

PETITIONER:
GURDIT SINGH AND ORS. ETC.

Vs.

RESPONDENT:
MUNSHA SINGH AND ORS. ETC.

DATE OF JUDGMENT 29/11/1976

BENCH:
SINGH, JASWANT
BENCH:
SINGH, JASWANT
RAY, A.N. (CJ)
BEG, M. HAMEEDULLAH

CITATION:
1977 AIR 640 1977 SCR (2) 250
1977 SCC (1) 791

ACT:

Limitation Act, 1908--S. 14--Applicability of--Punjab
Limitation (Customs) Act, 1920, Art. 2 of Schedule--Accrual
of the right to use--Meaning of.

HEADNOTE:

The appellants filed three suits (the earliest of the three suits was filed on December 18, 1945) for possession of lands claiming that K, the last owner of the lands died on August 15, 1945. Those suits were dismissed on August 3, 1951, as premature on the ground that the fact of the death of K had not been established.

The appellants again instituted three suits in October 1952, December 1952 and May 1953 for the same relief as in the previous suits alleging that the right to sue had accrued after August 16, 1952, that is, after a period of seven years, under s. 108 of Evidence Act; that K died three years before the date of the filing of the suits; and that they were within time under art. 2(b) of the Schedule annexed to the Punjab Limitation (Customs) Act, 1920 which provides that the period of limitation for a suit for possession of ancestral immovable property which has been alienated, is three years, if a declaratory decree has been obtained, and that period commences from the date on which the right to sue accrues.

On appeal, a single Judge of the High Court decreed the suits holding that K having been treated as alive by the High Court when it passed the previous decree in 1951, the conclusion of the lower courts that he had been dead for seven years before the institution of the suits could not be sustained and also excluded the time spent on the previous litigation from 1945 to 1951 under s. 14(1) of the Limitation Act. On Letters Patent appeal, the Division Bench held: (1) that the single Judge was in error in excluding the time spent on the previous litigation by applying s. 14(1) of the Limitation Act; (ii) that the words "or other cause of a like nature" occurring in s. 14(1) had to be read ejusdem generis with the preceding words "relating to the defects of jurisdiction" and that it was not possible to give the benefit of that provision to the plaintiffs.

Dismissing the appeal to this Court (per A.N. Ray, C.J..

and Jaswant Singh, J)

HELD: (1) Under art. 2(b) of the Schedule to the Punjab Limitation (Customs) Act, 1920 in order to be able to succeed the plaintiffs must bring their suits within three years of the accrual of the right to sue (which according to well settled judicial opinion means the accrual of the right to seek relief), namely within three years of the death of K. They had to prove affirmatively that the death of K took place within three years of the institution of the suits. Granting that K has to be presumed to be dead, it cannot be overlooked that under s. 108 of the Evidence Act, the precise time of the death is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within seven years lies upon the person who claims the right for the establishment of which the proof of that fact is essential. The plaintiffs had not only, therefore, to prove that K had not been heard of for a period of seven years and was to be taken to be dead, but it also lay heavily on them to prove the particular point of time within seven years when K's death occurred. This they have failed to prove. In the absence of such proof, it cannot be held that the present suits had not been brought within three years of the accrual of the right to sue. [263 D-G]

251

Nepean v. Doe D. Knight (1837) 2 M & W 894; 7 L J Ex 335, Jayawant Jivarao Deshpande v. Ramachandra Narayan Joshi (A.I.R. 1916 Born. 300), Lalchand Marwari v. Ramrup. Gir (LIII I.A.24; A.I.R. 1926 P.C. 9), Jiwan Singh v. Kuar Reoti Singh & Anr. (A.I.R. 1930 All. 427), Kottappalli Venkateswarla v. Kottapalli Bapayya & Ors. (A.I.R. 1957 A.P. 380), Punjab and Ors. v. Natha & Ors. (A.I.R. 1931 Lah. 582) and Ram Kali & Ors. v. Narain Singh (A.I.R. 1934 Oudh 298 F.B.) referred to.

(2) If K had died beyond three years, from the date of the suits, the suits would be barred by limitation because the appellants cannot claim the benefit of s. 14 of the Limitation Act 1908. The three important requirements of the section are: (1) that the plaintiff must have prosecuted the earlier civil proceeding with due diligence; (2) the former proceeding must have been prosecuted in good faith in a court which from defect of jurisdiction or other cause of a like nature was unable to entertain it and (3) the earlier proceeding and the later proceeding must be based on the same cause of action. [265 D]

(3) The contention that the appeals had been rendered untenable as a result of the amendment made to s. 7 of the Punjab Customs Power to Contest) Act 1920 by the Amending Act 12 of 1973 has no force and must be rejected. Section 4 of the Act provides that the Act shall not affect any right to contest any alienation or appointment of an heir made before the Act came into force. This section has been left untouched by the Amending Act of 1973. In the instant case, the alienation was made before the 1920 Act came into force and was not affected by that Act. [261 F-H]

(4) The words "or other cause of a like nature" in s. 14(1) take their colour from the preceding words "defect of jurisdiction" according to the rule of ejusdem generis. Therefore, the defect must be of a character analogous to jurisdiction barring the Court from entertaining the previous suit. In the instant case, the Court which tried and dismissed the previous suits as premature did not suffer from inability or incapacity to entertain the suits on the ground of lack of jurisdiction or any other ground analogous to the defect of jurisdiction. The exclusion of the period

during which the previous suits were pending, could not, therefore, be allowed to the plaintiffs while computing the period of limitation. [265 E; I-1; 266 A]

Bhai lai Kishan Singh v. People Bank of Northern India, I.L.R. [1944] Lah 136, Dwarkanath Chakravarti v. Atul Chandra Chakravarti (I.L.R. 46 Cal. 870) and Palla Pattabhira-mayya & Ors. v. Velga Narayana Rao (A.I.R. 1960 A.P. 625) referred to.

[Obiter: The causes of action in the previous suits and in the present suits are also different. And hence the appellants cannot press s. 14 into service.]

Beg, .J. (Dissenting)

The Division Bench of the High Court was wrong in ignoring the effect of the finding of the single Judge that a new cause of action had arisen within three years before the filing of the plaintiffs' suits. [281 C]

The question of time bar or its removal by resorting to s. 14(1) of Limitation Act postulates that a point of time from which limitation could run had been ascertained. As that point could not be the date of the death of K, which was unknown the suits could not be dismissed on that ground. [281 D]

(1) The single Judge had sufficiently indicated that the cause of action in the previous litigation was different from the one in the later inasmuch as the facts proved in the later case showing that K must be presumed to be dead could not be and were not set up in the earlier suits. The cause of action had not accrued in 1945. The effect of the judgment in the former suits was that these suits were premature, which is not the case in the suits in appeal. The plaintiffs in the later cases set out the case founded on new facts not in existence at the time of the earlier litigation and expressly stated why the plaintiffs rely on the presumption of death of K. If the previous suits were dismissed on the ground that they were premature, the cause of action could only, be said to have accrued after their institution. [268 G; 269 C]

252

The findings of the single Judge showed that the plaintiffs were entitled to the benefit of the presumption laid down by s. 108 of the Evidence Act. He found that till August 3, 1951 when the judgment of the High Court in the previous suits was delivered, the position was that the death of K had not been established. This meant that on new facts asserted and proved, K could be presumed dead when the subsequent suits were instituted in 1952 and 1953. This presumption of death having become available to the plaintiffs within three years of the suits and not before, no occasion for applying s. 14 of the Limitation Act could arise. The evidence sought to be given in the previous suits was that K had died on a particular date but the evidence in the subsequent suit was not that he had died on a particular date but that he had not been heard of from August 5, 1945 upto the time of filing of the subsequent suits. [269 H; 270 H]

Modi Khalil Khan v. Mahboob Ali Mian, A.I.R. 1949 PC 78 at 86 referred to.

(2) (a) If causes of action differ from suit to suit, the accrual of the cause of action can also not be tied down to a particular kind of fact such as the date of actual death of the holder of the property. Once it is held that the causes of action differ for purposes of their accrual, their accrual could not be made to depend on facts of one type only. Facts denoting their accrual must differ from case to case. Proof of date of actual death is conclusive.

But, where the basis of the right to sue is presumption of death, the date of accrual of the right is the date on which that presumption matures. [271 C]

Indian Electric Works Ltd. v. James Montosh & ,Anr. [1971] (2) SCR 397 followed.

Mst. Rante Surno Moyee v. Shooshee Mokhee Burmonia & Ors. 12 Moore's I.A. 244, State of Madras v.V.P. Agencies & Anr. AIR 1960 SC 1309 at 1310 and Mst. Chand Kour v. Partap Singh, 15 Ind. App. 156, referred to.

(b) The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense it has been used to denote the whole bundle of material facts which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff must fail in his suit. [272 G]

(c) Applying these tests, in the instant case, the causes of action in the earlier and later litigations would be materially different. No cause of action had arisen at all if it is assumed that K had not died at all. K's death was an essential part of the cause of action. It had to be proved to enable the plaintiffs to put forward their claims to succeed. But proof of the date of death was not essential or indispensable for that purpose. It could only become material in deciding whether the right accrued had been extinguished by the law of limitation. Both the narrow and wider sense of the term "cause of action" would include all those facts and circumstances on the strength of which the plaintiffs urged that they were entitled to the benefit of the obligatory presumption of law contained in s. 108 of the Evidence Act. As these were not available to the plaintiffs before the expiry of seven years from August 5, 1945, it was not possible to urge that this cause of action had arisen more than three years before the filing of the suits. Therefore, the date of its accrual could not lie a day earlier than seven years after August 5, 1945 when K was last heard of. [272 G-H; 273 A-B]

(d) It was for the defendants to establish that K was either alive or had died more than three years before the suits were filed. The presumption under s. 107 of the Evidence Act could not come to the aid of the defendants when the plaintiffs had established facts necessary to raise the presumption under s. 108 of the Evidence Act. [273 E]

(e) The suits are not barred by limitation. The plaintiffs discharged their burden as to when the accrual of their cause of action was within the prescribed period of limitation. If the "media" upon which the plaintiffs rest their cases

253

are different in the previous and subsequent litigations, the causes of action are different. If the alleged date of death of K was the date of accrual of the previous cause of action, the date of accrual of the second could only be something other than the date of death of K, it could not possibly be the same. The other date of accrual could only be subsequent to August 5, 1945 because it was held in the previous suit that the suit was premature on the ground that seven years since K was last heard of had not elapsed then. Since the evidence was that he was last heard of on August 5, 1945, the only possible date of accrual of the subsequent cause of action could be seven years after the date. The suits were filed within three years of that date. [273 H; 274 A-C]

(3)(a) The term 'right to sue' occurring in art. 2 of

Schedule to the Punjab Limitation (Customs) Act 1 of 1920 must be equated with cause of action." The "date of death" cannot be substituted for the date of accrual of the "right to use". In the Limitation Act the accrual when intended to be tied to the date of some event is specified as the date of that event. In this case, it is not so. It cannot be held that the date of accrual in both sets of suits is one and the same, that is to say, the actual date. of death. [274 D]

(b) Wherever the accrual of a right or commencement of a period of limitation, within which a suit must be shown by the plaintiffs to have been brought, could only be established by proving the date of a person's death, that duty must be discharged by the plaintiffs or the suit will fail. But to carry the doctrine beyond that and to lay down that the date of death must invariably be proved, whenever the question of limitation is raised in such cases must result in stultifying or defeating legal right and wiping out the effects of a statutory presumption. The accrual of a cause of action based on untraceability of the owner could not be said to depend at all on proof of either actual death or the date of actual death of the owner. It accrues as soon as death can be presumed and not a day earlier. [278 D-F]

(c) It is not in every suit for possession that the commencement of the date of dispossession must be established by the plaintiffs. It is only in a suit for possession based on the allegation by the plaintiff of his own dispossession that the burden is governed by Art, 142 of the Limitation Act. [274 G]

(d) In the instant case, the plaintiffs were never in possession and, therefore, there was no question of their dispossession. It was a pure and simple suit for possession on the basis of title against which the defendants had not even alleged adverse possession. Therefore, there is no need to bring in the actual date of death constructively, as the date of the presumed dispossession or adverse possession has not been asserted anywhere. [275 B]

(e) The plaintiffs have asserted and proved that the period of seven years when K was last heard of by those who would in the natural course of events have heard of or about him if he was alive, had elapsed and that their cause of action matured within three years of their suits. Assuming that the concept of adverse possession of the defendants was to be introduced, the legal position is that possession of defendants could not be adverse to K's reversioners even before K could be presumed to be dead. The defendants themselves had set up the plea that he must be still deemed to be alive. The plaintiffs could only be required to prove K's death but not the date of his death or the date of the plaintiffs' dispossession. Neither cases dealing with recovery of possession on the plaintiffs' allegation of their own dispossession nor those where proof of date of death was a necessary statutory duty for showing that the suit was within time; are applicable in these cases. [275 E-F]

Nepean v. Doe D. Knight (English Reports 150 Exchequer p. 1021), Jayawant Jivanrao Deshpande v. Ramachandra Narayan Joshi, AIR 1916 Bom. 300 & 301., Lal Chand Marwari v. Mahant Ramrup Git & Anr. AIR 1926 PC 9, Jiwan Singh v. Kuar Reoti Singh & Anr. AIR 1930 All. 427, Kottapalli Venkateswarlu v. Kottapalli Bapayya & Ors. AIR 1957 AP 380 Punjab v Natha AIR 1931 Lab. 582 (FB) & Ram Kali & Ors v. Naraian Singh AIR 1934 Oudh 298 & 299-300, referred to.

254

(f) It is neither a part of the case of any plaintiff in

these cases nor necessary for the success of his case to prove that K died on a particular date or that K died before or after somebody else. The plaintiffs cannot be saddled with the responsibility to prove this date. [279 ,B]

(4) The suits were not barred by limitation because the causes of action in the previous litigation and the litigation now are different and the subsequent cause of action has arisen within three years before the filing of the suits. Assuming that the suits were filed beyond the period of limitation on the actual basis of their claims the plaintiffs are entitled to succeed because this is a fit case in which s. 14(1) Limitation Act could come to the aid of the appellants. They had been asserting repeatedly that the basis of their claim was that although the actual date of death of K could not be proved, yet, he has not been heard of for seven years. That basis having emerged within three years before the filing of the suits, their suits could not be barred by time. If the causes of action did not arise no question of its exceeding by the law of limitation, could emerge. [280 G]

The previous suits did not fail for want of jurisdiction. The delay in bringing the present suits was due to the fact that no court could decree the claim before the cause of action matured. Therefore, the cause of action of a "like nature" to a defect of jurisdiction is present in these cases, since the provision has to be liberally construed. The defect revealed by the evidence in the latter litigation was that the suits did not lie at all as they were premature. This was a defect reasonably comparable to a want of jurisdiction. [280 A-C]

India Electric Works Ltd. v. James Mantosh & Anr. [1971] (2) S.C.R. 397, followed.

(5)(a) If no cause of action could accrue at all unless and until the date of actual death of K was established, there could be no commencement of a period of limitation. The only possible point from which limitation could start framing in these cases is the date on which seven years expired from the date on which K was last heard of. This was within three years before filing of the suits. [280 D]

(b) The issue in the earlier litigation was whether K was actually shown to have died on a particular date. This was quite different from the issue decided now, which was whether K's whereabouts had remained unknown for seven years so that he could be presumed to be dead. [280 F]

ARGUMENTS

For the appellants:

The legal presumption under Section 108 was not sought to be raised in the prior suits. It was for the first time raised in the subsequent group of suits instituted in October, 1952 based on the allegation that Kishan Singh was not heard of since 15th August, 1945.

This submission opens the questions (i) when is the presumption of death to be raised and (ii) whether for the purpose of proceedings in which it is raised or any prior proceedings. The presumption is to be raised in the proceedings where the question has been raised i.e. the second group of suit. However, there is no presumption as to the time of death of the person whose death is accepted as a result of presumption.

The two are distinct matters--(i) the legal presumption of death and (ii) the time of death preceding the period when presumption is drawn. The death may be at any time during the preceding period of 7 years----the period that has enabled the court to draw presumption of death.

The law requires that if one has to establish the pre-

cise period during these 7 years at which such person died he must do so by evidence.

255

The conclusion of the court of presumption of death based upon disappearance from 15th August, 1945 cannot be ignored.

Death at any time on or after 15th August, 1945 does not in any manner adversely affect the case of the appellants, inasmuch as the parties had instituted suits (of course premature) on 18th December 1945 (other suits some time later decided by a common judgment). If the parties are held entitled to the benefit of deduction of time from 18th December 1945 to 3rd August, 1951, the death of Kishan Singh even if it took place between 15th August, 1945 to any date before 3rd August, 1951 the suits are not barred by limitation.

On the pleading of the parties it cannot be assumed that the presumption of death would justify acceptance of date of death, any time prior to 15th August, 1945.

The period of limitation for the suit for possession was 3 years. The defendants had not pleaded in the prior suit that the suit was barred by limitation as instituted. In other words it was not alleged that he had died at any time 3 years prior to the institution of the suit (18th December, 1945). Actually death has not been admitted even on 15th August, 1945.

The trial Court and the District Judge held the suit to be time barred not on the ground that his death had taken place at a period exceeding 3 years from the date of the institution of the first suit. They have apparently not ignored the possibility of death having taken place during the period between 18th December, 1945 to 3rd August, 1951. They have held the suit to be time barred because it was considered that the appellants are not entitled to deduct the stated period spent in the prior suits.

Even if it is considered that death had taken place during this period or any time after 15th August, 1945 or during the 3rd August to 31st October, 1952 the suits are not time barred.

Preliminary objection was raised by the respondents as to the effect of the Punjab Customs (Power to Contest) Amendment Act, 1973 (Punjab Act 12 of 1973). It was urged that the Act had come into force on 23rd January, 1973, it has retrospective operation and bars all suits to contest alienation also including the suits for possession of the property following a declaratory decree. It was urged that the appeals are barred as a consequence of repeal of the provisions of Punjab Act II of 1920.

The contention as to the effect of Act 12 of 1973 is not correct. The previous law on the subject of right to contest alienation of immovable property and the limitation of suits relating to alienation of ancestral immovable property is regulated by two Acts.

(1) Punjab Act II of 1920--Described an Act to restrict the powers of the descendants or collaterals to contest an alienation of immovable property; and

(2) Punjab Act I of 1920 Described as an Act to amend and consolidate the law governing the limitation of suits relating to alienations of ancestral immovable property etc.

The present Act 12 of 1973 repeals s. 6 of Act II of 1920. It also amends s. 7 of the aforesaid Act. Effect of the repeal of s. 6 and amendment of s. 7 merely is that the right to contest vesting in the collaterals upto 5th

degree has been done away with and the suit to contest alienation of ancestral property has been taken away. Under the previous existing law an alienation of non-ancestral property could not be contested.

Act I of 1920 has also not been repealed.

The limitation provided for a suit for possession i.e. 3 years is still an existing provision of the Act. It is obvious that the legislature has retained

256

Act I of 1920 unrepealed so that the benefit of the decrees may be available to all persons under s. 8 of the Act and the period of limitation may be retained as before.

The effect of the declaratory decree is that the alienation is not binding against the inheritance. The succession never remains in abeyance. A person entitled to succeed to the last male holder is entitled to sue for possession on the basis of right to succession to the property.

For the respondent:

The principle of res judicata would be immediately attracted if the plaintiffs allege the "same cause of action" and seek the exclusion of the time because the earlier suit was tried on merits by a competent court having jurisdiction and was dismissed holding that 'plaintiff failed to prove that Kishan Singh died on 15th August, 1945. This finding would be binding between the parties in the subsequent suits as they have been given after recording the evidence and a full trial by, the competent court having jurisdiction.

Therefore, the plaintiff is barred by principles of res judicata from alleging the accrual of right to sue before the filing of the earlier suits as the same would be res judicata. The plaintiff is estopped from alleging the accrual of same cause of action, therefore, no question of exclusion of time inasmuch as the principle of s. 14 of exclusion of time arises only if the cause of action is the same. Section 14 uses the words "the proceeding is founded upon the same cause of action". The language of s. 14 of the Limitation Act by using the words "same cause of action" makes it very clear that time can be excluded for the same cause of action only if the earlier suit is dismissed because of defect of jurisdiction or other cause of a like nature. On the interpretation of s. 14 also the time cannot be excluded for the reason that the earlier suit was dismissed as premature and the new suit was filed on a new cause of action, namely, Alla Singh and his line became extinct on the death of Kishan Singh on 15th of August, 1952 i.e. after the expiry of seven years from 15th August, 1945. Since a new cause of action was alleged after the dismissal of previous suit, s. 14 cannot be attracted.

The words "is unable to entertain it" mean that it is not able to admit the matter for consideration on merits i.e.. the inability is of a formal nature but it does not mean inability to grant relief.

From the decisions one principle is deducible that s. 14 of the Limitation Act has to be construed harmoniously with s. 11 C.P.C. Section 11 C.P.C. bars the filing of a fresh suit on the same cause of action whereas s. 14 of Limitation Act allows time to be excluded in the previous litigations was "founded on the same cause of action".

Section 12 says that if plaintiff is barred under s. 11 C.P.C. to file suit for any cause of action then plaintiff cannot file suit for a such cause of action in any court to which C.P.C. applies.

If both. s. 14 of Limitation Act and principles of res

judicata are to operate then, it should be held that to apply s. 14 the earlier suit had been dismissed on a technical ground of jurisdiction, or other cause of a similar nature, court is unable to entertain it without going into the merits of the case. In the present case earlier suits were dismissed because the plaintiff failed to prove the death of Kishan Singh and the extinction of line of Alia. The words used by the High Court at page 302 line 37 are:

"The suit had been rightly dismissed as premature" do not mean that Kishan Singh was alive but it means that plaintiffs have not proved the accrual of cause of action namely the extinction of line of Alia. In these circumstances it is submitted that the suits were not dismissed on the ground of defect of jurisdiction or other cause of similar nature for which the court was unable to entertain it. Section 14 of the Limitation Act does not apply. Plaintiffs have failed to prove the date of death of Kishan Singh and the extinction of line of Alla within 3 years of the filing of the suit. Suits are therefore time barred.

257

Sections 107 and 108 of the Evidence Act do not help the appellants. Rule of evidence in s. 107 is that it is for the plaintiff to prove the death of a person if he was alive within 30 years and s. 108 says that burden of proving that a man was alive is on the person who alleges he is alive if it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had even alive. In this case the plaintiffs-appellants have alleged that Kishan Singh was last heard of on 15th August, 1915 and since then he is not heard of. The onus is, therefore, on the plaintiff-appellant under s. 107 of Evidence Act to prove as to when Kishan Singh died. It is submitted that Kishan Singh may have died on any date either before 15th August, 1945 or immediately thereafter. There is no presumption that he died on the expiry of 7 years from the date he was last heard. The date of death is thus required to prove by the plaintiff like any other fact.

The suits are, therefore, barred by time and should be dismissed plaintiffs' failure to prove death of Kishan Singh within three years of the filing of suits.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 1944-1946/67.

(From the Judgments and Decrees dated the 20th July, 1964 of the Punjab High Court in L.P.As. Nos. 23 to 25 of 1960).

M.L. Sethi and Harder Singh, for the appellants.

S.K. Mehta and S. Ranga Raju, for Respondents No.s. 1-5.

The Judgment of A.N. Ray, C.J. and Jaswant Singh J. was delivered by Jaswant Singh, J.M.H. Beg, J. gave a dissenting opinion.

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

The facts leading to these appeals are:

As appears from the pedigree table referred to in the judgment under appeal, Chuhar Singh, a descendant of Amrika,

son of Har Lal, sold land admeasuring 167 kanals and 10 marlas situate in village Dhugga, Tahsil Hoshiarpur, to Bhagwan Singh, the grandfather of defendants Nos. 1 to 6, for Rs.23/8/- vide a registered sale deed dated June 20, 1885. After the aforesaid alienation, one Hamira, a collateral of Chuhar Singh, filed a suit for possession by pre-emption of 52 kanals, 13 marlas out of the aforesaid area which was decreed in his favour on April 29, 1889 on payment of 671/-. The mutation in respect of the remainder of the land admeasuring 114 kanals and 17 marlas was attested in favour of Bhagwan Singh on May 4, 1890. Hamira did not retain the property which he secured by pre-emption and sold it back to Bhagwan Singh on September 20, 1890, with the result that Bhagwan Singh again became the owner of the entire land which was originally sold to him by Chuhar Singh who died in 1896. On July 19, 1898, Jiwan, Bela, Jawahar and Jawala, descendants of Bharimian, another son of Har Lal, filed a representative suit for declaration to the effect that the aforesaid sale by Chuhar Singh in favour of Bhagwan Singh would not affect their reversionary rights as the aforesaid land was ancestral and the sale thereof was with-

out
18--1458sc//76

258

consideration and legal necessity. A Division Bench of the Punjab Chief Court finally disposed of the said suit by judgment dated July 29, 1902 declaring that upon the death of Alla Singh, adopted son of Chuhar Singh, and extinction of his line, the aforesaid sale of 1885 would not affect the reversionary interests of Bela and Jawahar. This declaration was made subject to the condition that before these plaintiffs or their successors-in-interest would take possession of their share of the land sold, they would pay to Bhagwan Singh or his successors-in-interest a sum bearing the same proportion of Rs.1611/- i.e. Rs.2378 minus 767/-) as their share in the land sold bore to the whole area sold. On the death of Alia Singh, Kishan Singh, his only son, succeeded him. On December 18, 1943, Jawahar Singh and Bela Singh brought a suit for possession of land admeasuring 113 kanals and 18 marlas situate in village Dhugga alleging that Kishan Singh having died on August 15, 1945, and the line of Alia Singh having become extinct, they were entitled to possession of the land in accordance with the aforesaid decree of the Punjab Chief Court. This suit was followed by two more suits of identical nature for the remainder of the land by two other sets of collaterals of Bhagwan Singh, one by Waryam Singh and his three brothers who claimed half of the entire holding and the other by Khazan Singh and Jagat Singh, who claimed one fourth share of the holding. The Trial Court consolidated all these three suits and proceeded to try them together. Eventually it decreed the first two suits in favour of the plaintiffs pursuant to the aforesaid decree of the Chief Court of Punjab holding that Kishan Singh had died on August 15, 1945. It, however, dismissed the suit brought by Khazan Singh and Jagat Singh on the ground that they being the successors-in-interest of Hamira, who had brought the aforesaid pre-emption suit, were stopped from claiming possession of the land. On appeal, the District Judge, Hoshiarpur, dismissed all the three suits as premature holding that the factum of Kishan Singh's death not been established. The decision of the District Judge was affirmed in appeal by a Single Judge of the Punjab High Court by his judgment and decree dated August 3, 1951. The plaintiff's in the last mentioned suits, viz. Waryam Singh and his three brothers, Jawahar Singh and Bela Singh, and

Khazan Singh and Jagat Singh again instituted three separate suits (out of which the present appeals have arisen) on October 28, 1952, December 16, 1952, and May 12, 1953, respectively for the same relief which was sought by them in the previous suits. In these suits, the plaintiffs averted as follows with regard to the cause of action :--

"5. After Alia, adopted son of Chuhar Singh, deceased, his son Kishan Singh became his heir and representative. Now the whereabouts of Kishan Singh aforesaid, have not been traceable for more than seven years. Since the 15th Aug., 1945, no information or intimation that he is alive has been received by any of his relative or any other concerned person. Hence, he is considered as dead and his suit is being filed. The line of Alia has become extinct. Under these circumstances, the plaintiffs being collaterals of Chuhar Singh, deceased vide the pedigree-table given
259

above, are entitled to get possession of the laud of half share, the sale of which has been cancelled vide the decree granted by the Chief Court, subject to payment of Rs.805/8/- of their proportionate share. Hence, we have filed this suit. The parties are governed by the Zamindara custom in the matters of succession.

6. Prior to it, the plaintiffs had filed a suit for possession of this property (land) on the 18th December, 1945, in the Civil Court at Hoshiarpur, alleging that Kishan Singh, son of Alia who was the last man of the line of Alia, has died on 15th August, 1945

7. The suit of the plaintiffs, detailed in para No. 6 above was based upon the factum of the death of Kishan Singh. The plaintiffs had no personal knowledge about this fact, rather it was based on mere hearsay, but this event of the 15th of August, 1945, came out to be false and such a decision was passed in the previous suit between the parties and the parties are bound by the same. But the whereabouts of Kishan Singh, aforesaid, have not been traceable since the 15th August, 1945, according to the above facts mentioned in para No. 5. After the 15th of August, 1952, (1945 ?) the event of his death is to be determined according to law (under section 108) and facts (under section 114) Evidence Act. Accordingly, Kishan Singh is to be considered as dead after the 15th of August 1952(?) and he is not alive. Two months prior to the 15th of August, 1945, he had been residing sometime at Mauza Dhugga, District Hoshiarpur and sometime at Mauza Sonion, District Jullundur, permanently. Thereafter, he went outside towards Ahmedabad for searching some job and earning his livelihood. The last information about his presence in Ahmedabad was received on the 5th of August, 1945 and since then his whereabouts have not been available.

".. 10. The right to sue has accrued against defendants Nos. 1 to 6 within the jurisdiction of his district after the 16th of

August, 1952, in the beginning of the months of October, 1952 viz., after a period of seven years since the whereabouts of Kishan Singh have not been traceable and since he is considered to be dead according to law and so the Civil Court of this District is competent to try this suit At any rate, Kishan Singh died within a period of three years from the date of filing the suit and so this suit is within time. At any rate, the entire aforesaid period mentioned in para No. 6 from 18-12-45 to 3-8-51 is liable to be deducted according to law and facts."

These suits which were resisted by the contesting defendants on a number of grounds, were eventually dismissed by the Trial Court as time barred with the finding that though Kishan Singh had not been heard for 'seven years before the institution of the suits, the actual date

260
of this death had not been proved. The trial Court, however, held that the decree of the Punjab Chief Court enured for the benefit of the entire body of reversioners and not exclusively for the benefit of Jawahar Singh and Bela Singh. On appeal, the District Judge upheld the dismissal of the suits adding that Hamira having successfully brought a suit for pre-emption in respect of a portion of the sale precluded not only himself but his successors as well from acquiring the property. In this view of the matter, he opined that Jagat Singh and Khazan Singh were not entitled to any share at all in the land. On further appeal, a Single Judge of the Punjab High Court decreed all the three suits by his judgment dated October 28, 1959, holding that Kishan Singh having been treated as alive by the High Court when it passed the previous judgment dated August 3, 1951, the conclusion of the courts below that Kishan Singh had been dead seven years before the institution of the present suits could not be sustained. While computing the period of limitation, the Single Judge also excluded the time spent on the previous litigation from 1945 to 1951 under section 14(1) of the Limitation Act. It would be advantageous to reproduce the observations made in this behalf by the Single Judge:

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

Admittedly, the whereabouts of Kishan Singh are still not known and, in my opinion, there can be no escape from the conclusion on these facts that the death of Kishan Singh must be presumed under section 108 of the Indian Evidence Act as he had not been heard of for a period of seven years. The present suits were brought between 28th of October, 1952 and 12th of May, 1953. The correct approach to reach a solution of the present problem is to give allowance to the plaintiffs, if found necessary, for the period which they spent in previous litigation that is to say, from the years 1945 to 1951. Under sub-section (1) of section 14 of the Indian Limitation Act, the time during which the plaintiff has been prosecuting with due diligence another civil-proceeding, whether in a court of first instance or in a court of

appeal, against the defendant, shall be excluded, where the proceeding is found upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it Both the previous litigation and the present are found on the same cause of action. The previous litigation ended with the judgment of the Punjab High Court in which it was held that the suit was premature, the plaintiffs having failed to establish the death of Kishan Singh

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

261

now that Kishan Singh's death must be presumed. The decision of the High Court in 1951 should provide a suitable ground for extension of time under provisions of section 14 of the Indian Limitation Act. The whole basis of the judgment of the courts below, in my opinion, is erroneous. It is not a requirement of section 108 of the Indian Evidence Act that the date of death of the person whose death is to be presumed must be established. All that is said is that if a person is not heard of for a period of seven years, his death maybe presumed."

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

Before advertng to the contentions raised before us on behalf of the appellants, we must first dispose of the preliminary objection raised by Mr. Mehta, counsel for the contesting respondents, regarding the maintainability of the appeals. According to Mr. Mehta, the said appeals have been rendered untenable and have to be dismissed in view of the amendment introduced in section 7 of the Punjab Custom (Power to Contest) Act, 1920 (Act 2 of 1920) by the Punjab Custom (Power to Contest) Amendment Act, 1973 (Act 12 of 1973) which has been given a retrospective operation by

sub-section (2) of section 1 of the Amending Act. This contention is, in our opinion, wholly misconceived and cannot be allowed to prevail as it overlooks the savings clause contained in section 4 of the Punjab Custom (Power to Contest) Act, 1920 (Act 2 of 1920) which has been left untouched by the Punjab Custom (Power to Contest) Amendment Act, 1973 (Act 12 of 1973) and runs thus:

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

The alienation in question was admittedly made by Chuhar Singh in favour of Bhagwan Singh in 1885 i.e. long before the 28th day of May, 1920--the date on which the Punjab Custom (Power to Con-

test) Act 1920 (Act 2 of 1920) came into force. It was, therefore, not at all affected by Act 2 of 1920. In this view of the matter, it is not necessary to go into the other contention raised by Mr. I Sethi, counsel for the appellants, to the effect that in any event the preliminary objection raised by Mr. Mehta is not tenable as the Punjab Custom (Power to Contest) Amendment Act, 1973 (Act 12 of 1973) had not the effect of abrogating the declaratory decree already obtained by predecessors-in-interest of his clients prior to the coming into force of the Amending Act.

Having disposed of the preliminary objection, we now proceed to consider the contentions that have been pressed for our consideration by Mr. Sethi, counsel for the appellants. He has strenuously urged that section 14(1) of the Limitation Act was applicable to the facts and circumstances of the present case and that the Division Bench of the High Court has grossly erred in not giving the benefit of the provision to the appellants which would have entitled them to the exclusion of the time from October 10, 1945 to August 3, 1951 spent in prosecuting with due diligence and in good faith the previous suits in the court of first instance and in the courts of appeal which expressed their inability to entertain the suits on the ground that they were premature. There is no force in these contentions.

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

Description of suit	Period of limitation	Time from which period begins to run
<p>2. A suit for possession of ancestral immovable property which has been alienated on the ground that the alienation is not binding on the plaintiff according to custom--</p> <p>(a) if no declaratory decree of the nature referred to in Article 1 is obtained.</p>	<p>6 years</p>	<p>First :--If the alienation is by a registered deed, the date of registration of such deed.</p> <p>Secondly--If the alienation is not by a registered deed--</p> <p>(a) if an entry regarding</p>

the alienation in the Register of Mutation has been attested by a Revenue Officer under the Punjab Land Revenue Act, 1887, the date on which the entry is attested.

263

(1)

(2)

(3)

(b) if such entry has not been attested, the date on which the alienee takes physical possession of the whole or part of the property alienated in pursuance of such alienation.

(c) in all other cases, the date on which the alienation comes to the knowledge of the plaintiff.

(b) if such declaratory decree is obtained. 3 years The date on which the right to sue accrues or the date on which declaratory decree is obtained, whichever is later

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

"The doctrine laid down is, that where a person goes abroad, and is not heard of for

seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period

264

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

This case was followed by a Division Bench of the Bombay High Court as far back as 1916 in Jayawant Jivanrao Deshpande v. Ramchandra Narayan Joshi (A.I.R. 1916 Bom. 300)

A similar view was taken by the Privy Council in Lalchand Marwarí v. Ramrup Gir (LIII I.A. 24: A.I.R. 1926 P.C. 9) where it was observed :-

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

Another case in point is Jiwan Singh v. Kuar Reoti Singh & Anr. (A.I.R. 1930 All. 427), where it was held :-

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

Similar view was expressed in Kottapalli Venkateswarlu v. Kottapali Bupayya & Ors. (A.I.R. 1957 A.P. 380). In Punjab & Ors. v. Natha & Ors. (A.I.R. 1931 Lab. 582). a Full Bench of the Lahore High Court observed :-

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

Again in Ram Kali & Ors. v. Narain Singh (A.I.R. 1934 Oudh 298 F.B.) it was laid down:

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

265

In the instant cases, assuming that Kishan Singh died

within seven years of the institution of the suits out of which the present appeals have arisen, even then the benefit of the section 14 cannot be allowed to the appellants. This provision in so far as it is material for our purpose runs as follows :-

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

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

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

In the instant cases, it is not denied by the plaintiffs that the Court which tried the previous suits was not precluded from entertaining them because of any defect of jurisdiction. We have, therefore, only to see whether the said court was unable to entertain the former suits on account of any defect of an analogous character. Even a most liberal approach to the question does not impel us to hold that the court trying the earlier suits was unable to entertain them on any ground analogous to the defect of jurisdiction. In *Dwarkanath Chakravarti v. Atul Chandra Chakravarti* (I.L.R. 46 Cal. 870) where the court trying the previous suit had refused to entertain a claim for rent because it was premature, it was held that in a subsequent suit for the aforesaid rent, the plaintiff could not rely upon the provisions of section 14(1) of the Limitation Act and say that the time did not run against him while those proceedings were being prosecuted. Again in *Palla Pattabhiramayya & Ors. v. Velaga Narayana Rao* (A.I.R. 1960 A.P. 625) it was held that the fact that the previous suit was dismissed as the plaintiff had no cause of action was not a ground which was covered by section 14 (1).

266

Thus it could not be held that the court which tried the previous suits but eventually threw them out as premature suffered from inability or incapacity to entertain the suits on the ground of lack of jurisdiction or any other defect of the like character. Accordingly the exclusion of

the period from December 18, 1945 to August 3, 1951 sought by the appellants cannot be legitimately allowed to them while computing the period of limitation.

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

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

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

"5. Dismissal of suits of the description specified in the act if instituted after the period of limitation herein prescribed has expired. Subject to the provisions contained in sections 4 to. 25 (inclusive) of the Indian Limitation Act 1903, and notwithstanding anything to the contrary contained in the first schedule of the said Act, every suit, of any description specified in the schedule annexed to this Act, instituted after the period of limitation prescribed therefor in the schedule shall be dismissed, although limitation has not been set up as a defence."

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

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

267

Plaintiffs in the three suits instituted in circumstances explained fully by my learned brother Jaswant Singh, included all those persons who could sue as reversioners of Kishan Singh if it was proved that he was dead or presumed to be dead; and, they are all appellants before us. It is evident from a bare statement of the case set up in each of the identically similar plaints in the suits now before us that, as three previous suits filed by these very plaintiffs in 1945 for the same reliefs had failed against the same defendants for want of proof of date of death of Kishan

Singh, the suits now before us were based on somewhat different allegations setting up a new cause of action. Otherwise obviously, they would have been barred by res judicata. As the learned Single Judge, before whom the three cases now before us first came up in the High Court, had pointed out, the earlier suits had failed because they were held to be pre-mature so far as the cause of action now before us is concerned and for want of proof of the date of death of Kishan Singh so far as the actual cause of action set up there was concerned. We also indicated, quite clearly, how the causes of action in the earlier and later sets of litigation were quite different. and why the new cause of action arose within three years before the filing of the suits.

Considerable confusion seems to have been caused by the prolixity of pleadings in the case so that, although the plaintiffs asserted clearly the accrual of a new cause of action, with the aid of a presumption, they were saddled with the responsibility to discharge another onus tied to the proof of a particular date which had been abandoned by them after their dismal failure in the earlier litigation to prove the actual date of death of Kishan Singh who had disappeared. Could they fail again for the same reason although the cause of action they set up is fresh and different and arose within three years before filing of the suits? That is the real question we have to answer. Perhaps the way in which I look at the question and have stated it makes an answer in the negative unavoidable. Hence, my inability, with great respect, to concur with another view put forward by my learned brother Jaswant Singh.

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

"All the three sets of plaintiffs have come up in second appeal to this Court and Mr. M.L. Sethi has addressed a very persuasive argument on the question of limitation which in reality is now the only substantial matter in dispute. He has pointedly brought to my notice the anomalous and baffling situation in which the plaintiffs have been placed. According to the judgment of the High Court of 3rd August, 1951, it was found that the death of Kishan Singh had not been proved. In other words, Kishan Singh was deemed to have been alive at the time when the High Court decree was passed on 3rd of August, 1951. If that position is accepted, as indeed it must, the conclusion of the

268

Courts below, that Kishan Singh had been dead seven years before the institution of the present suits, cannot be sustained. To this position there is the added complication of the defendant's own admission that Kishan Singh was alive at the time when the statement was made by their counsel Milkhi Ram on 27th of April, 1953. I find myself unable to assent to the proposition on which both the courts below have founded their conclusions that suits must be regarded as barred by time as the date of death of Kishan Singh had not been proved. The District Judge has arrived

at his conclusion because in the previous suits it was asserted that Kishan Singh had died on 15th of August, 1945. As the death of Kishan Singh had not been proved, the suits were dismissed up in the High Court being premature. It passes my comprehension how it can now be said that Kishan Singh died sometime before 1945 and the suits having been brought more than three years after his death are now barred by statute. The previous suits filed by the three different sets of plaintiffs were founded on the allegation that Kishan Singh had died in Ahmedabad some where in August 1945. A good deal of oral and documentary evidence was led in support of Kishan Singh's death. The conclusion of the learned District Judge (Mr. Chhakan Lal) was that the plaintiffs had not succeeded in establishing the death of Kishan Singh and it could not, there, be held that the line of Alia had become extinct. In the judgment, in second appeal, of Harnam Singh J., the only question which, was discussed was whether the death of Kishan Singh had been proved. It is pertinent to observe that in the High Court it was common ground between both the parties that the case did not fall under section 108 of the Indian Evidence Act. Like the District Judge, Harnam Singh J., discussed the oral and documentary evidence, which had been adduced by the parties and agreed with the finding of the lower appellate Court. Till 3rd of August, 1951, when the judgment (of the HC in the previous suits) was delivered. the position was that the death of Kishan Singh had not been established".

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

It is true that the learned Single Judge had thought that, alternatively, Section 14 of the Limitation Act could apply inasmuch as the causes of action in the previous litigation as well as in the present litigation were identical. In so far as the learned Single Judge postulated though for a limited purpose, an identity of causes of action of the previous and the present sets of suits, the assumption was inconsis-

269

tent with his own emphatically expressed opinion revealing the difference in the causes of action. The plaintiffs in the suits before us set out the history of the whole litigation and clearly set up a case founded on new facts, not in existence at the time of the earlier litigation, and expressly state why the plaintiffs now rely on the presumption of death of Kishan Singh.

The identically similar complaints of the plaintiffs now before us were not based upon any assertion or plea of their own dispossession. For such suits the period of limitation

was given in Article 2 to the schedule of the Punjab Limitation (Customs) Act of 1920. The provisions are set out in the judgment of my learned brother Jaswant Singh. The period of limitation for such suits is three years from "the date on which right to sue accrues or the date on which declaratory decree is obtained, whichever is later". If the previous suits were dismissed, as it seems to me that they were, on the ground inter alia, that they were premature, the cause of action could only be said to have accrued after their institution.

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

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

If the date of death of Kishan Singh had to be proved by the plaintiffs, no question of invoking the aid of a presumption to prove death could arise. Proof of death would dispense with the need reply on any mere presumption of death. The result of the District Judge's failure was that the Single Judge of the Punjab High Court had to record essential findings of fact on this crucial question of availability of the presumption of death. These indicated, beyond the shadow of doubt, that the plaintiffs were entitled to the benefit of the presumption laid down by Section 108 of the Evidence Act. This meant that, on new facts asserted and proved, Kishan Singh could be presumed to be dead when the suits now before us were instituted in 270

1952 and 1953. And, this presumption of the death of Kishan Singh having become available to the plaintiffs within three years of the suits and not before, no occasion for applying Section 14 Limitation Act could arise.

The defendants, while pleading the bar of limitation to the suits had, quite inconsistently, also tried to suggest that Kishan Singh was either alive or must be assumed to be alive. The plaintiffs could not be expected, on their plea that, proof of date of death of Kishan Singh being absent, they were relying only on the presumption of death, to lead evidence of any date of death. All that could be reasonably expected from them was to show that the presumption became available to them within three years before the filing of their suits. The learned Single Judge of the High Court had, in my opinion correctly, recorded the following finding which made the presumption of death of Kishan Singh avail-

able to the plaintiffs:

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

The learned Single Judge had also observed:

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

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

In Mohd. Khalil Khan v. Mohboob Ali Mian, (1) it was laid down: "A rough test, although not a conclusive one, as to whether the cause of action in a subsequent suit is the same as that in the former suit, is to see whether the same evidence will sustain both suits, and regard should be had to the allegations in the two suits, and not the facts found by the Court in the former suit". On the facts of the cases before us, we find the evidence sought to be given in the previous suits was that Kishan Singh had died on a particular date (i.e. 15th. August, 1945), but, the evidence in the subsequent suits (now before us for decision) was not that he had died on a particular date but that he had not been heard of from 5th August, 1945, up to the time of the filing of new suits. This evidence could not be given in the previous suit's. Hence, the above test is satisfied.

(1) A.I.R. 1949 P.C. 78, 86.

271

In Smt. Mahadevi v. Kaliji Birajman, (1) it was held that, if certain additional facts had to be proved for the success of the subsequent suit, the causes of action would differ. It did not matter if there is a certain common ground to be covered by the evidence in both sets of cases. This test would also be satisfied in cases before us now because the additional facts show that Kishan Singh had not been heard of by those who would have otherwise heard of him in the course of seven years. This evidence could not be led at all in the previous suits as they were filed very soon after the alleged date of death of Kishan Singh.

If causes of action differ from suit to suit, the accrual of the cause action can also not be tied down to a particular kind of fact such as the date of actual death of the holder of the property. Once it is held that the causes of action differ for purposes of their accrual, their accrual could not be made to depend on facts of one type only. Facts denoting their accrual must differ from case to case. Of course, proof of date of actual death is conclusive. But, where the basis of the right to sue is presumption of death the date of accrual of the right is the date on which that presumption matures.

I have set out above the reasoning which appeals to me and makes the decision of this Court in *India Electric Works Ltd. v. James Mantosh & Anr.*, (2) applicable to the cases now before us. In that case, the appellant before this Court was a defendant tenant in a suit for recovery of damages with interest and costs. In a previous suit the predecessor-in-interest of the plaintiff had sued the defendant for ejection, but the defendant had continued in occupation of the premises as the suit was compromised. The accommodation was requisitioned on 2nd February, 1945. After the accommodation was released by the Govt. on 21st November, 1945, the plaintiff filed two suits against defendant one for the recovery of damages upto 1st February, 1944, and another for damages from 22nd November, 1945, upto the date of recovery of possession although there was no suit for possession. When the matter came up before the High Court in appeal, the High Court disallowed the claim for future mesne profits on the ground that it "was a pure money suit and not a suit for recovery of possession of immovable property and for mesne profits under Order 20, Rule 12, Civil Procedure Code". The plaintiff then filed a third suit on 5th November, 1956, for recovery of Rs.28,650/ as damages with interest thereon for a period from 22nd November, 1948, to 5th November, 1956. The benefit of Section 14 of the Limitation Act was claimed for the amount claimed for the period beyond three years. Two of the learned Judges of this Court, Shah and Grover, J.J., held that, although the claim for future mesne profits, not having been satisfied by the money suit of 1948, in which the decree of the Trial Court was set aside on 30th June, 1955, by the High Court, a fresh cause of action arose from 30th June, 1955, yet, it was unnecessary to decide the case on that principle because the Court was satisfied that, in any event, Section 14(1) of the Limitation

(1) 1969 All L.J. 896. (2) [1971] (2) S.C.R. 397.
272

Act, which had to be construed liberally, would cover the period for which the claim was said to be barred by limitation. Though, the third learned Judge, Hegde, J., seemed to be of the opinion that Section 24(1) of the Limitation Act could not help the plaintiff, yet, following the decision of the Judicial Committee in *Mst. Raneesurno Moyee v. Shooshee Mokhee Burmonla & Ors.* (1) which had governed later decisions of the Privy Council and various High Courts a new cause of action, arising within the period of limitation, would, ensure to the benefit of the plaintiffs.

It seems to me that the lines on which the case of *India Electric Works* (supra) was decided enable us to correctly decide whether a new cause of action had accrued in favour of the plaintiffs in the suits before us, which were filed within three years of the accrual of this cause of action, as well as on the question whether, if this be not the correct position, Section 14(2) of the Limitation Act could be invoked by plaintiffs. Indeed, the view accepted by the three Judges of this Court, that it is enough to institute proceedings within the prescribed period from the accrual of the fresh cause of action, appears to me to provide the common view we cannot reject. This view would apply if we agree, as my learned brother Jaswant Singh does, that a cause of action had arisen here.

In *State of Madras v. V.P. Agencies & Anr.*, (2) Das, C.J., referred to various expositions of the meanings of the term "cause of action", including that by Lord Watson, in *Mst. Chand Kour v. Partap Singh*, (3) where we find (at p. 1310):

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

The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff must fail in his suit. Now, whether we use the expression in the narrower or in the wider sense, in the case before us, the death of Kishan Singh was certainly an essential part of the cause of action. It had to be proved to enable the plaintiffs to put forward their claims to succeed at all. But, proof of the date of death was not essential or indispensable for that purpose. It could only become material in deciding whether the right which had accrued had

(1) 12 Moore's I.A. 244. (2) A.I.R. 1960 S.C. 1309 at 1310.

(3) 15 Ind. App. 156.

273

been extinguished by the law of limitation. Both the narrower and the wider sense of the term "cause of action" would certainly include all those facts and circumstances on the strength of which the plaintiffs urged that they were entitled to the benefit of the obligatory presumption of law contained in Section 108 of the Evidence Act. As these were not available to the plaintiffs before the expiry of seven years from 5th August, 1945, it does not seem to be possible to urge that this cause of action had arisen more than three years before the filing of the suits now before us. Applying the tests stated above, the causes of action in the earlier and later litigations would, in my opinion, be materially different. We could only hold that no cause of action had arisen at all if we assume that Kishan Singh had not died at all. And, how could we assume that without disregarding Section 108 Evidence Act? If we cannot do that, the cause of action could only accrue when we could presume that he is dead, And, the date of its accrual could not possibly lie a day earlier than 7 years after 5th August, 1945, when Kishan Singh was last heard of.

As indicated above, the identity of the relief asked for in the earlier and later suits does not matter. It also does not matter that the defendant in both sets of suits have attempted to suggest that Kishan Singh is still alive. It is they who had asserted that the plaintiffs' rights were extinguished by the operation of the law of limitation. Therefore, strictly speaking, it appears to me that it was for the defendants to establish, if they could, that Kishan Singh was either alive or had died more than three years before the suits were filed. There is no proof of either of these here, The presumption under Section 107 of the Evidence Act could not come to the aid of the defendants when the plaintiffs had established facts necessary to raise the presumption under Section 108 of the Evidence Act. There seemed to be irrefutable evidence that, after a letter of Kishan Singh, received at Ahmedabad on 5th August, 1945, nothing had been heard or was known about him. Hence, the

plaintiffs relied on the presumption under Section 108 Evidence Act 'because 'they could not prove the actual date of death which had a bearing only on the bar of limitation set up by the defendants. As has been pointed out sometimes, the function of a presumption is to fill a gap in evidence. In these circumstances, it seems to me that the defendants should have been called upon to show, before relying upon the bar of limitation, how the death of Kishan Singh took place on a date. beyond three years of the filing of the suit before the question of applying Section 14 Limitation Act could arise at all.

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

19--1458SCI/76

274

of accrual of the second cause of action. If the alleged date of death of Kishan Singh was the date of accrual of the previous cause of action, the date of accrual of the second could only be something other than this date of death of Kishan Singh. It could not possibly be the same. And, that other date of accrual could only be subsequent to 5th August, 1945, because, as indicated above, it was held in the previous suit that ,the suit was premature on the ground that seven years since Kishan Singh was last heard of on 5th August, 1945, had not elapsed then. Since the evidence was that he was last heard of at Ahmedabad on 5th August, 1945, the only possible date of accrual of the subsequent cause of action here could be seven years after that (i.e. 6th August, 1952). The suits before us were filed within three years of that date. Therefore, I fail to see how the suits before us could possibly be held to be barred by Limitation.

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

It is well established that it is not in every suit for possession that the commencement of date dispossession must be established by the plaintiff. It is only in a suit for possession, based on the allegation by the plaintiff of his own dispossession, that the burden has been held to be governed by Article 142 of the repealed Limitation Act (See Ram Gharib v. Bindhiyachal(1), and the plaintiff is required to prove the date of his dispossession within limitation. Its equivalent, the present Article 64 of the Limitation Act of 1963, places the position beyond the region of every conceivable doubt.:

"64. For possession of Twelve years
The date of immovable property
dispossession.

based on previous
possession and not
on title, when the
plaintiff while in
possession of the
property has been
dispossessed.

(1) A.I.R. 1934 All. (ST.) 993.
275

Objects and Reasons

Articles 142 and 144 of the existing Act have given rise to a good deal of confusion with respect to suits for possession by owners of property. Article 64 as proposed replaces Art. 142, but is restricted to suits based on possessory title so that an owner of property does not lose his right to the property unless the defendant in possession is able to prove adverse possession". (See: Chitale & Rao--the Limitation Act 1903--Vol. II).

There is no suggestion whatsoever in the suits before us that the plaintiffs were ever in possession so that no question of their dispossession could possibly arise. It was a pure and simple suit for possession on the basis of title against which the defendants had not even alleged adverse possession. Hence, there was, it seems to me, no room here for bringing in the actual date of death, constructively, as the date of some presumed dispossession or adverse possession which has not been asserted anywhere. As pointed out earlier, the defendants seem to have cleverly drafted theft pleadings so that a Division Bench of the High Court, which had erroneously allowed the defendants' appeals, had been misled into placing a burden upon the plaintiffs which, according to law, as I see it, could not rest there at all. The Division Bench applied decisions on Section 14 of the Limitation Act when this provision could not, as explained below, be invoked at all.

The plain and simple question which arose on the pleadings was whether seven years had elapsed since Kishan Singh was last heard of by those who would, in the natural course of events, have heard from or about him if he was alive, and if so, did this happen within three years before the filing of the suits? The plaintiffs have asserted and proved that this period of seven years had elapsed. According to them, their cause of action matured within three years of their suits. Even if, by some stretch of imagination, the concept of adverse possession of the defendants were to be introduced in this litigation, when neither the plaintiffs nor the defendants have pleaded it, it is abundantly clear that the legal position is that the possession

of defendants could not conceivably be adverse to Kishan Singh's reversioners even before Kishan Singh could be presumed to be dead. Indeed, the defendants had themselves set up the plea that he must be still deemed to be alive. On these pleadings, the plaintiff could only be required to prove Kishan Singh's death but not the date of his death or the date of the plaintiff's dispossession which can occur only after a previous possession of the plaintiffs followed by the adverse possession of the defendants. Neither cases dealing with recovery of possession on the plaintiff's allegation of his own dispossession nor those where proof of date of death was a necessary part of either the cause of action or the plaintiff's statutory duty, for showing that the suit was within time, are really applicable here. We have a simple case before us where the cause of action seems to me to have clearly been shown to have arisen within three years before the filing of the suits. Nevertheless, I will deal here with some authorities which are relied upon by my learned brother Jaswant Singh.

The first of these is: *Nepean v. Deo D. Knight*(1). In this case, an action for ejectment was brought, apparently on an allegation

(1) English Reports 150 Exchequer p. 1021.
276

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

"It is true the law presumes that a person shewn to be alive at a given time remains alive until the contrary be shewn, for which reason the onus of shewing the death of

Matthew Knight lay in this case on the lessor of the plaintiff. He has shewn the death by proving the absence of Matthew Knight, and his not having been heard of for seven years, whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive; but the onus is also cast on the lessor of the plaintiff of shewing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of Matthew Knight".

This was really a case in which it was not enough to invoke the presumption of death, but, the right to sue itself depended on commencing the suit within 20 years of the date of accrual of the right to entry which was held to be the actual date of death of Matthew Knight who had disappeared. In the case before us, I think that the accrual of the right to sue arises only seven years after Kishan Singh was last heard of. If *Nepean's* case (*supra*) could or did lay down anything applicable to the cases before us, I am unable, with great respect, to accept it as correct law which we could follow. In my opinion, the facts as well as the applicable provisions of law in the case before us are very

different from those in Nepean's case (supra) which could, in any event, not be more than an authority of some persuasive value in this Court.

In *Jaswant livanrao Deshpande v. Ramchandra Narayan Joshi*, (1) in a suit governed by Article 141 Limitation Act, it was held (at p. 301):

"Art. 141 Lira. Act, is merely an extension of Art. 140, with special reference to persons succeeding to an estate as reversioners upon the cessation of the peculiar estate of a Hindu widow. But the plaintiff's case under each article rests upon the same principle. The doctrine of non-adverse possession does not obtain in regard to such suits and the plaintiff suing in ejectment must prove, whether it be that he sues as a remainderman in the English sense or as a reversioner in the Hindu sense, that he sues within 12 years of the
(1) A.I.R. 1916 Bom. 300 @ 277

estate failing into possession, and that onus is in no way removed by any presumption which can be drawn according to the terms of S. 108, Evidence Act. The exact point for the purpose of Art. 140, and also, in our opinion, of Art. 141, has been decided many years ago in England soon after the passing of the English Law of Limitation regarding Real Property in *Nepean v. Deod. Knight* (1973) 2 M & W 894-7 L.J. Ex. 335".

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

In *Lal Chand Marwari v. Mahant Ramrup Gir & Anr.* (1) the suit seems to have been based on an allegation by the plaintiff of his own dispossession by the defendant. Hence, it was governed by Article 142 of the former Limitation Act, the equivalent of which is Article 64 of the Limitation Act of 1963. It seems to me that Article 144 of the old Limitation Act is mentioned by mistake in the body of the judgment here. In any event, the statement of facts showed that the plaintiff had pleaded his own dispossession, or, at least, the plaint could be so construed as to imply that. Hence, a case of this type is distinguishable.

In *Jiwan Singh v. Kaur Reoti Singh & Anr.*, (2) a decree in a previous suit brought against a person alleged to be insane as well as not heard of for more than seven years had been assailed on several grounds: that, the defendant was insane; that, the defendant was unheard of for more than seven years, and, therefore, should have been deemed to be dead; that, the decree was obtained by fraud. As the High Court upheld the plea of fraud, it did not consider it necessary to decide on other grounds. Nevertheless, it pointed out, quite correctly, that the presumption under Section 108 of the Evidence Act only enables the Court to

presume the factum of death but not the date of death. No question of limitation arose at all in this case.

In Kottapalli Venkateswarlu v. Kottapalli' Bapaya & Ors,(3) reliance was placed, Inter alia, on Punjab v. Natha,(4) which, in my opinion, was wrongly decided. Venkateswarlu's case (supra), however, arose on facts and circumstances in which the proof of date of death was necessary to determine as the question was whether a legatee had

(1) A.I.R. 1926 P.C. 9. (2) A.I.R. 1930 All. 427.
(3) A.I.R. 1957 AP. 380. (4) A.I.R. 1931 Lah. 582 (F.B.).
278

survived the testator. In such a case, proof of date of death is necessarily a part of the cause of action.

In Ram Kali & Ors. v. Narain Singh,(1) it was held that: (at s. 299-300):

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

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

I may point out that the rule laid down in re Phene's Trusts(2), which has been repeatedly followed by the Privy Council and by our High Courts, was enunciated in the circumstances of a case in which it was absolutely essential for the success of the claim before the Court that a legatee claimant must be shown to have survived a testator. It was a case in which there was a competition between claimants which could only be resolved by a decision of the question as to who died first. It is in such circumstances that the onus of proving the date of death also would properly and squarely lie upon the plaintiff claimant. The general principles were thus enunciated in this case(at p. 144):

"First: That the law presumes a person who

has not been heard of for seven years to be dead, but in the absence

(1) A.I.R. 1934 Oudh 298 @ 289,300.

(2) 5 Chancery Appeal cases p. 139 @ 144.

279

of special circumstances draws no presumption from that fact as to the particular period at which he died. Secondly: That a person alive at a certain period of time is, according to the ordinary presumption of law, to be presumed to be alive at the expiration of any reasonable period afterwards. And, thirdly: That the onus of proving death at any particular period within the seven years lies with the party alleging death at such particular period".

It is neither a part of the case of any plaintiff before us nor necessary for the success of his case to prove that Kishan Singh died on a particular date or that Kishan Singh died before or after somebody else. I, therefore, fail to see, with great respect, how the plaintiffs can be saddled with the responsibility to prove this date in the suits now before us. It was nobody's case that Kishan Singh died long ago and that the defendants have been in open hostile adverse possession against Kishan Singh and whoever may be his heirs or feoffmenters. In the earliest litigation, the defendants claimed as transferees of the rights of Kishan Singh. The declaratory decree restricted their rights to the life time of Kishan Singh. Their rights could not extend beyond the point of time when Kishan Singh must be presumed to be dead. That is the farthest limit of their rights. They knew this after the litigation which terminated in 1902. That is why, in the suit's now before us, they took up the alternative case, though rather obliquely, that Kishan Singh must be or at least deemed to be alive, so that they may benefit from the declaration in 1902 that their rights were limited to the life-time of Kishan Singh.

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

If, for some reason, we could still hold that the plaintiffs' claims were made beyond the period of Limitation. I think that this would be a fit case in which Section 14(1) of the Limitation Act could

280

come to the aid of the plaintiffs provided there was identity of issues to be tried. The previous suits did not fail for want of jurisdiction. Nevertheless, the provision has to be liberally construed as this Court has to be a period of time, shown to have elapsed since the expiry of the present suits was certainly due to the fact that no Court could decree the claim before the cause of action matured. This was, certainly beyond the control of the plaintiffs. Therefore, a cause of "like nature" to a defect of jurisdiction seems to me to be there. Indeed, it could be urged that it is a stronger ground in equity than a lack of jurisdiction which can be foreseen with sufficient diligence.. It is far more difficult to predict the outcome of a suit depending largely on oral evidence. The defect revealed by the evidence in the earlier litigation was that the suits did not lie at all as they were "premature". This was, in my opinion, a defect reasonably comparable to want of jurisdiction.

I, however, find it very difficult to attempt to apply Section 14 Limitation Act to the cases before us for two reasons. Firstly, there has to be a period of time, shown to have elapsed since the expiry of the period of limitation, which could be excluded under section 14. If the cause of action does not accrue at all there is no point of time from which any period of limitation could run. Hence, if no cause of action could accrue at all unless and until the date of actual death of Kishan Singh is established, there could be no commencement of a period of limitation. If that be the correct position, where is the question of excluding any time in computing it? The only possible point from which limitation could start running here is the date on which seven years expired from the date on which Kishan Singh was last heard of. This was within three years before filing of the suits as pointed out above. Secondly, Section 14 provides that the time to be excluded spent in proceedings prosecuted in good faith must relate to "the same matter" as is "in issue" in the subsequent proceeding. It seems to me that the issue in the earlier litigation was whether Kishan Singh was actually shown to have died on a particular date. This was quite different from the issue decided in the cases now before us. This is whether Kishan Singh's whereabouts had remained unknown for seven years so that he could be presumed to be dead. I, therefore, rest my judgment solely on the ground that, the causes of action in the previous litigation and the litigation now before us being different, and the subsequent cause of action having arisen within three years before the filing of the suits before us, the suits were not barred by limitation.

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

281

"Admittedly, . the whereabouts of Kishan Singh are still not known and, in my opinion, there can be no escape from the conclusion on these facts that the death of Kishan Singh must be presumed under Section 108 of the Indian Evidence Act as he had not been heard of for a period of seven years. The present

suits were brought between 21st of October, 1952 and 5th of May, 1953. The correct approach to reach a solution of the present problem is to give allowance to the plaintiffs, if found necessary. for the period which they spent in previous litigation that is to say, from the years 1945 to 1951".

The Division Bench had thus completely ignored the effect of the finding of a new cause of action arising within three years before the filing of the plaintiffs suits. In my opinion, this finding of the learned Single Judge was enough to dispose of these appeals. And, as I have pointed out above, question of either a time bar or its removal by resorting to Section 14(1) Limitation Act postulates that a point of time from which limitation can run has been ascertained. As that point, on the findings of every Court, including this Court, could not be the date of Kishan Singh's death, which is unknown, the suits could not possibly be dismissed on that ground. They could conceivably be dismissed on the finding that the date of death of Kishan Singh, being an indispensable part of the cause of action, the plaintiffs do not disclose a cause of action at all, and, therefore, should have been rejected. But, the defendants have not taken any such plea directly. Nor was this argued on their behalf.

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

Consequently, I would allow these appeals, set aside the judgment and decrees of the Division Bench of the High Court and restore those of the learned Single Judge and leave parties to bear their own costs throughout.

P.B.R.
missed.
282

Appeals dis-