrears of rent against the male members of the family, namely, the two eons of Tara Prasad and his two surviving brothers Ram Narain and Luchmi Narain: *Khetier Mohan Pal v. Tran Kristo*[31] In such circumstances, the vital question is, whether the tenure was completely represented by the defendants on the record. Upon that aspect of the case, it is plain that the appellants have no substantial grievance. This is clearly a case where the doctrine of representation, recognised in *Nitayi Behari v. Hari Govinda Saha*[32] *Gagan Sheikh v. Abejan Khatun*[33] *Profulla Kumar Sen v. Salimullah Bahadur*[34] and *Banbihari v. Khetra Pal Singh*[35] may be invoked. If we examine the constitution of the rent-suit, we find that Ram Narain and Lashmi Narain, the two brothers of Tara Prasad, were joined as defendants. Ram Narain was described as the certificated guardian of Asutosh and Sarat. None of contested the claim. The interest of Ram Narain as a co-sharer of the tenancy was identical with that of his nephews. The evidence shows that the defendants were aware of the suit, the decree and the execution proceedings. They did not contest the claim, because there was no defense available. Although many years have elapsed since the decree was made and the sale was held, no endeavour has ever been made to re open

[26]65 Ind. Cas. 18 : 34 C. h. J. 293
[27]19 Ind. Cas. 293 : 40 I. A. 140 : 40 C. 635 : 17 C. L. J. 572 : 17 C. W. N .687; (1913) M.W.N. 487 : 11 A. L. J. 517 : 15 Bom. L. R. 515 : 14 M. L. T. 37 : 25 M.L. J. 140 (P.C)
[28]18 Ind. Cas 414 : 15 C. L J. 3
[29](33) 12 C. 69 : 6 Ind. Dec. (n. s.) 48
[32]26 C. 677 : 13 Ind. Dec. (n. s.) 1033
[33]10 Ind. Cas. 116 : 14 C. L. J. 180
[30]35 Ind. Cas. 63 : 38 A. 452 : 14 A.L.J. 438
[31]3 C. W. N. 371
[34]52 Ind. Cas. 301 : 23 C.W.N. 590
[35]13 Ind. Cas. 785 : 16 C. W. N.259 : 38 C. 923

the proceedings : *Ganpat Lal v. Bindbasini Prashad Narayan Singh*[36]and in the present litigation it has not even been hinted that the arrears claimed in the rent suit were not due in fact, or that the decree was erroneous or otherwise unjust in any particular. In such circumstance, we should look, not so much to the outward form of the Proceedings in the suit as to the substantial justice of the case, as was done by the Judicial Committee in *Han Saran Moitrct v Bhubaneswari Debi*[37] where reference is made to the decision of the Judicial Committee in *Dhurm Das Pandey v. Shami Soondri Dibiah*[38] and of a Full Bench of this Court in *Suresh Chunder v. Jagut Chunder Deb*[39] Tested from this point of view, there is no foundation for the argument that the tenancy was not

adequately represented in the rent-suit and that the decree made therein did not operate as a rent-decree. The second ground urged by the appellants cannot, consequently, be maintained,

10. As regards the third point, it has been urged that the tenancies get up by the second set of defendants were real and rot tietitious as held by the Subordinate Judge. The pedigree get out above shows that defendant No. 7 is the sister of defendant No. 3, defendants Nos. 8 and 9 are the wives of defendant No. 2 and defendant No. 10 is the wife of defendant No. 1. These defendants allege that they are tenants under their relations, and that the tenansies were (treated in their favour shortly after the settlement was obtained from the Zemindar. Defendants Nos. 11 and 12 claim to hold usufruatuery mortgages executed in their favor on the 5th July 1902 by defendant No. 10 and defendant No. 8 respectively. The Subordinate Judge has held that the alleged tenancies had no real existence and were created by the tenure holders in favor of the female members of their family with a -view to keep down the amount of acsses leviable on the assets as also to save a fragment in the event of an execution sale. The tenancies are mentioned in a Road cess return submitted by Tara Prasad Maiti on the 24th June, 1875 and this may lend some support to the first hypothesis just mentioned. The circumstances that the tenancies were all in favour of the ladies of the family and that the rents were unusually small in comparison with the rent payable to the Zemindar are undoubtedly grounds for suspicion. But as was said by Sir Lawrence Jenkina in *Mina Eumari Bibi v. Bibi Bijoy Singh*[40] the decision must rest, not upon suspicion but upon legal grounds established by legal testimony. The Sub-ordinate Judge has kept this principle in mind and has carefully traced the history of each of these tenancies. He has shown that there is no satisfactory evidence of possession by the alleged lessees. This, indeed, was the crucial test, and it is significant that none of the female defendants has ventured to give evidence in support of her claim, while both Ram Narayan and Lakchi Narayan have kept away from the witness box, although they are the only persons who could have been expected to give valuable evidence from personal knowledge, as to the creation and enjoyment of these tenancies. Nor have the account-books been produced to show that the cultivation was carried on by tenants settled on the land by the ladies and that the ladies themselves received the profit. It is not necessary to review in detail the evidence relating (o each of these tenancies, which has been commented open minutely by Counsel on both sides and has been carefully scrutinized by us. It is sufficient to state that our attention has not been drawn to any material

[36]56 Ind. Cas. 274 : 47 I A. 91 : 18 A. L. J. 555 : 1920 M. W. N. 382 : 12 L. W. 59 : 39 M. L. .T. 103 : 2 U. P. L. B. 103 : 24 C. W. N. 954 : 28 M. L. T. 330 (P.O)

[37]15 I. A. 195 : 16 C 40 : 12 Ind. Jur. 373 : 5 Sar. P. C. .1. 198 : 8 Ind Dec. (N.S)

[38]3 M I A. 22 , 6 W. R. P. C. 43 : 1 Suth P. C. J. 147 : 1 Sar. P. C. J. 271 : 18 E. B. 484

[39](43) 14 C. 204 : 7 Ind. Dec. (n. s.) 135

[40]40 Ind. Cas. 242 : 44 I. A. 72 : 26 C L. J. 508 : 1 F. L. W. 425 : 5 L. W. 711 : 32 M L J 425 : 210. W. N. 586 : 21 M. L. T. 344 : 15 A. L J 382

misstatement of the effect of the evidence as set out in the judgment of the Subordinate Judge. We hold, accordingly, in concurrence with the Subordinate Judge, that the tenansies in the names of the ladies were fictitious and that they were never in possession as tenants under the tenure-holders. The third ground, consequently, fails like the first and the second.

11. Finally, a question has been raised as to the identity of the lands in suit with the lands comprised in the lease of the 10th November 1874 and the sale certificate of the 18th February, 1904. This question was raised in the eleventh issue in the court below. The Subordinate Judge states in his judgment with reference to that issue that 'the disputed lands are admittedly included

in the tenure and so they are included in the sale certificate." The appellants have, however, contended that this statement must have been made by the Subordinate Judge under a misapprehension and that no such admission was made before him. But this allegation is an unproved assertion which we are not prepared to accept. In the case of *Damodar Narayan v. Dalglish*[41] it appeared from the judgment of the Subordinate Judge that at the trial before him it was admitted with regard to some of the lands in suit that those lands were the private lands of the proprietor the case proceeded before the Subordinate Judge and was dealt with by him on the footing of that admission. On appeal, this Court went behind the admission. Sir Arthur Wilson observed that the High Court was in error in going behind the admission and re opening the question whether the smaller area was the private land of the proprietor. Again, in *Nellavadivu v. Sabra-mania Pillai* (46) Mr. Justine Sadasiva Iyer observed that a statement in a judgment as to an admission made before the Court of first instants should not be doubted lightly by the Appellate Court, spatially in the absence of an affidavit by the Vakil who appeared in the Court of first instance. It is plain that in cases of this Character where a litigant feels aggrieved by the statement in a judgment tint an admission has been made, the most convenient and satisfactory course to follow, wherever practieable, is to apply to the Judge without delay and ask for rectification or review of the judgment. This course was not pursued in the case before us, nor is the proof of the allegation that the Trial Judge was under a misapprehension. We must consequently, hold that the appellants cannot be permitted to re-open the question in this Court. But we may add that we heard the appellants, upon the merits, on this part of the case, and we did not feel at all impressed that there was any substance in the contention that the lands in suit were not lands included in the lease and the sale certificate.

12. The result is, that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

[41]9 Ind. Cas. 913 : 38 I. A. 65 : 38 C. 432 : 13 C. L. J. 512 : 10 C. W. N. 311 : 9 M. L. T. 381 : 8 A. L. J. 411 : 13 Bom. L. R. 396; (1911) 2 M. 188