FULL BENCH

Before S. S. Dulat, A. N. Grover and I. D. Dua, JJ.

SANTA SINGH AND OTHERS,—*Appellants*

versus

RAJINDER SINGH AND OTHERS,—*Respondents*

Regular Second Appeal No. 1532 of 1961.

1965

March 4th.

Limitation Act (IX of 1908)—Art. 142—Applicability of—Plaintiff alleging possession and dispossession by defendant—Whether governed by Art. 142—Transfer of Property Act (IV of 1882)—S. 52—Doctrine of lis pendens—*Meaning and applicability of—Whether applies to a case in which plaintiff in a suit for declaration of title and possession obtains possession of the land in suit somehow—Suit of the plaintiff dismissed—Defendant of that suit filing suit for possession against the then plaintiff for possession of the land—Whether can take benefit of the doctrine of* lis pendens.

Held, by majority (Dulat and Grover, JJ.)—That a suit for possession based on an allegation of title as also prior possession and subsequent dispossession and discontinuance of possession is governed by Art. 142 of the Indian Limitation Act, 1908, and the plaintiff must prove his possession within 12 years of the suit. When land is jungle land or land under water where no evidence of actual user in the ordinary sense can be expected to be adduced, the presumption that possession follows title may be called in aid but the presumption arising from title is not available where the land is capable of actual possession by cultivation or otherwise.

Held that, the doctrine of *lis pendens* embodied in section 52 of the Transfer of Property Act, 1882, is expressed in the Maxim *"ut lite pendente nihil innovetur"* the principle being that *pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent. The rule is based not on the doctrine of notice but of expediency. The effect of the maxim is not to annul the conveyance but only to render it subservient to the rights of the parties to the litigation. Thus the word "transfer" essentially has reference to alienations and not to one of the parties to the suit taking forcible possession of the property in dispute which, by no stretch of reasoning, can be regarded to be an alienation. The words "or otherwise dealt with" would probably include such transactions as a release or a surrender. They have been held to include a contract of sale and a partition between co-defendants. They also apply to any collusive decree or compromise by which the title of a party is affected during the pendency of a suit, for the principle underlying the section

is that a litigating party is exempted from taking notice of a title acquired during the litigation.

Held that, the rule of *lis pendens* unmistakably hits transfer of interest during the pendency of the litigation as also any such act or dealing with the property which may defeat the rights of the parties to the suit. Its operation, however, according to the clear language of the section, is confined to the *lis* during which the property is transferred or otherwise dealt with and the result is that the decree is to be made in complete disregard of any transfer or dealing with by any of the parties which may affect the rights of the other party. Although the words "or otherwise dealt with" appear to have been used by the legislature to connote any act or transaction in the nature of transfer of interest, but even if the widest possible meaning is given to them and they are to be regarded as covering the taking of possession by one party from the other during the pendency of a litigation, the question still remains whether that would affect the running of the period of limitation when a subsequent suit for possession of the property is instituted—as in the present case. Section 9 of the Limitation Act provides that where once time has begun to run, no subsequent disability or inability to sue stops it. It is well-known that time begins to run when the cause of action accrues and the cause of action accrues when there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. In the present case the cause of action arose to the plaintiffs-respondents in 1945-46 for filing a suit for possession and from that date the limitation started running and it could be interrupted only if the respondents had filed the present suit within a period of 12 years of their dispossession. After the lapse of that period, the bar of limitation would operate and for this purpose it is wholly immaterial whether the respondents were deprived of their possession during the pendency of the suit of 1940. The suit of the respondents is barred by limitation under Article 142 or alternatively that the appellants have become owners of the suit property by having remained in adverse possession for a period of over 12 years and that the bar created by Article 144 applies. The rule contained in section 52 of the Transfer of Property Act, is not applicable so far as the present suit is concerned. The operation of that rule was confined to the stage of the dismissal of the first suit of 1940 and it is neither relevant nor can it be applied when it is to be decided whether the present suit for possession is barred under the Limitation Act.

Case referred by the Hon'ble Mr. Justice Mehar Singh and the Hon'ble Mr. Justice Inder Dev Dua on 24*th April,* 1963, *to a larger Bench owing to an important question of law involved in the case and the case was finally decided by a Full Bench consisting of the Hon'ble Mr. Justice S. S. Dulat, the Hon'ble Mr. Justice A. N. Grover and the Hon'ble Mr. Justice Inder Dev Dua, on* 4*th March,* 1965.

Regular Second Appeal from the decree of the Court of Shri Radha Kishan Baweja, 1st Additional District Judge, Amritsar, dated the 4th day of July, 1961, reversing that of Shri Harish Chandra Gaur, Sub-Judge, 1st Class, Amritsar, dated the 22nd April, 1960, and granting the plantiffs a decree for possession of land in suit measuring 331 kanals 11 marlas, as prayed for and leaving the parties to bear their own costs throughout.

D. N. AGGARWAL, G. R. MAJITHIA AND B. N. AGGARWAL, ADVOCATES, for the Appellants.

S. L. PURI AND MUNISHWAR PURI, ADVOCATES, for the Respondents.

JUDGMENT

Grover, J.

GROVER, J,—This is a second appeal which has been referred by a Division Bench to a larger Bench for decision owing to the importance of the main point involved in it relating to the applicability of the doctrine of *lis pendens* embodied in section 52 of the Transfer of Property Act, 1882, to the facts of the present case.

It is necessary to recapitulate the facts. One Sham Singh owned a little more than 892 *kanals* of land. He died more than 40 years ago leaving behind two daughters, Mst. Premi and Mst. Khemi, and a widow Mst. Malan. Mst. Premi died before the year 1936 leaving two sons Mohinder Singh and Rajinder Singh. In 1936 Mst. Malan gifted one-half of the property to which she had succeeded on her husband's death to Mohinder Singh and Rajinder Singh and one-half to Mst. Khemi. The donees entered into the possession of the land. This gift was challenged in 1940 by Santa Singh and others who were collaterals of Sham Singh by a suit for declaration and possession of that land on the ground that they were preferential heirs of Sham Singh. This suit had a chequered career. It was stayed under the Indian Soldiers (Litigation) Act, 1925, because Mohinder Singh and Rajinder Singh were serving in the Army and it was not revived till 1946. It appears that at the time of the partition of the country in 1947 some of the plaintiffs, who had admittedly become Muslims, had gone away to Pakistan. The plaint was, therefore, amended and the suit proceeded to trial. Meanwhile in 1945 Mst. Khemi had died and the mutation of her one-half share was sanctioned in favour of Santa Singh, etc., on 24th February 1945 and in 1946, they are said to have entered into possession of the suit property.

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Mohinder Singh and Rajinder Singh moved the appellate and revisional authorities on the revenue side in the mutation proceedings and ultimately the Financial Commissioner held that the mutation should be made in their favour and it was duly made (*vide* Exhibit P. 10). The suit of Santa Singh and others which was still pending was disposed of by the trial Court on 28th February, 1950. It was held that the property was self-acquired of Sham Singh and, therefore, Mohinder Singh and Rajinder Singh were the rightful heirs of Mst. Khemi. The gift by Mst. Malan was found to have been made by way of acceleration of succession. Santa Singh alone filed an appeal to the High Court (Regular First Appeal No. 44 of 1950) which was not disposed of until 21st November, 1958. It was held that the suit had been rightly dismissed because the collaterals of the 8th degree could have no possible claim to non-ancestral property of the last male holder and that even if the property had been found to be ancestral, they would still not have been preferential heirs as against Mohinder Singh and Rajinder Singh.

The suit out of which the present appeal has arisen was filed on 20th April, 1959, for possession of agricultural land measuring 331 *kanals* 11 *marlas*, the plaintiffs being Rajinder Singh and Inderjit Singh, etc., the legal representatives of Mohinder Singh who apparently had died by this time. Santa Singh and others as also the Custodian of Evacuee Property were impleaded as defendants. In paragraph 3 of the plaint it was stated that pursuant to the orders of the Financial Commissioner, dated 13th December, 1946, mutation was effected in favour of the plaintiffs who took possession of the share of Mst. Khemi through the Tehsildar in 1947. Thereafter a suit was filed by the present defendants Santa Singh and others for possession of the disputed land along with other land on 28th February, 1949 in the Court of Shri Gobind Ram, Subordinate Judge, Amritsar, in which it was admitted that the plaintiffs were in possession. That suit was dismissed on 28th February, 1950 and the appeal against the decree of the trial Court was also dismissed by this Court on 21st November, 1958. It may be mentioned that the date of institution of the suit, namely, 28th February, 1949, given in paragraph 4 of the plaint is altogether incorrect as the suit was admittedly, filed in April 1940, as has been previously stated. In paragraph 5 of the plaint it was pleaded that after the decision of this Court on 21st

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November, 1958, the defendants took possession of the land in an unlawful manner. It was averred that after the aforesaid decision the defendants had no right to remain in possession and that the plaintiffs had become the owners by virtue of the High Court's decision, their title being beyond dispute now. In paragraph 6 relating to the question of limitation, it was said that the defendants had been asked to surrender possession pursuant to the decision of the High Court but they had refused to do so a week before the institution of the suit. The cause of action for the suit for possession had arisen for that reason as also on account of the decision of the High Court delivered on 21st November, 1958. In the written statement in paragraph 3, it was claimed *inter alia* that on the death of Mst. Khemi in 1945, the mutation had been entered in the name of the defendants and that they had continued to remain in adverse possession for a period of more than 12 years. It was denied that the plaintiffs had obtained possession through the Tehsildar. In paragraph 4, it was stated that during the pendency of the suit which had been instituted in 1940, the defendants had taken possession as heirs of Mst. Khemi and had continued to remain in possession throughout till the present time. In paragraph 5, it was pleaded apart from other matters that the suit was barred by time. The correctness of paragraph 6 of the plaint was denied and it was asserted that no cause of action had arisen to the plaintiffs.

The main issues which are relevant now are the following:—

(1) Whether the plaintiffs obtained the possession of the land in dispute through the Tehsildar near about the date 13th December, 1946, as alleged by them in paragraph 3 of the plaint?

(2) Whether the defendants took possession of the land in dispute after 21st November, 1958 as alleged in paragraph 5 of the plaint?

(3) Whether the defendants have become owners of the land in dispute through adverse possession?

Before the trial Court, it appears that the position taken up on behalf of the plaintiffs was that they had been in possession of the suit land since 1947 up to 21st November.

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1958. On a consideration of the evidence the Court negatived this contention and found that the plaintiffs had not taken possession in the year 1947 nor had they remained in possession up to 21st November, 1958. It was found proved that the defendants had been in possession since 1945 without any break, their possession being continuous throughout. Upon the question of limitation, the trial Court's judgment in paragraph 9 was:—

> "Another point which is to be discussed is whether the case of the plaintiffs is governed by Article 142 or 144 of the Limitation Act. The answer is that the case of the plaintiffs is governed by Article 142, when they have alleged that they have been dispossessed by the defendants and it is for them to prove that they have been dispossessed from this date and they have failed to prove it. They have not led evidence for establishing and proving particular date on which date they were dispossessed within 12 years. Therefore, the possession of the defendant is over the suit land for more than 12 years since 1945 up to the institution of the suit as their evidence is cogent and convincing regarding this fact."

The suit having been dismissed, an appeal was taken to the Additional District Judge who examined with care the entire evidence and came to the firm conclusion that possession of the suit land right from 1945-46 up to the present time was not that of the plaintiffs but of the defendants. It was further found that the possession of the defendants was forcible and they were not holding it as tenants under the plaintiffs. He was, however, of the view that since the defendants had taken possession of the land during the pendency of the suit which had been instituted in 1940 the principle embodied in section 52 of the Transfer of Property Act became applicable. According to him, the defendants began to acquire their title by adverse possession during the pendency of the suit which was finally decided by the High Court on 21st November, 1958. Therefore, although the defendants had remained in actual possession during that period no right could accrue to them by virtue of the applicability of the rule of *lis pendens*. Their right became adverse only with effect from 21st November, 1958,

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when their appeal was dismissed by the High Court. As the present suit had been filed on 20th April, 1959, it could not be held that the defendants had acquired any title by adverse possession for a period of 12 years. The suit was consequently decreed. This led to the present second appeal having been instituted in this Court by the defendants.

Although the Bench hearing the present appeal regarded the question of the applicability of section 52 of the Transfer of Property Act to acquisition of title by adverse possession as decisive of the appeal, learned counsel for the parties have raised certain other points which are fairly important and it will be necessary to decide them because the entire appeal is before us for disposal. The questions canvassed on behalf of the appellants are :

(1) The present suit was governed by Article 142 of the Limitation Act and if that Article applied, it merited dismissal on the ground that the respondents had failed to establish that they were in possession within 12 years of the suit.

(2) Section 52 or the principles embodied therein had no applicability to the facts of the present case and even if Article 142 did not apply, the appellants had succeeded in proving their adverse possession for over 12 years with the result that they have become the owners of the land in dispute.

Mr. S. L. Puri for the respondents, apart from supporting the decision of the Additional District Judge on the ground that section 52 of the Transfer of Property Act applied, has endeavoured to assail the concurrent findings of fact of the Courts below relating to the factum of possession of the parties and the parcels of land over which they had possession.

Mr. D. N. Aggarwal for the appellants has referred to the plaint and has urged that the case of the respondents was founded in substance and effect on allegations of possession and dispossession. The unequivocal position taken up by the respondents was that they had entered into possession soon after the order of the Financial Commissioner dated 13th December, 1946, in the mutation proceedings and that they had been dispossessed after 21st

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November, 1958, which was the date of the decision of the High Court in the suit of 1940. This attracted the rule laid down by the Full Bench in *Behari Lal* v. *Sunder Das* (1). In that case the plaintiffs had brought a suit for possession against the defendants alleging that they were the owners of a house and had given it on lease to Nabi Bakhsh defendants No. 2 in the year 1927. Subsequently Nabi Bakhsh granted a sub-lease to defendant No. 1. A suit was filed by the plaintiffs against Nabi Bakhsh and defendant No. 1 for rent in which defendant No. 1 denied their title and denied that he was a tenant under Nabi Bakhsh. The Court gave a decree for rent against Nabi Bakhsh but dismissed the suit against the defendants. They, therefore, brought a suit for recovery of possession. The question of applicability of Article 142 of the Limitation Act arose and in that connection Dalip Singh, J., who delivered the judgment of the Full Bench observed:—

> "On the pleadings of the plaintiffs it appears to me to be perfectly clear that the plaintiffs pleaded possession and dispossession. It is not necessary for the purpose of deciding this question that the plaintiffs should have alleged this in so many words. What is necessary is whether on the allegations of fact made by them it is either alleged or follows as a necessary inference that they alleged possession and dispossession.

According to the Full Bench by alleging title in themselves and that Nabi Bakhsh had been put into possession as a tenant in 1927 the plaintiffs had made an allegation that prior to 1927, they were themselves in possession, at any rate constructively through the tenant Nabi Bakhsh. They had then alleged a sub-lease to the contesting defendant by Nabi Bakhsh and further alleged that in a suit brought by them the sub-tenant had denied the title of Nabi Bakhsh. It was clear from this that as there was no fixed period of lease alleged or proved the plaintiffs alleged their dispossession by the sub-tenant (defendant No. 1) at any rate from the date when it came to their knowledge that defendant No. 1 denied the title of Nabi Bakhsh and of the plaintiffs. The fact that they had sued

(1) I.L.R. 16 Lah. 442=A.I.R. 1935 Lah. 475.

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for possession itself showed that they knew that they had been dispossessed of the property in question. That being so, it was clear that Article 142 of the Limitation Act would govern the case. *In Official Receiver of East Godavari at Rajahmundry* v. *Chava Govindaraju* (2), a full Bench speaking through Leach, C.J., expressed the view, after a consideration of the Privy Council cases (*Mohima Chand Mozumdar* v. *Mohesh Chunder Neoghi* (3), *Mahamad Amanulla Khan* v. *Badan Singh* (4), and *Dharani Kanta Lahiri* v. *Gabar Ali Khan* (5), that it cannot be maintained that a person who proves title in a suit for ejectment has the right to the decree sought unless the defendant proves adverse possession for 12 years. The plaintiff is not entitled to succeed unless he shows, in addition to title, that he has been in possession of the property within 12 years of the suit. In *Jaldhari Mahto* v. *Rajendra Singh* (6), a Full Bench of the Patna Court, after an exhaustive review of the case law including the Lahore and Madras Full Bench decisions, summarised the true position in this way. In a suit for ejectment the initial burden lies on the plaintiff to prove that he has the title to immediate possession by ejectment of the defendant. If the suit is based on the ground of dispossession or discontinuance of possession and the defendant is in possession and asserts title independent of the title alleged by the plaintiff, then barring the cases, where on proof of plaintiff's title possession is presumed with him on the principle that possession follows title, the plaintiff must prove in addition that he was in possession within twelve years of the suit. Where, however, it is admitted or found as a fact that the plaintiff has title to the suit land and is entitled to recover *khas* possession and the defendant asserts tenancy rights, the burden is on the tenant defendant to prove that he has the right of occupancy which he claims, and such a case would be governed by Article 144 of the Limitation Act. It may be mentioned that in *the Patna case*, it was found on the pleadings and on the evidence that the suit was one between a landlord and a tenant and the defendant did not set up an independent title by virtue of adverse possession. The Lahore and the Madras decisions were distinguished on that very ground. In the earlier Full Bench

(2) A.I.R. 1940 Mad. 798.
(3) I.L.R. 16 Cal. 473.
(4) I.L.R. 17 Cal. 137.
(5) 25 M.L.J. 95.
(6) I.L.R. 1958 Patna 373.

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case of the Patna Court *Raja Shiv Prasad Singh* v. *Hira Singh* (7), the correctness of whose decision was accepted, the plaintiffs had claimed their title under a registered *kabala* granted in the year 1901. They pleaded that they were in possession up till June, 1916 when they were dispossessed by the defendants. It was thus admitted that the defendants were in possession on the date of the suit which was instituted on 9th August, 1916. One of the main pleas in defence was that the suit was time barred as the defendants had been in adverse possession for over 12 years. Dawson Miller, C.J., who delivered the judgment of the majority, was of the view that the plaintiff in a suit for ejectment must prove not only his antecedent title but also his possession within 12 years of the suit. In *Mst. Murti Dussadhin* v. *Surajdeo Singh* (Civil Appeal No. 625 of 1960), decided by the Supreme Court on 11th August, 1964, the decision of the Full Bench in *Jaldhari Mehto* v. *Rajindra Singh* (6), was approved. The decisions of the Madras and the Lahore Courts referred to before were considered and were neither disapproved nor any contrary opinion expressed but they were distinguished from the facts of the case which was before the Supreme Court. The following observations of their Lordships containing the gist of their view may be reproduced:—

> "Construing the plaint as a whole, it is clear that the plaintiff never alleged dispossession or being out of possession. He asserted ownership of the suit land and claimed that he was in possession. Section 145 Criminal Procedure Code proceedings seemed to have cast a doubt on his title and he accordingly brought a suit for a declaration. It is true that in the alternative he prayed for a decree for possession and mesne profits. He was careful even in this alternative prayer to say that he could only be deemed to be dispossessed by section 145 proceedings. The defendants did not deny the title of the plaintiff to the suit land but asserted that they had been settled and acquired occupancy rights. On these facts it seems to us that it is Article 144 and not Article 142 that applied."

(7) A.I.R. 1921 Patna 237.

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The pleadings of the parties to which reference has been made leave no room for doubt that the suit instituted by the respondents in the present case for possession was based on an allegation of title as also prior possession in the year 1947 and dispossession and discontinuance of possession subsequently. There is thus a good deal of substance in the argument of Mr. D. N. Aggarwal that the suit was governed by Article 142 and that the decisions of the Full Benches of the Lahore and Patna Courts were fully applicable. On this view of the matter the decision of the trial Court must be regarded as having been correctly given with regard to the applicability of Article 142.

Mr. Puri has not been able to challenge the correctness of the decisions relating to the applicability of Article 142 but according to him the appellants are not entitled to raise this question because it is not to be found as having been specifically raised in the grounds of appeal to this Court. It is true that no specific ground was taken on the point but Mr. Aggarwal has sought our permission to raise this matter and he says that on proved and admitted facts it would be a pure question of law whether Article 142 governed the present case or whether it was governed by any other Article of the Limitation Act. He has further pointed out that the trial Court had given a decision, the relevant part of which has been reproduced by which it had applied Article 142. It was the duty of the Additional District Judge to have given some reason for reversing the trial Court's view on the point of limitation with reference to Article 142. Mr. Puri submits that it is apparent from the judgment of the learned Additional District Judge that the question of the applicability of Article 142 was neither raised nor pressed before him and his decision was invited on the basis that Article 144 would be applicable. Although there is no mention or discussion relating to Article 142 in the judgment of the Additional District Judge and the normal rule is to hold in such circumstances that the matter was not argued but in *Lachhmi Sewak Sahu* v. *Ram Rup Sahu* (8), their Lordships allowed the question of limitation to be raised even in the Court of last resort with the following observations:—

> "Upon one point, however, this appeal has been urged. It is not a point taken at any stage of

(8) A.I.R. 1944 P.C. 24.

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the proceedings in either of the Indian Courts but, as it is a point of limitation, it is *prima facie* admissible even in a Court of last resort."

In the present case it is not altogether a new point which has been sought to be argued. As stated before, the trial Court had rested its decision on the question of limitation mainly on Article 142. It was essentially covered by issues 1 and 2. No new facts have to be proved and all that has to be seen is whether according to the pleadings of the parties and the findings which have been given and which are binding on them, the suit would be governed by Article 142. In these circumstances there would b(every justification for deciding the aforesaid point and affirming the decision of the trial Court with regard to it.

Before I proceed to discuss the second question raised by Mr. Aggarwal with regard to the applicability of section 52 of the Transfer of Property Act, it is necessary to dispose of the submission of Mr. Puri that the finding given by the Courts below relating to factum of possession of the parties was vitiated and erroneous in law. According to Mr. Puri, certain documentary evidence, i.e., the *khasra girdawari* entries which had been produced by the respondents to prove their possession within 12 years of the present suit was ignored. He has referred to the statement of defendant No. 1. Santa Singh who appeared as D. W. 6 and who stated that there was some *banjar* land comprised in the share of Mst. Khemi, the area being about 40/50 bighas, part of which had been reclaimed. He could not say how much area had been reclaimed by all the defendants but he had reclaimed about 14 *kanals* of land. Mr. Puri says that with regard to the *banjar* land possession would follow title and on the admission of Santa Singh himself the Courts below were in error in holding that the appellants had been in possession of the entire land left by Mst. Khemi from the year 1945 up to the present time. There can be no doubt that when land is jungle land or land under water where no evidence of actual user in the ordinary sense can be expected to be adduced, the presumption that possession follows title may be called in aid but the presumption arising from title is not available where the land is capable of actual possession by cultivation or otherwise (see in this connection pages 393-394 of *Jaldhari Mahto* v. *Rajendra Singh* (6). But Santa Singh had stated that some of the

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banjar land had been reclaimed and the matter was not pursued on behalf of the respondents as to how much exact area remained wholly uncultivated and in a condition in which acts of possession could not be exercised by the appellants. The learned Additional District Judge had considered with care the entire evidence including the statements of the witnesses of the respondents and had found that the oral evidence coupled with the entries in the revenue record conclusively established that the possession over the suit land right from 1946 up to the present time was of the appellants. It is not open to this Court in a second appeal to disturb a finding of this nature which is one of fact and, therefore, the contention pressed by Mr. Puri. must be repelled.

I shall now proceed to deal with the point which necessitated reference to a larger Bench although strictly speaking it is not essential to decide it as it has been found that the suit was barred under Article 142 of the Limitation Act. The learned Additional District Judge applied the doctrine of *lis pendens* embodied in section 52 of the Transfer of Property Act on the facts found by him, namely, that the appellants had entered into forcible possession of the land in the year 1945-46 when the suit which they had filed for declaration and possession was still pending. The possession, therefore, could not be adverse with effect from the aforesaid dates but it only become adverse after the final decision of that suit by this Court in November, 1958. Now, section 52 of the Transfer of Property Act is in the following terms:—

> "During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government, . . . of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.
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> * * * * *"

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It cannot be said that any property was transferred in the sense in which that expression is used in the aforesaid section during the Pendency of the suit. On behalf of the respondents an endeavour has been made to bring the case within the words "or otherwise dealt with." It is pointed out that these words are of wide connotation and would cover a case of the present type where possession was taken by the appellants during the pendency of the suit, and, therefore, it could not be regarded as adverse. It is said, with a good deal of plausibility; that there was no question of the respondents instituting a suit for possession or taking any other steps to recover possession of the land of which they had been dispossessed because (a) the appellants had themselves filed a suit for possession which implied that they were out of possession, and (b) the whole question as to who was entitled to ownership and possession of the disputed land was in issue in the suit which was pending when the change of possession took place. Mr. Aggarwal has, however, relied on the language of section 52 itself which, according to him, can be of no avail to the respondents so far as the present suit is concerned. According to him, firstly, there was no transfer or such dealing with of the property which would fall within the ambit of the section and secondly, even if it be assumed that the change of possession was covered by the expression "or otherwise dealt with," that was relevant and had to be taken into consideration only at the time when the decree in the suit of 1940 was to be made and it could not save limitation once it had started running by reason of the possession which the appellants held adversely to the respondents.

The doctrine of *lis pendens* is expressed in the maxim *"ut lite pendente nihil innovetur"* and the principle on which it rests is explained in *Bellamy* v. *Sabine* (9), The exposition of law in that case by Cranworth, L.C., and Turner, L.J., was followed by the Privy Council in *Faiyaz Husain Khan* v. *Munshi Prag Narain* (10), the principle being that "*pendente lite* netiher party to the litigation can alienate the property in dispute so as to affect his opponent." As mentioned in Mulla's Transfer of Property Act, the rule is based not on the doctrine of notice but of expediency. According to Story, the effect of the maxim is not to annul the conveyance, but only to render

(9) (1857) I G. & J. 566.
(10) 34 I.A. 102.

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it subservient to the rights of the parties to the litigation. Thus the word "transfers" essentially has reference to alienations and not to one of the parties to the suit taking forcible possession of the property in dispute which by no stretch of reasoning can be regarded to be an alienation.

According to the commentary in Mulla's Transfer of Property Act, the meaning of the words "or otherwise dealt with" is not so clear. They would probably include such transactions as a release or a surrender. They have been held to include a contract of sale and a partition between co-defendants. They also apply to any collusive decree or compromise by which the title of a party is affected during the pendency of a suit, for the principle underlying the section is that a litigating party is exempted from taking notice of a title acquired during the litigation. It is wholly unnecessary to refer to all the authorities cited by Mr. Puri relating to transfer *pendente lite*. Two cases may be mentioned. One is *Narain* Singh v. *Imam Din* (11), in which the principle of the section was applied by Abdul Rashid, J., at the stage of execution of a decree. In the other *Sakhubai* v. *Eknath Bellappa* (12), a learned Single Judge held that a person who had acquired a right of redemption by transfer or by adverse possession during the pendency of the mortgage suit was not a necessary party to the suit as the right which he acquired was hit by the principle of *lis pendens*. In my opinion, it is not possible to derive much assistance from these cases where the facts were very different.

The rule of *lis pendens* unmistakably hits transfer of interest during the pendency of the litigation as also any such act or dealing with the property which may defeat the rights of the parties to the suit. Its operation, however, according to the clear language of the section, is confined to the *lis* during which the property is transferred or otherwise dealt with and the result is that the decree is to be made in complete disregard of any transfer or dealing with by any of the parties which may affect the rights of the other party.

Although the words "or otherwise dealt with" appear to have been used by the legislature to cannote any act or transaction in the nature of transfer of interest, but even

(11) A.I.R. 1934 Lahore 978.
(12) A.I.R. 1948 Nag. 97.

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if the widest possible meaning is given to them and they are to be regarded as covering the taking of possession by one party from the other during the pendency of a litigation, the question still remains whether that would affect the running of the period of limitation when a subsequent suit for possession of the property is instituted—as in the present case. Section 9 of the Limitation Act provides that where once time has begun to run, no subsequent disability or inability to sue stops it. It is well-known that time begins to run when the cause of action accrues and the cause of action accrues when there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. The argument of Mr. Aggarwal is that on the finding that the appellants had entered into forcible possession of the suit land in the year 1945-46 and have remained continuously in possession, they acquired title by adverse possession by virtue of the applicability of Article 144 of the Limitation Act. The present suit was instituted admittedly after the lapse of the period of 12 years from the date on which the appellants entered into adverse possession. The pendency of the suit emphasised the adverse nature of the possession. In that suit the question of title had been raised and that had undoubtedly been finally decided by this Court in 1958 in favour of the respondents. But the only result of that suit and the decree made therein was the dismissal of the action of the appellants. That did not, and indeed could not, prevent the period of limitation running against the respondents. As soon as 12 years expired from the date forcible possession was taken, the rights of the appellants as owners became unassailable under the Law of Limitation in the absence of any effective legal steps being taken to recover possession.

The decisions of the Privy Council may be first discussed. In *Subhaiya Pandaram* v. *Mohmad Mustafa Maracayar* (13), the appellant was the grandson of the settlor who had endowed a *chatram* with immovable property by means of two deeds in the years 1890 and 1894. The settlor died in 1895 and was succeeded by Arunachellam, the father of the appellant, as trustee of the charity. Arunachellam became involved in debt and one

(13) I.L.R. 46 Mad. 751.

of the creditors sued him and obtained a decree. In execution of that decree the endowments of the charity were attached. The appellant preferred objections against the attachment but they were dismissed in 1897. In 1898 he filed a suit seeking to establish the validity of both the deeds. While the suit was pending the property was brought to sale in execution of the decree against the appellant's father on 22nd March, 1898. It was purchased by respondents No. 1 who took possession of it in the same year. The auction-purchaser had on his own application been impleaded as a defendant in the suit which had been filed by the appellant in the year 1898 and which was pending. That suit was decreed in favour of the appellant on 31st December, 1904, (the date given in the body of the judgment "31st December, 1900" does not appear to be correct), it being declared that the properties in question were trust properties. Later on, the appellant obtained a decree in July, 1913 removing Arunachellam as a trustee and he himself succeeded him as a trustee. On 23rd July, 1913, he instituted a suit to recover possession of the property which had remained in possession of respondent No. 1, the auction-purchaser, throughout this period. Both the Courts in India decided against the appellant and their decision was affirmed by the Privy Council. The following observations at page 755 are pertinent:—

> "Now the real argument in favour of the appellant was that in the presence of the purchaser it was declared that the trust had been validly created and that the property was, in fact, trust property, and it is suggested that this affects *res judicata* as against the respondents and prevents them from now asserting that the property is their own. Their Lordships do not think that the decree had that effect. At the moment when it was passed the possession of the purchaser was adverse, and the declaration that the property had been properly made subject to a trust disposition, and, therefore, ought not to have been seized, did not disturb or affect the quality of his possession; it merely emphasised the fact that it was adverse. No further step was taken in consequence of that declaration until the present proceedings were instituted, when it was too late."

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The facts in the Privy Council case are quite opposite for the purpose of deciding the effect of the pendency of a suit relating to title during which a party claims to hold possession adversely. The auction-purchaser in that case took possession during the pendency of the suit for title in which the appellant there ultimately succeeded but in spite of that the possession of the purchaser was held to be adverse and the appellant was non-suited in his action for possession. The only distinction which Mr. Puri has been able to make is that in the present case the suit which had been filed by the appellants in the year 1940 was not only for declaration of title but also for possession. It is, however, not possible to see how that would make any difference because in that suit it was mainly the question of title of the parties which was being adjudicated and it was simply dismissed on the finding that the respondents were the owners of the disputed land. Any such decision on the principles laid down in the above case could not affect the possession which the appellants held in assertion of their hostile title. On the other hand, the decree in that suit only emphasised the fact that the possession of the respondents who were found to have no title, was adverse. It must be remembered that as soon as the appellants took possession in the year 1945-46, the cause of action accrued to the respondents to institute legal proceedings for the restoration of possession of which they had been unlawfully deprived. Upon the accrual of the cause of action the period of limitation started running and it could not be interrupted unless the plaintiffs took some effective steps to assert their rights which could only be done either by instituting proceedings under section 9 of the Specific Relief Act or taking any other steps under the law for restoration of possession or by filing a regular suit for possession, the latter course being indicated by the second decision of the Privy Council which will be presently discussed.

It has been suggested on behalf of the respondents that the filing of a suit for possession by the respondents during the pendency of the suit of 1940 would have been futile because the second suit would only have been ordered to be stayed pending the decision of the suit which had been instituted first. An effective answer to this argument is furnished by *Narayan Jivangonda Patil* v. *Puttabai* (14), in which the facts were fairly complicated. Briefly stated, in February, 1920 one Gurunath

(14) A.I.R. 1945 P.C. 5.

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got possession of the properties in dispute but mutation proceedings were decided in favour of the appellant before their Lordships. On 25th November, 1920, Gurunath filed a suit challenging the title of the appellant which he was claiming through adoption and prayed for cancellation of the order in the mutation proceedings, a declaration that he was in possession and a permanent injunction restraining the defendants from dispossessing him and receiving rents from the tenants. A temporary injunction was issued in favour of Gurunath. The main contest in that case centered on the validity of the appellant's adoption and the Courts in India found against him but on appeal the Privy Council held that the appellant had been validly adopted and the appellant's title to the lands in question was thus definitely established. In November, 1932, he along with another person brought a suit against Gurunath claiming possession of the properties on the strength of the title established in his favour by the judgment of the Privy Council. It was held, apart from other matters, that there was nothing in the injunction or in the decree which had been granted in the suit of Gurunath by the Courts in India which prevented the appellant from instituting a suit for possession in 1920 or at any time before the expiry of the period of limitation. Sir Thomas Strangman had contended before their Lordships that since the title of the contending parties was involved in the suit it would have been quite futile to have instituted a suit for possession. This contention was repelled in the following words:—

> "Their Lordships are unable to appreciate this point for the institution of a suit can never be said to be futile if it would thereby prevent the running of limitation."

Mr. Puri has sought to distinguish the facts in the above case by pointing out that Gurunath had entered into possession before the suit had been filed by him for declaration of title and that possession had not changed hands during the pendency of the suit. That is, however, wholly immaterial, once the principle with regard to the law of limitation which is quite distinct from the doctrine which is embodied in section 52 of the Transfer of Property Act is kept in view. The Privy Council in the above case had affirmed the decision reported in *Narayan Jivaji Patil* v. *Gurunathgonda Khandappagonda Patil* (15),

(15) A.I.R. 1939 Bom. 1.

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in which the learned Bombay Judges had elaborately discussed the effect of the provisions of the Limitation Act with particular reference to sections 4 to 25 including section 9 and had observed that it is by the Limitation Act that all questions of limitation must be decided and it is not permissible to any Court to travel beyond its provisions. In other words, when time has begun to run, owing to a right to sue having arisen or accrued to a person not under any legal disability, any subsequent disability or inability to sue, is not a ground of exemption from the operation of the ordinary rule of limitation save as provided by the statute.

I may now advert to some of the important decisions of other High Courts in which this matter has come up for consideration. In *Dagadabai Fakirmahomed* v. *Sakharam Gavaji* (16), a Division Bench to which Gajendragadkar, J. (as he then was) was a party, observed that the question whether a decree for possession in favour of a plaintiff does or does not interrupt adverse possession is purely a question of fact to be decided on the circumstances of each case. If the decree does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, it cannot be said that it has interrupted possession nor can it in law affect the nature of the possession, unless it does so in fact. A decree for possession followed by an unsuccessful execution cannot be deemed as a matter of law to have the effect of either interrupting possession or altering its character. According to this view, even if a suit had been filed in the present case by the respondents for possession soon after 1946-1947, it would not have interrupted the adverse possession of the appellants unless the decree had been actually executed and possession taken by the respondent. The Calcutta Court is of a different view. In *Achhiman Bibi* v. *Abdur Rahim Naskar* (17), a distinction was made between a suit for mere declaration and a suit for declaration coupled with a prayer for possession. It was recorganised that by a decree for declaration without more the position of a person in wrongful occupation will not be disturbed even if the decree be passed in his presence. If such a person continues in possession even after the declaratory decree he may nevertheless acquire prescriptive title. Mr. Aggarwal has

(16) A.I.R. 1948 Bom. 149.
(17) A.I.R. 1958 Cal. 437.

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relied on the Bombay case but, with the utmost respect; the observations made there must be confined to its facts. The Calcutta view appears to be more in accord with principle and authority (in particular, *Narayan Jinangonda Patil* v. *Puttabhi* (14), because an impossible situation can arise if the Bombay view is logically followed. For instance in the present case even if a suit had been filed by the respondents soon after 1945-1946 for possession and supposing that suit had remained pending or a decree obtained in it had remained unexecuted till after the lapse of 12 years from 1945-46, the adverse possession of the appellants would not have been interrupted according to the Bombay view. The only remedy of an aggrieved party if he is disposssessed is to file a suit for possession and it is difficult to understand and appreciate that a party in adverse possession can by merely delaying the final disposal of the suit perfect his title by prescription. But even if the Calcutta view is to be followed, the question still remains how the respondents can derive any benefit from it. They did not file any suit for possession within 12 years of their dispossession and the only suit which was pending was one in which they had agitated the question of title. The limitation, therefore; continued to run and when the present suit was instituted "it was too late" in the words of their Lordships.

In *Raja Har Indar Singh* v. *Shiv Ram* (18), Addison and Din Mohammad; JJ.; expressed the view that where a person has instituted as suit under Order XXI, rule 63 of the Code of Civil Procedure for a declaration of his title to certain property and if during the pendency of such suit he is wrongly dispossessed then it is his duty to protect himself from adverse possession either by amendment of his original suit or by instituting a fresh suit even though the fresh suit would be decided after the decision of the first suit. If he takes no such steps within 12 years from the date of dispossession the possession would be adverse and a decision in the declaratory suit in his favour would not affect the adverse possession. The facts in that case were very different but all the relevant case law has been discussed including the Privy Council decision in *Subhaiya Pandaram* v. *Mohammad Mustafa Marayar* (13), It has been pointed out that the earlier judgment of the Bombay Court in *Akbaralli Mir Inayatalli* v. *Abdul*

(18) A.I.R. 1937 Lah. 602.

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Ajiz (19), in which a different view was taken had been overruled and not followed in later cases by that very Court nor had it been followed by the other Courts. I do not propose to discuss the Lahore case in detail as Mr. Puri says that apart from the facts being distinguishable the opinion expressed therein was obiter. Even if that be so, it may be mentioned that the observations were made after a full discussion of the Privy Council decision in *Subhaiya Pandaram* v. *Mohammad Mustafa Maracayar* (13), and show how that case was understood and applied by the Lahore Court. It would be pointless to refer to various other authorities which were cited before us because they are either distinguishable on facts or do not provide much assistance in deciding the points in controversy.

I venture to think that the law has been laid down in clear and positive terms by the Privy Council in the two cases which have been discussed. It is true that the question of the applicability of the rule of *lis pendens* was not specifically raised or considered by their Lordships. It could not arise in the second case but in the first case *Subhaiya Pandaram* v. *Mohammad Mustafa Maracayar* (13), it could have been invoked and applied; if it was at all applicable because it was during the pendency of the suit which had been filed by the appellant in 1898 that possession had been transferred to the auction-purchaser. As *lis pendens* applies equally to voluntary and involuntary sales, it would certainly have engaged the attention of their Lordships if it had been relevant for the purpose of deciding the case but, as has been stated before; the law of limitation admits of no exemptions or exceptions apart from the matters provided in the Limitation Act itself.

In the present case once it is held that the cause of action arose to the respondents in 1945-46 for filing a suit for possession, limitation started running and it could be interrupted only if the respondents had filed the present suit within a period of 12 years of their dispossession. After the lapse of that period, the bar of limitation would operate and for this purpose it is wholly immaterial whether the respondents were deprived of their possession during the pendency of the suit of 1940. It may be

(19) I.L.R. 44 Bom. 934.

unfortunate that the respondents either misconceived their remedies or did not consider it necessary to institute any action while the suit of 1940 was pending and that they cannot now succeed in the present suit although the title in the property vests in them but the law must take its inexorable course and no amount of sympathy for the respondents can be allowed to affect or influence the judgment of the Court in the matter.

For the reasons stated above, I would hold that the suit of the respondents is barred by limitation under Article 142 or alternatively that the appellants have become owners of the suit property by having remained in adverse possession for a period of over 12 years and that the bar created by Article 144 applies. The rule contained in section 52 of the Transfer of Property Act, in my opinion, is not applicable so far as the present suit is concerned. The operation of that rule was confined to the stage of the dismissal of the first suit of 1940 and it is neither relevant nor can it be applied when it is to be decided whether the present suit for possession is barred under the Limitation Act.

In the result, the appeal is allowed and the decision of the lower appellate Court is set aside and that of the trial Court restored. In view of the nature of the points involved, there will be no order as to costs throughout.

S. S. DULAT, J.—I agree.

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DUA, J.—I have read with great care the judgment prepared by my learned brother Grover, J., with whom my learned brother Dulat, J., has agreed. The high regard and esteem in which I hold their opinions has impelled me to read his judgment more than once and devote my most anxious attention and thought to the points arising for decision in my effort to see if I can persuade myself to agree, but it is with genuine regret that after deep deliberation I find myself constrained with respect to disagree.

The vital facts giving rise to this regular second appeal have been broadly stated by me in the referring order of the Division Bench which may be read as part of

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this order. It is not disputed that the property in question is non-ancestral of Sham Singh, the last male holder, who died more than 40 years ago leaving behind his widow Mst. Malan, and two daughters Mst. Premi and Mst. Khemi. Mst. Premi also died sometime prior to the year 1936 leaving behind two sons Rajinder Singh and Mohinder Singh. In 1936, the widow gifted one-half of this property to Mst. Premi's sons Rajinder Singh and Mohinder Singh and the other half to Mst. Khemi, the other daughter. The period was marked by serious conflict of judicial opinion in the Punjab between the claims of daughters and collaterals respectively of male holders governed by the Punjab custom on the question of succession to their non-ancestral property. This controversy was settled by the Privy Council in *Mst. Subhani* v. *Nawab* (20), in favour of daughters, though even after this decision several attempts were made to take cases out of its ratio. The position has since been crystalised in favour of daughters by various decisions like *Sadhu Singh* v. *Harnama* (21), and now the Supreme Court has put its seal on the daughters being preferential heirs under custom with respect to non-ancestral property as against collaterals: see *Jai Kaur* v. *Sher Singh* (22), overruling a Bench decision of this Court in *Mohinder Singh* v. *Kehr Singh* (23).

In 1940 after the widow's death, Santa Singh and others, the collaterals of Sham Singh in eighth degree seem, as was usual in those days, to have instituted a suit for *possession* of the gifted property claiming under the customary law to be preferential heirs than daughters and urging that the gift made by the deceased widow was not binding on them. The property was alleged to be ancestral. During the pendency of that suit, Mst. Khemi, the surviving daughter of Sham Singh, also died issueless sometime in 1944. The property which had been gifted to her was initially mutated in the names of the collaterals per Exhibit D. 1, but an appeal by Mohinder Singh and Rajinder Singh against this order was allowed by the Financial Commissioner on 8th February, 1947, The suit for possession instituted by

(20) I.L.R. 1941 Lahore 154 (P.C.)
(21) A.I.R. 1946 Lahore 444.
(22) A.I.R. 1960 S.C. 1118
(23) A.I.R. 1949 E.P. 328.

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the collaterals in 1940 apparently did not proceed with the normal speed for various reasons. Mohinder Singh and Rajinder Singh were serving in the army and proceedings were apparently stayed under section 7 of the Indian Soldiers' Litigation Act, 1925. Some of the plaintiffs-collaterals had been converted to Islam and on the partition of the country, they apparently migrated to Pakistan, with the result that the Custodian of Evacuee Property had to be impleaded as a defendant in the case. This suit for possession was ultimately dismissed by the trial Court on 28th February, 1950 (Exhibit P. 3), on the view that property was non-ancestral and the consensus of judicial opinion was decidedly in favour of daughters in respect of the self-acquired property of their father. A certified copy of the judgment shows the plaint to have been presented on 29th May, 1946/28th February, 1949, which suggests that the original plaint was perhaps later amended. An appeal against this judgment and decree was preferred by Santa Singh in this Court (R.F.A. 44 of 1950), which was also dismissed on 21st November, 1958 (Exhibit P. 2). This Court observed that the plaintiff-collaterals' suit had rightly failed on the ground that collaterals of eighth degree could have no possible claim to non-ancestral property of the last male holder and that if the property had been found to be ancestral, they would still not have been preferential heirs as against the defendants. Reference for this view was made to *Mst. Amar Devi* v. *Sant Ram* (24), and *Mst. Rukmani* v. *Chuni Lal* L.P.A. No. 117 of 1951 decided on 24th February, 1956. Though Santa Singh alone appealed to this Court, all the other collaterals were apparently made respondents including even the Custodian of Evacuee Property as representing the Muslim evacuee collaterals.

After the final determination of the question of succession and title by this Court the present suit for possession was instituted by the respondents before us in April, 1959, which was resisted by Santa Singh and others (appellants in this Court) on various grounds. The parties went to trial on the following issues—

"(1) Whether the plaintiffs obtained the possession of the land in dispute through the Tehsildar near about the date 13th December, 1946, as alleged by them in para 3 of the plaint?

(24) A.I.R. 1952 Punj. 242.

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(2) Whether the defendants took possession of the land in dispute after 21st November, 1958 as alleged in para 5 of the plaint?

(3) Whether the defendants have become owners of the land in dispute through adverse possession?

(4) Whether the plaintiffs are estopped from bringing the present suit?

(5) Whether the plaint discloses any cause of action against Union of India?

(6) Whether the suit is barred under the provisions of Administration of Evacuee Property Act and Displaced Persons (Compensation and Rehabilitation) Act?

(7) Whether notice under section 80 C.P.C. was not necessary?"

On the first three issues (Nos. 1 to 3), which were discussed together by the trial Court, the decision was given against the plaintiffs and in favour of the defendants. Its opinion was expressed in these words:—

"It is found from the documents referred to in the judgment that the litigation had started between the parties in 1940 after the death of Mst. Malan who had made a gift of her land which was being held as life estate and the defendants being the collaterals of Sham Singh deceased filed suit for possession after the death of Mst. Malan. During the pendency of the suit, it is established on the record that Mst. Khemi to whom half share of land was gifted breathed her last and her share was possessed by the defendants, being the collaterals of Mst. Malan and the other half share of land which was gifted by Mst. Malan remained in possession of the present plaintiffs, Rajinder Singh and Mohinder Singh, and that land is still in

possession of the plaintiffs who have filed the present suit simply to get the possession of half share of Mst. Khemi to whom half share of land was gifted by Mst. Malan."

"Another point which has to be discussed is whether the case of the plaintiffs is governed by Article 142 or 144 of the Limitation Act (of 1908). The answer is that the case of the plaintiffs is governed by Article 142 when they have alleged that they have been dispossessed by the defendants and it is for them to prove that they have been dispossessed from this date and they have failed to prove it. They have not led evidence for establishing and proving particular date on which date they were dispossessed within twelve years. Therefore, the possession of the defendants is over the suit land for more than twelve years since 1945 up to the institution of the suit as their evidence is cogent and convincing regarding this fact.

Therefore, on account of the above circumstances, I hold that all these three issues are decided against the plaintiffs and in favour of the defendants."

Issues Nos. 6 and 7 were also discussed together by the trial Court and it held that notice under section 80, Civil Procedure Code, was not served upon the Government and then proceeded to observe:—

"When the notice is not served upon the Government of India, it means that the suit against the Government cannot be filed with the result that the suit cannot lie at all and is not tenable at all."

An appeal was taken to the Court of District Judge at Amritsar and was disposed of by Shri Radha Kishan Baweja, 1st Additional District Judge. The learned Judge of the Court of first appeal, to begin with, disagreed with the decision of the trial Court on issue No. 7, with the observation that the Government of India had not been made a party, by the plaintiffs and that the question of

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notice under section 80, Civil Procedure Code, on the Government of India did not arise at all. The trial Court had, in the lower appellate Court's view, due to oversight considered the Custodian of Evacuee Property as the Government of India. Reversing the finding of the Court of first instance, the first appellate Court held the suit to be competent in spite of absence of notice under section 80. Civil Procedure Code, on the defendant concerned.

After dealing with the pleadings and the evidence the lower appellate Court agreed with the findings of the trial Court on issues Nos. 1 and 2 and observed as follows:—

> "This oral evidence coupled with the entries in the revenue record conclusively establishes that the possession over the suit land right from 1946 up to the present time was not that of plaintiffs but of the defendants."

The next question considered by the Court below was whether the defendants had acquired title in respect of the suit land by adverse possession. On this aspect the Court observed that the possession of the defendants over the land in suit was forcible and not as tenants under the plaintiffs. The learned Judge then considered the effect of section 52 of the Transfer of Property Act on the controversy in question and took the view that on the principle underlying this section a litigating party is exempted from taking notice of title acquired during the litigation, and as the defendant began to acquire their title during the pendency of the earlier suit the principle of *lis pendens* became applicable and no such title could be acquired during the pendency of the suit which was finally decided by the High Court on 21st November, 1958. Support for this view was sought by the learned Additional District Judge from *Sukhubai* v. *Eknath Bellappa* (25). On this view of the matter, the appeal was allowed and reversing the trial Court's decree the plaintiff-respondents' suit decreed.

It may be pointed out that before the lower appellate Court no attempt was made by the defendants (appellants in this Court) to argue as they were entitled to do,

(25) A.I.R. 1948 Nagpur 97.

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that the plaintiffs' suit was barred under Article 142 of the Limitation Act, 1908, and, therefore, in any case liable to be dismissed. Indeed it is not the appellants' case on second appeal that this point was actually argued and that the court below has erroneously failed to consider and discuss it in its judgment.

On second appeal in this Court, the matters was argued before Mehar Singh, J., and myself sitting in Division Bench at full length and as is clear from the referring order, the only question argued before the Division Bench was whether section 52 of the Transfer of Property Act would hit the adverse possession claimed by the defendants. The concluding paragraph of the referring order quite clearly indicates that since this was the only point on which the fate of the appeal depended, instead of formulating a question of law for decision by the Full Bench, which is usually done, we adopted the course of referring the whole appeal itself for decision to a larger Bench. In the memorandum of appeal in this Court also, it may be pointed out, there is no specific ground urging that the suit was barred by limitation as the plaintiffs had not established dispossession within twelve years and indeed it is not possible reasonably to construe any one of the seven grounds of appeal to suggest challenge to the judgment and decree of the Court below on this ground. It is also nowhere objected that the learned Additional District Judge was in error in allowing the appeal without deciding the question of limitation or that such a question was argued before the Court below.

The first question, therefore, which confronts us is whether the appellants are entitled to urge before the Full Bench that the suit being barred by limitation under Article 142 of the Indian Limitation Act, 1908, it should have been dismissed and that this Court should on this short ground allow the appeal and set aside the judgment and decree of the lower appellate Court and dismiss the suit. Now, Order 42, Rule 1, Code of Civil Procedure, has made applicable the rules or Order 41; so far as may be, to appeals from appellate decrees. Under Rule 1(2) of Order 41, every memorandum of appeal has to set forth concisely under distinct heads the grounds of objection to be numbered consecutively to the decree appealed from without argument or narrative. According to Rule 2, the appellant

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shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. The appellate Court, however, in deciding the appeal need not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court, subject to the proviso that it must not rest its decision on any other ground unless the party affected has had a sufficient opportunity of contesting the case on that ground. In this connection, it is important to recall that not only was this objection not argued by the defendants before the lower appellate Court but no attempt whatsoever was made to argue it before the Division Bench at any stage of the lengthy arguments. Even after the reference of the case to the Full Bench, no attempt was made either to seek amendment of the memorandum of appeal or to formally seek leave of the Court to urge or be heard in support of this new ground of objection. Indeed, at no stage was ever any reason, not to speak of a cogent and convincing reason, assigned as to why this point had not been urged in the lower appellate Court or before the Division Bench before which the whole case was fully argued by both sides, or included in the memorandum of appeal. The sole argument pressed on behalf of the appellant seems to be that since the objection of time bar in regard to the plaint is a pure question of law, this Court, even on second appeal, must in the interest and to promote the cause of justice allow him to urge it because section 3 of the Indian Limitation Act enjoins the Court to dismiss a suit instituted after the period of limitation, even though limitation has not been set up as a defence. The argument thus put appears to be *prima facie* attractive but a little scrutiny would show that it is not as sound as it may appear on first blush.

Section 3 of the Indian Limitation Act no doubt provides that "subject to the provisions contained in sections 4 to 25 (inclusive) every suit instituted, appeal preferred and application made after the period of limitation prescribed therefore by the first Schedule, shall be dismissed, although limitation has not been set up as a defence." But this has scarcely if ever been held to impose an obligation on the Court to raise and decide *suo motu* the question whether a suit is barred by limitation merely because such question is material for the decision. Still less would it

be a matter of legal obligation for the Court of appeal to raise and consider a ground of objection of the suit being barred by time, which is not included in the memorandum of appeal within the period of limitation. This matter, in my opinion, depends on the law of procedure and Court is not bound to raise and decide a question of fact of its own motion. The Limitation Act and the Code of Civil Procedure, it may appropriately be pointed out here, being *pari materia* have to be read together for our present purpose, and indeed the provisions of the Code relating to suits and appeals may legitimately be considered to be largely subject to the provisions of the Limitation Act. Now, if a ground has not been argued in the lower appellate Court and has not been taken in the memorandum of appeal in this Court and the period of limitation for the appeal has expired, section 3 would equally well impose an obligation on this Court not to allow such a ground to be raised and argued. The respondent in such a case acquired a right of which he should not in fairness be deprived without good and cogent cause in law. This brings me to Order 41, Rule 2, of the Code. It is true that the appellate Court in deciding the appeal is not to be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under Rule 2, but again the question is how far it is obligatory for the Court of appeal, as a matter of law to hear the parties on afresh point after the expiry of limitation. Is it a matter of judicial discretion governed by facts and circumstances of each case for the purpose of advancing the true cause of justice or does it provide a rigid rule that merely because a party is desirous of raising a fresh point it must be allowed? For my part I am unable to subscribe to the view that the Court of appeal must allow every new point to be raised without applying its judicial mind to the nature of the point raised, the reason for not raising it earlier at the proper stage and its effect on the party affected by it, in the background of the justice of the cause. The Court is, in my opinion, under a solemn obligation to judiciously hold the scales even and after considering what is just and proper on a fair and impartial scrutiny, to allow or disallow the fresh point. Plea of limitation, as has been said by high authority, pertains to procedure and does not go to the inherent jurisdiction of the Court; and fresh points of law also can normally be allowed only to promote

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and not to defeat the cause of substantial justice, of course, justice according to law.

Law of limitation, as I view it, is based on two broad considerations. First, there is a presumption that a right not exercised for a long time is non-existent and a person not in possession for long may be presumed to be not the owner thereof; Second, it is necessary that title to property and matters of right in general should not be in a state of constant uncertainty, doubt and suspense. The interest of the State requires that there should be end to litigation and it is for this reason that statutes of limitation are described to be statutes of peace and repose. From this point of view, law of limitation may well be stated to be founded on the noble policy to quiet title, to suppress fraud and to supply deficiency of proof arising from antiquity or obscurity. Law, it is often said, comes to the assistance of the vigilant. On the facts and circumstances of this case, when the question of succession and title was actually being determined in a proper effective litigation; properly initiated between the parties to the controversy; can it be said that the respondents were not diligent or that they should be presumed on account of long neglect not to be owners of the property and, therefore, it would promote the cause of justice to permit the appellants to raise the fresh point of limitation in regard to the suit, not argued by them before the learned Additional District Judge, nor before the Division Bench, and to urge which no leave was ever formally asked for upto the end? Law of limitation is not designed to operate as a trap or a share to catch the unwary litigant, who honestly and with reasonably diligence and vigilance have been pursuing legal proceedings, which would seem to me to be the result if we were to permit this point to be raised at this stage on the present facts and circumstances. It may be remembered that the collaterals in the earlier case had right up to the High Court been asking for a decree for possession in the contest in which the question of succession was also directly in issue which necessarily means that they had all along been asserting that Mahinder Singh and Rajinder Singh were in possession. If in the amended plaint of 1948 or 1949, possession was again solemnly alleged to be with Mohinder Singh and Rajinder Singh, and, still later, on appeal to this Court in 1950, as indeed right up to 1958, decree for possession was in all earnestness being claimed against

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Mohinder Singh and Rajinder Singh, then at this belated stage, this new plea of time-bar in respect of the suit would seem to me clearly to tend to defeat the cause of justice. It is unnecessary to refer to decided cases on the question of the exercise of judicial discretion under Order 41, Rule 2, of the Code, because each case has to proceed on its own facts; suffice it to say that the judicial thinking must consider judiciously and weigh fairly the respective rights and conduct of the rival contesting parties before granting leave. It should not be granted automatically or allowed for the mere asking. The principle on which section 3, Indian Limitation Act, is founded, would also seem to serve as a mandate to this Court not to allow after the expiry of limitation a fresh ground not included in the memorandum of appeal if the true dictates of substantial justice would be defeated by such permission. There is also some authority for the view that leave to urge an additional point should normally be taken in advance by the party seeking to so urge it and in the case in hand there is no dispute that no leave was ever formally sought and none was granted by the Bench after considering the various aspects and applying its judicial mind to the exercise of the requisite discretion.

I am not unmindful of the view that it is open even to the Court of last resort to allow a new point of law to be argued, but, then again it seems to me undeniably to be matter of judicial discretion, whether or not it would promote the cause of justice to allow a new point, even of law, to be argued, for it is not a matter of absolute right of the litigant but a power of the Court to be invoked only to promote and never to defeat the cause of justice. This must inevitably depend on the facts and circumstances of each case. The broad rule however is that when a question of law is raised for the first time in a court of last resort upon facts either admitted or proved beyond controversy, it is not only competent but perhaps expedient in the interests of justice to entertain the plea. But the expediency of adopting this course is clearly doubtful when the plea cannot be satisfactorily disposed of without deciding nice questions of fact. Indeed such a course should never be followed unless the Court is satisfied that the evidence upon which it is asked to decide establishes beyond doubt that the facts, if fully and properly investigated would have

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supported the new plea and also that interest of justice demands it.

This brings me to the other aspects to which I may appropriately advert at this stage. There is no clear-cut issue framed in the trial Court on the plae of the suit being barred by time, having been instituted 12 years after the plaintiff's dispossession. The earlier suit for possession brought by the collaterals initially in 1940 appears to have remained stayed because the real contesting parties Mohinder Singh and Rajinder Singh were serving in the Army. Had there been a clear-cut issue on the point the exact period during which the suit was stayed under the Indian Soldiers' Litigation Act would have been perhaps properly brought on the record so that the effect of section 11 of that Act to the controversy could be properly appreciated. The lower appellate Court has casually observed that the earlier suit was held up till 1946 because these two persons were serving in the Army, without adverting to the exact period during which Mohinder Singh and Rajinder Singh were entited to the benefit of section 11. Again, in so far as the share of the Muslims-collaterals who migrated to Pakistan in August, 1947, is concerned, that share under the law vested in the Custodian under the evacuee law. Shri Puri has also urged that some part of land in dispute was *banjar* and in regard to this part, possession, according to the learned counsel must be deemed to follow title even for the purposes of Article 142, Indian Limitation Act. In view of my holding, I do not consider it necessary to go into these points at this stage.

As a result of the foregoing discussion, I find that:—

(i) there was no clear-cut issue claimed by the defendants on the point that the suit was barred by limitation, having been instituted more than 12 years after dispossession;
(ii) this point was not argued before the lower appellate Court;
(iii) no ground of objection to this effect was taken in the memorandum of appeal in this Court;
(iv) this point was, not argued before the Division Bench, which referred the case to a larger Bench after hearing full arguments;

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(v) the memorandum of appeal was never sought to be amended by seeking inclusion of this ground;

(vi) no formal leave was sought to urge this point as contemplated by Order 41, Rule 2, of the Code;

(vii) no cogent reason has been suggested for the aforesaid omission;

(viii) in the earlier litigation right up to this Court, when the controversy regarding the right of succession finally terminated in 1958, it was represented that possession was with Mohinder Singh and Rajinder Singh because a decree for possession against them was persistently being sought. Apparently even in the amended plaint possession with the said persons, who were defendants, was asserted;

(ix) Mohinder Singh and Rajinder Singh were clearly serving in the Army during at least in part of the pendency of the previous litigation in which the question of succession to Sham Singh and the validity of the gift made by Mst. Malan were being adjudicated. Had there been a clear-cut issue on this point, proper enquiry would perhaps have been made into the period of their service under special conditions and the effect of section 11 of the Indian Soldiers litigation Act considered;

(x) the effect of migration to Pakistan of those plaintiff-collaterals in the earlier litigation who had become Muslims, and of vesting of their interest in the property in question in the Custodian of Evacuee Property was not convassed before and considered by either of the two Courts below; nor did the Courts below consider how much was *banjar* land and if in respect of that land possession could be held to follow title; and

(xi) no sufficient and convincing reason has been shown as to how cause of justice would be advanced by ignoring the period of limitation fixed for appeal and permitting the appellants to urge the new ground of appeal at this stage.

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Considering all these aspects and speaking with respect, I do not find it possible to persuade myself to hold that it is a fit case for exercising my judicial discretion in favour of the appellants and that cause of justice would be promoted by allowing this new point to be urged at this belated stage. I would accordingly decline to entertain this argument. I should, however, also like to state that even if I had considered it desirable to allow this point to be raised, I would perhaps have preferred either to remand the case for a proper trial of this point after framing a precise issue or I would have called for a report on it from the Courts below, because I am far from satisfied that there has been a proper trial of this plea of limitation. I am not unmindful of the fact that this course would have caused some more delay but I am equally conscious of the fact that Courts solely exist for satisfactory administration of justice according to law which should by no means be sacrificed at the altar of avoiding mere slight delay. In the case in hand, the delay in calling for a report would have promoted rather than defeated the cause of justice.

This takes me to the point that the appellants have matured their title by adverse possession for more than 12 years. Connected with this point is the argument based on the applicability, scope and effect of section 52, Transfer of Property Act. Apart from this section, it should be remembered that right up to 1958 when this Court dismissed R.F.A. No. 44 of 1950, the collaterals were apparently representing to the Court that they were not in possession and indeed they were seeking the Courts's assistance to secure a decree for possession, though of course after claiming adjudication of their title as well in a suit in which the right of succession was in issue. The Courts below do not seem to have cared at all to advert to this aspect. Perhaps their attention was not drawn to it. In order to constitute adverse possession, in my view; the possession acquired must be adequate in continuity, in publicity and in extent so as to show that the possession is adverse to the opposite party. And it is for the person claiming adverse possession to satisfactorily establish these ingredients. In the case in hand in 1940, the collaterals instituted the earlier suit claiming possession of Sham Singh's estate as heirs and admitting possession to be with the contesting defendants. On Mst. Khemi's death, mutation of her land was

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sanctioned in favour of the collaterals in February, 1945. On appeal to the Financial Commissioner, this order was reversed and mutation was sanctioned in favour of Mohinder Singh and Rajinder Singh in February, 1947. The appellant's case is that soon after the sanction of mutation in their favour in February, 1945, they entered into possession and did not quit possession in 1947 on the reversal of the order of mutation. The Courts below have come to the conclusion that possession remained with them all through, up to the institution of the present suit in 1959. The question is : Whether they have matured their title by adverse possession?

Now, if in the civil Court, the collaterals were solemnly asserting that the possession was with Mohinder Singh and Rajinder Singh and they were seeking a decree for possession right up to the High Court in 1950 when the appeal was preferred and indeed till 1958 when the appeal was disposed of, it is somewhat difficult to attach to their possession the quality of adequate publicity and openness which would make it adverse in law. It is also somewhat doubtful if one can easily impute to the collateral-plaintiffs in the earlier suit in this background the requisite animus of prescribing for adverse possession as discussed above.

Here, I may for a moment turn to the argument based on the principle of *lis pendens* embodied in section 52, Transfer of Property Act. This section is in the following terms:—

> "52. Transfer of property pending suit relating thereto. During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit of proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be made therein except under the authority of the Court and on such terms as it may impose.

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Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

Tre principle embodied in it is without doubt of considerable antiquity; having come from the Common Law of England that acquisition of title pending litigation must not be allowed to render the judgment ineffective. This doctrine has its roots in the fundamental idea that when dispute relating to title to any property is being adjudicated upon; the litigating parties are exempted from the necessity of taking any kind of notice of title acquired during pendency of suit and as to them it is as if no such title existed; for otherwise suit would be interminable and there would be no end to multiplicity of suits. Indeed in that event; it would be at the pleasure of one party at what period the suit should be determined. As has sometimes been said, the property which is the subject matter of a suit is in a sense under the doctrine *of lis pendens, res litigiose* and is in *custodia legis,* for the sole object of this doctrine is to keep the subject in controversy within the power of the Court until final judgment and decree so as to make them effective. The true foundation of this rule appears to me to be public policy and necessity. The doctrine holds mainly to prevent circumvention of Court's judgments by disposition of or dealing with the property in controversy. If circumvention were permissible, a person would hardly enforce his legal rights through Court action.

It is, however, contended that in the case in hand the collateral-plaintiffs' suit for possession was dismissed and, therefore, there is no question of either executing that decree or the judgment and decree becoming ineffective and if the collateral-plaintiff's had somehow during the pendency of the suit recovered possession, they must under the law

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be permitted to prescribe for adverse possession, their claim for a decree for possession in the pending suit notwithstanding. It is of course logical to extend this argument to the length of urging; as indeed it has been frankly so urged by the appellants' learned counsel; that if the previous suit for possession had lasted for 12 years after the plaintiffs had secured possession during its pendency, then the plaintiffs could safely have at the expiry of 12 years allowed their suit to be dismissed in default or otherwise and successfully confronted the defendants with the adverse possession -having matured into unassailable title. The question at once pertinently arises : Is this the legal position? It has been boldly argued on behalf of the appellants that the Limitation Act in addition to being a purely arbitrary enactment is rigid and inflexible and no equitable considerations arise in its application. The argument so put may be conceded. But the point for determination is : Is the provision of law of limitation which concerns us in this case so clearly applicable to the facts and circumstances and does it contain a mandate as claimed by the appellants? If it does, then there can be no alternative except to apply it irrespective of the consequences. Justice has undoubtedly to be administered according to law. The appellants have sought support for their submission from some decided cases including some decisions by the Privy Council. It is necessary at this stage to advert to them. But before doing so, I may point out that precedents are employed, as is often said, only to discover principles and principles are employed only to discover justice. To discover the true *ratio decidendi* is, therefore, ethical and is creative evaluation as opposed to mechanical application of a precedent. A rule of law defined by precedent in its further extension is essentially subject to review in the light of varying analogies and differences of facts and concepts involved in new cases.

The first case to which I may advert is *Faiyaz Husain Khan* v. *Munshi Prag Narain etc.* (10). The facts of that case are clear from the judgment. On 14th June, 1889, H, the owner of Mauza Bhagwan mortgaged it to N. On 13th July, 1891 N sued on his mortgage and obtained a decree for sale on 23rd August, 1892. This decree was made absolute on 21st November, 1895. The property was sold in execution of this decree on 21st February, 1901, and purchased by P, who was the son and the representative of N,

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the decree-holder. On 2nd July, 1901, P obtained the requisite sale certificate. But in his attempt to recover possession of the property, he was abstructed by F who was in possession under a decree for sale obtained on a subsequent mortgage. P was thus obliged to sue for possession. There was no incumbrance upon the property either of 14th June, 1889 or 13th July, 1891. On 15th July, 1891 after the institution of Nos. suit before the service of summons the mortgager granted a second, mortgage to M. On 20th March, 1894, the second mortgage M instituted his mortgage suit without impleading N, the first mortgagee and also obtained a decree for sale. On 20th December, 1900, the property was sold in execution of M's decree and purchased by 1 F. the son of H, the mortgagor. H had become major in 1894. It was in these circumstances that "F" had managed to get possession of the property and resisted all attempts on the part of P to dispossess him.

The principal contention raised before the Judicial Committee was that a suit contentious in its origin and nature would not be contentious within the meaning of section 52, Transfer of Property Act of 1882, until a summons is served on the other party. This view seemed to obtain in the Indian Courts. The Judicial Committee did not agree with it, holding it to be untenable on the statutory language as also to lead to inconvenient results on account of difficulties in effecting service in this country. After expressing this opinion, Lord Macnaghten delivering the judgment observed:—

> "The doctrine of *lis pendens,* with which section 52 of the Act of 1882 is concerned is not, as Turner L. J. observed in *Bellamy* v. *Sabine* (9) at P. 584, 'founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is . . . . a doctrine common to the Courts both of law and of equity, and rests . . . . upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienation *pendente lite* were permitted to prevail.' The correct mode of stating the doctrine, as Granworth L.C. observed in the same case, is that *pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent."

The other ground of decision by the Judicial Committee that "F" had on the date of sale in his favour (20th December, 1900) knowledge of the earlier mortgage, the decree and sale proceedings does not concern us.

I am quite unable to see how the *ratio decidendi* of this decision helps the appellants' case. If anything, the words in which the doctrine was put by Cranworth L. C. and approved by the Judicial Committee may be relied upon by the respondents before us (defendants in the earlier litigation- for invoking this doctrine. In *Subbaiya Pandaram* v. *Mahammad Mustapha Marcayar* (13), the property in suit was devoted to charitable purposes by the settler by two deeds dated 21st February, 1890 and 13th December, 1894. By the first document, the heir of settler declared that his heirs in the order of primogeniture should be trustees and conduct the said charities. The settler died in 1895 leaving him surviving his widow "W" and the only son "A". A was thus the trustee of the charity and having become involved in debt, one of his creditors sued him and obtained a decree in the execution of which the endowments of the charity were attached. The settler's widow, on behalf of A's son "S.P.", who was then a minor; objected to the attachment. The objection was dismissed on the ground that during his father's lifetime, S.P. had no *locus standi*. In the same year, another suit was instituted by the minor through the same next friend seeking to establish the validity of the two deeds mentioned above. During the pendency of these suits, the property was brought to sale on 22nd March, 1898 under the decree against A. It was purchased by M whose legal representatives were respondents before the Privy Council. The sale was confirmed on 11th August, 1898 and delivery of possession was made to the purchaser, the settler's widow having been removed from the possession. From that date onwards, the purchaser and those claiming under him remained in uninterrupted possession of the property.

On 31st December, 1900 in the second suit was declared that the properties including those seized under the execution sale formed a trust estate for the purposes specified in the relevant deed. On 6th August, 1910, S.P. became of age and on 9th November, 1911, he petitioned the District Court for leave to bring a suit to remove his father A from the office of trustee. On such leave being granted.

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a suit was instituted which was decreed on 21st July, 1913 removing A, with the result that S.P. succeeded as trustee. On 23rd July, 1913, S.P. instituted the suit out of which the appeal to the Privy Council arose. The Courts in India dismissed the suit, though on different grounds, but the Privy Council held the result of the decision to be correct, observing that whatever be the period of limitation assigned, the full period had run before the institution of the suit unless by virtue of the aforesaid proceedings some interruption of the period could be alleged.

Before the Judicial Committee, the real argument urged was that as in the presence of the purchaser it was declared that the trust was valid and the property in question was in fact trust property, this operated as *res judicata* estopping the purchaser from asserting his ownership. The Board did not agree that the said decree had any such effect observing. "At the moment when it was passed, the possession of the purchaser was adverse, and the declaration that the property had been properly made subject to a trust disposition, and therefore ought not to have been seized did not disturb the quality of his possession; it merely emphasised the fact that it was adverse. No step was taken in consequence of that declaration until the present proceedings were instituted when it was too late." The discussion relating to section 10, Indian Limitation Act, or to the arguments that statute of limitation begins to run a fresh as each new trustee succeeds to the office does not concern us. The *ratio decidendi* of this case also does not seem to me strictly to cover the point before us, as would also be clear from the arguments addressed at the bar of the Judicial Committee reproduced at pp. 752 and 753 of the report. The decision in *Narayan Jivangouda Patil* v. *Puttabi* (14), also appears to me to be of little assistance. It is unnecessary to state the facts in detail. Suffice it to say that in pursuance to an award dated 23rd February, 1920, consent decree was passed on 24th February, 1920. Purporting to act under its terms on the same date 'T' handed over the properties in question to 'G' who remained in sole and exclusive possession thereof. 'G' thereafter applied for mutation in his favour. So did N who became of age on 5th March, 1920. Mutation was ordered by the Mamlatdar in favour of G but this order was set aside by the District Deputy Collector. 'N' alleging himself to be an adopted son of Bhimabai and Jivangouda laid

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claim by survivorship to all the joint family properties subject to the rights of T and Bhimabai for maintenance. On 25th November, 1920 G instituted a suit against N, Bhimabai and others challenging the adoption of N and praying for cancellation of the order of the District Deputy Collector for a declaration that he was in possession and a permanent injunction restraining the defendants from dispossessing him and receiving rents from the tenants. G also secured a temporary injunction in the same terms as the permanent injunction applied for by him; this was confirmed up to the High Court on 22nd January, 1924. The main contest centred round the validity of N's adoption. This validity was ultimately upheld by the Privy Council, the date of the order in Council giving effect to the judgment being 10th November, 1932. On 25th November, 1932 N and Bhimabai instituted a suit for possession on the strength of the decision of the Privy Council. 'G' claimed title by adverse possession and it was this plea which was the subject matter of the controversy up to the Privy Council. The plea that the cause of action had arisen on 4th November, 1932 or on 25th November, 1920 was not pressed before the Privy Council. The trial Court had found that time had certainly begun to run against "N" from 24th February, 1920. On 4th November, 1935; "N" and Bhimabai had also applied under sections 144 and 151. Civil Procedure Code, for injunction against "G", for possession and mesne profits, damages and compensation etc., by way of restitution consequent on reversal of the trial Court's decree. But this was disallowed in view of the findings that the suit was barred by time and adverse possession, etc. Before the Privy Council it was conceded by the appellants' counsel that his clients' title must be held to have been extinguished by adverse possession unless in computing time benefit of section 14 or section 15, Indian Limitation Act, could be claimed. In terms, both these sections were hold inapplicable on the facts of the case.

Quite clearly, no question of the applicability of sections 14 and 15, Indian Limitation Act, arises in the case before us. The ratio of the reported decision is thus of little assistance in solving the problem confronting us.

Support for the appellants' contention has been sought from the following observations:—

> "Sir Thomas Strangman contended strongly that since the title of the contending parties was involved in the suit, it would be quite futile to

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institute a suit for possession. Their Lordships are unable to appreciate this point for the institution of a suit can never be said to be futile, if it would thereby prevent the running of limitation."

These observations, speaking with respect, apply only to a case when the *terminus a quo* or the cause of action for a *lis* has indisputably come into existence and time has actually started running and the plaintiff desires to exclude some period in computing the period prescribed. The observations from the decision of a Court of justice however high, must not be detached or isolated and taken out of the context, for such a process may at times tend to be misleading and to create confusion in the discovery of the true *ratio decidendi.* The formulation of a rule in a judicial pronouncement is invariably embodied in the rest of the judgment and the entire context must always be examined in order to discover the true intended meaning of a given passage in a judicial decision. I would, therefore, be inclined to read these observations in the light of the applicability of sections 14 and 15 of the Limitation Act and not to interpret them as laying down any general and unqualified rule applicable to cases where some grievance has come into being during the pendency of a litigation in which the crucial question in issue between the parties is being adjudicated upon. In my view, therefore, where the question posed is whether time has at all started running or whether there is a *terminus a quo,* or an effective cause for a fresh action, then these observations may not legitimately be attracted.

If time begins to run, then obviously section 9, Indian Limitation Act, in the clearest possible terms lays down that no subsequent disability or inability to sue stops it of course subject to the provisions of the Limitation Act or of any other law, if attracted. The problem which faces us is, when the question of title is being determined between the parties and the plaintiff himself is solemnly asserting that he is out of possession and is seeking a decree for possession from the Court against the defendants, and during that litigation he happens to take possession, but does not *elect to modify his prayer in the Court, but presists in continuing the plea of his own dispossession and seeking

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on the basis of this plea, a decree for possession founded on his title, can it be said that a cause of action has accrued to the defendant obliging him to file another separate suit for possession based on his title, which must inevitably, from the very nature of things, be stayed under section 10 of the Code of Civil Procedure, and on his failure to institute such a suit, the plaintiff can successfully plead that his possession has become adverse? The observations of the Privy Council about the futility of the suit with which the Law Lords were concerned, in my opinion, would not be attracted to the facts before us. In the present case the defendants' suit would clearly be futile; and indeed; I am also inclined; as at present advised, to take the view that there could be no cause of action for their suit till the final adjudication of the plaintiff-collaterals' suit in favour of the defendants. It may be remembered that in the earlier litigation, the question of succession to the last male holder, which means the question of title of the parties; was also directly in issue. It is contended that section 9 of the Specific Relief Act would certainly have entitled the present plaintiff-respondents to institute a suit for possession without establishing or even pleading ownership. This argument, in my opinion, is completely besides the point; for we are here concerned with the suits governed by Article 142 and 144 of the Indian Limitation Act. The relief under section 9, Specific Relief Act, is a summary remedy and merely because that remedy has not been utilised can by no means result in extinguishing a party's title; for it is always open to a party to bring a regular suit in which the question of title may also be decided. And then, it is extremely doubtful if on the facts and circumstances of the present case, section 9 could at all be attracted. This aspect, it may be stated, has not been fully convassed at the bar and only a passing reference has been made to the possibility of a suit under this section.

Supposing, the plaintiff-collaterals' suit had been decreed and the defendants had gone up on appeal and succeeded and in the meantime, 12 years had expired. To hold that reversal of the decree secured by the plaintiff-collaterals by the appellate Court would be completely futile and that the defendants can successfully be faced by a plea of adverse possession would also seem to me to lead to consequences with which on the arguments addressed at the

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bar I am wholly disinclined, as at present advised, to reconcile my judicial mind. Unless law clearly forces me to come to such a conclusion, I would hesitate and feel great reluctance in upholding such a legal position solely on the authority of the observations in the decided cases, on which the apellants have placed reliance.

I may also at this briefly refer to a Bench decision of the Lahore High Court in *Raja Har Inder Singh* v. *Shiv Ram* (8), which clearly seems to me to be distinguishable. Apart from the circumstance that the facts of the reported case were very much peculiar, the ratio of that decision, as given in the head-note is:—

> "Where a person has instituted a suit under Order 21, Rule 63, Civil Procedure Code, for a declaration of his title to certain property on the ground that a cloud has been cast on his title by a certain act, and if during the pendency of such suit he is wrongly dispossessed of the property, then it is his duty to protect himself from adverse possession either by amendment of his original suit for declaration or by instituting fresh suit even though the fresh suit would be decided after the decision of the first suit. If he takes no such step within 12 years from the date of dispossession the possession would be adverse and a decision in the declaratory suit in his favour would not effect the adverse possession."

This ratio must, in my opinion, be construed to be confined to identical facts. I find it difficult to justify its extension to facts like those which confront us. I cannot help observing in this connection that a rule of law acted upon by a Judge while deciding a controversy, is rarely—if at all—stated with the completeness of a statutory draftman, confining his successors to mere interpretation, with the result that it is always open to later Courts to consider to what extent the earlier judicial Statement can safely be applied to materially different facts. The rule that an aggrieved party instituting a special statutory suit under Order 21, Rule 63, Civil Procedure Code, if meanwhile dispossessed, must either amend his plaint or file a separate regular suit claiming possession, failing which he must run the risk of

suffering adverse possession against him to mature, does neither attach to the collaterals' possession before us the quality of adverse possession nor does it impose any legal obligation on the respondents before us to have instituted a suit for possession pending the earlier suit against them for possession by the collaterals. I do not consider it necessary on the view I have taken to refer to other decisions of the various High Courts because they do not touch this aspect. In so far as the unreported Supreme Court decision in Mst. *Murti Dussadhin* v. *Surajdoo Singh, etc.* Civil Appeal No. 625 of 1960 is concerned, again, on the view that I have taken, its ratio does not come into the picture at all and I do not consider it necessary on this occasion to advert to its effect on the scope and applicability of Articles 142 and 144, Indian Limitation Act.

After giving to the various aspects of the case and the points raised my earnest thought and careful consideration, as discussed above, I am constrained with respect to disagree with my learned brethren and in the result to dismiss this appeal with costs.

Order of the Court.

In view of the decision of the majortiy, the appeal is allowed and the decision of the lower Appellate Court is set aside and that of the trial Court restored. In view of the nature of the points involved, there will be no order as to costs throughout.

B.R.T.

FULL BENCH

Before S. S. Dulat, A. N. Grover and P. D. Sharma, JJ.

THE ASSESSING AUTHORITY,—*Appellant*

versus

MANSA RAM,—*Respondent*

Supreme Court Application No. 92 of 1964

1965

March, 26th.

Constitution of India (1950)—*Articles* 133 *and* 226—*Order passed on a petition under Art.* 226 *in a matter relating to taxation—Whether order passed 'in a civil proceeding'—High Court—Whether competent to grant certificate for appeal to Supreme Court against such an order—Civil right—Meaning of—Claim asserting non-liability to tax—Whether a civil right.*