

**(1951) 04 CAL CK 0029**  
**In the Calcutta High Court**  
**Case No : A.F.A.O. No. 5 of 1949**

Abinash Chandra Dutta and Others

APPELLANT

Vs

Gour Chandra

RESPONDENT

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**Date of Decision :** 04-04-1951

**Acts Referred:**

Bengal Tenancy Act, 1885 — Section 185, 26G, 26G(5)  
Limitation Act, 1908 — Article 131, 181, 5

**Citation :** AIR 1952 Cal 76 : (1951) 1 CALLT 41 : 55 CWN 489 : (1952) 2 ILR (Cal) 150

**Hon'ble Judges :** Sen, J;K.C. Chunder, J

**Bench :** Division Bench

**Advocate :** Hemanta Kumar, for the Appellant; Ajit Kumar Dutt, for the Respondent

**Final Decision :** Dismissed

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## Judgement

K.C. Chunder, J.—This appeal is by a mortgagor claiming relief u/s 26G(5), Bengal Tenancy Act.

2. The facts are simple. A usufructuary mortgage was executed in 1902. The mortgagees remained in possession. On 19-6-1946, the present application was filed in the Court of the Munsif of Dubrajpur alleging that the usufructuary mortgage had become extinguished by virtue of possession of over 15 years u/s 26G(5), Bengal Tenancy Act. The Munsif gave relief to the appellant. On appeal being taken to the Court of the Dist. J. of Birbhum "the Dist. J. held that Article 181 of the Indian Limitation Act applied & therefore as the right to apply u/s 26G arose when the section was enacted in 1938 the present application in 1946 was barred by time. Against this decision of the Dist. J. the present appeal has been filed.

3. So far as the question of limitation is concerned with regard to proceedings under the Bengal Tenancy Act there are three classes of cases. The first is where the period of limitation is provided for in the section itself; for example in cases

of having sales set aside, or of pre-emption after receipt of notice etc. The section itself provides the period of limitation. The second class of cases is where the period of limitation is provided for in Sch. III, Bengal Tenancy Act; for example suits brought to recover possession when dispossession is by the landlord etc. The third class of cases is that in which no period of limitation having been provided for the Indian Limitation Act operates in view of Section 143, Bengal Tenancy Act, & Section 141. Civil P. C. In the present case the question is what will be the period of limitation under the Indian Limitation Act as no period of limitation is provided for either in Section 26G or in the third Schedule of the Bengal Tenancy Act for an application of this kind. This appeal first came up before me as a single Judge & as there has been no decision of this Court directly on this point it was referred by me to the Divisional Bench.

4. There are two decisions of this Court which have a bearing on this question; one which lays down that in case of an application u/s 26F, Bengal Tenancy Act, where the notice has not been served the period of limitation is three years under Article 181, Limitation Act; see the case of *Saktisaran Sinha v. Radha Raman Mandal*" 38 C. W. N. 50. The other decision relates to an application u/s 38J of the Act, in connection with an application by the landlord for realisation of landlord's transfer fee. It was held there also that in case of such an application the period of three years limitation under Article 181, Limitation Act, applied. Although these cases are not directly in point, the principle may be applied to the present case. The learned Dist. J. appears to have acted upon such principle & held that Article 181, Limitation Act, applied. Mr. Lala Hemanta Kumar appearing on behalf of the appellant has contended that in view of the decision of a Divisional Bench of this Court in the case of *"Sashi Bhusan v. Madhu Sudan"* I. L. R. (1942) Cal. 28 the period of limitation should be 12 years as provided in Article 131. That was a case in which the mortgagor presented an application u/s 26G(5), Bengal Tenancy Act, before the revenue officer as he was entitled to do. That application was dismissed for default. Then filed an application under the same section in the civil Court. It was contended that the fresh application was not maintainable & in that connection their Lordships were pleased to say:

"Under Section 26G(5), as soon as the period specified in that section expires, the consideration for the mortgage must be deemed to be extinguished, & the mortgagor gets the right to recover possession of the mortgaged property. In case the mortgagee does not deliver up possession of the property to the mortgagor, the latter can avail himself of the summary proceeding provided by the section & apply for possession, to a revenue officer or the civil Court as he thinks proper. The right to recover possession is a recurring right & continuous, so long as possession is not restored to him. If the right to recover possession is negatived by a competent tribunal, it cannot certainly be reagitated in the same Court or another Court, but, if the application is merely dismissed for default, a subsequent application cannot be barred, as the latter is not based on the same cause of action. The position is the same as in the case of partition suits, & so long as the right to partition remains, the mere dismissal of a previous suit for

non-prosecution is no bar to a subsequent suit."

Mr. Lala Hemanta Kumar relies upon the passage "the right to recover possession is a recurring right & continuous, so long as possession is not restored to him." It is obvious that what was meant by the word "recurring" was that it was a subsisting right which continued as the dismissal of the application by the revenue authority for default did not put an end to the right. There can be no question that the right of a mortgagor in case of a usufructuary mortgage to get back possession is not one which comes within the words "periodically recurring right" in Art 131, Limitation Act. There is nothing periodic about it, nor is it of that kind of recurring right as in the case of nuisance etc. Under these circumstances Art, 131, Limitation Act, is not the proper article to apply. The proper article is Article 181, Limitation Act, to apply to an application of this nature. The learned Dist. J. therefore rightly held that the application had been filed out of time.

5. Mr. Lala Hemanta Kumar has contended before us that had the question of limitation been raised at the first stage in the trial Court, then he would have had a right u/s 5, Limitation Act, on proper & sufficient grounds being shown to ask for an extension of the period of limitation from the Court. His contention is that this is an application under the CPC in view of the decision of the Special Bench in the case of "Asmatoli Sharip v. Mujaharali Sardar" 52 C.W.N. 64 at p. 71. He is entitled to an extended period if he can satisfy the Court u/s 5, Limitation Act. This argument is not sound in our opinion. It is unnecessary for us to say whether this is an application under the CPC or it is an application under the Bengal Tenancy Act the subsequent procedure of which is regulated by the CPC in view of Section 143, Bengal Tenancy Act, read with Section 141, Civil P. C. The Special Bench decision previously referred to does not appear to have kept this distinction in view clearly throughout though it would appear from a perusal of that decision that what the Court was driving at there was that an application of this nature was regulated by the CPC & not that it was exactly an application under the Code of Civil Procedure. This distinction is not so very material in the present case in view of the fact that the CPC itself does not make Section 5, Limitation Act, applicable to all applications under the Code of Civil Procedure. u/s 5, Indian Limitation Act, an application for review of a judgment or for leave to appeal or any other application to which Section 5 may be made applicable by or under any enactment for the time being in force the period of limitation may be extended. The CPC has not enacted that all applications under that Code will attract the operation of Section 5, Limitation Act. The Bengal Tenancy Act also has not provided in case of applications under any of the sub-sections of Section 28 that Section 5, Limitation Act, will apply. u/s 185, Bengal Tenancy Act, Section 5, Limitation Act, has been applied to certain specific proceedings coming within Schedule. III of the Bengal Tenancy Act. That section has not made Section 5, Limitation Act, applicable to Section 26G or to any of the other sections of the Bengal Tenancy Act under which an application of like kind can be made. Therefore, it is immaterial whether we call it an application under the CPC or an

application under the Bengal Tenancy Act regulated by the CPC as far as subsequent procedure is concerned, the law is the same namely that there is no provision for the application of Section 5, Limitation Act, to any such application either in the CPC or in the Bengal Tenancy Act. Therefore, Mr. Lala Hemanta Kumar's contention must fail.

6. The Dist. J. being right in his decision the appeal is dismissed.

7. Each party will bear his own costs in this appeal.

Sen, J.

8. I agree.