

(1907) 01 CAL CK 0004

In the Calcutta High Court

Case No : Appeal from Appellate Order No. 392 of 1905

Goohi Sheikh and others

APPELLANT

Vs

H. Mathewson

RESPONDENT

Date of Decision : 08-01-1907

Acts Referred:

Citation : (1907) 01 CAL CK 0004

Final Decision : Allowed

Judgement

1. This is an appeal on behalf of the Defendants against an order of the Subordinate Judge of Manbhoom by which he remanded the case for retrial to the Court of first instance. It appears that on the 22nd September 1870, the predecessor in interest of the present Plaintiff granted a lease to the predecessor in interest of the Defendants for the reclamation of certain jungle lands. The lease provided that the lessee was to reclaim the lands, that he was to hold them free of rent for a term of six years, that in the beginning of the seventh year, that is to say, on or about the 12th April 1876, the lessee was to cause measurement, jumabandi and settlement of the reclaimed lands by taking out an Ameen at his own cost from the landlord's sheristha that upon measurement and settlement of rent, the lessee was to hold six annas share of the lands and the tank rent-free, and that the remainder was to be liable for rent. The lease further provided that in the event of the failure of the tenant to cause measurement, jumabandi and settlement of rent as indicated, in the beginning of the seventh year, in April 1876, the landlord would be entitled to possession of ten annas share of the reclaimed lands, the remaining six annas being held by the tenant. The Plaintiff alleges that the measurement provided by the lease has never taken place and he consequently on the 27th February 1904 served notices upon the Defendants calling upon them to quit upon the expiry of three months. The Defendants did not give up possession of the land; the Plaintiff therefore sued to eject them. The Court of first instance held that the suit was barred by limitation, inasmuch as the forfeiture upon which the Plaintiff relied took place more than 12 years before the date of suit. Upon appeal the learned Subordinate Judge held that the

decision of the Munsif upon the question of limitation was obviously wrong. He did not, however, give any reasons in support of his view, nor did he indicate in his judgment on what article of the Limitation Act he relied. He reversed the decision of the Munsif upon the question of limitation and remanded the case to him for trial on the merits.

2. The Defendants have now appealed to this Court and on their behalf it has been contended that the suit is clearly barred by limitation. In our opinion this contention is manifestly well-founded. As we have already stated the lease in question made it obligatory on the tenants to cause measurement in April 1876. This they did not do. It then became open to the landlord to re-enter but he had waited till the 4th July 1904. It is clear therefore that he has lost his right to recover khas possession under Art. 143 of the Limitation Act. Art. 143 provides that a suit for possession, when the Plaintiff has become entitled to recover possession by reason of any forfeiture or breach of condition, that is, a condition of the tenancy, must be brought within 12 years from the date when the forfeiture is incurred or the condition is broken. In the case before us the condition in the lease was broken in April 1876, and the liability to forfeiture was incurred at that time. The Plaintiff was therefore bound to sue within 12 years from 1876. This view is supported by the decision of this Court in the case of *Tumeezooddeen Chowdhury v. Meer Surwar Khan* 7 W. R. 209 (1867). In that case it was held that limitation applies to a case in which the tenant undertakes to reclaim lands within a fixed time upon pain of forfeiture, and that the period runs from the time when the tenant fails to do so in accordance with the terms of his contract. The same view is supported by the decision of the High Court of Madras in *Madavan v. Athi Nangiyar* I. L. R. 15 Mad. 123 (1891).

3. It was argued by the learned vakil for the Respondent that Art. 129 applies to the present case. We are not prepared to uphold this contention, as Art. 139 provides that a suit by a landlord to recover possession from a tenant must be brought within 12 years from the date when the tenancy is determined. But even if this article applied, it would be of no assistance to the Plaintiff-Respondent, because in the present case the tenancy was determined by forfeiture in 1876.

4. It was next contended on behalf of the Respondent that sec. 23 of the Limitation Act is applicable. Sec. 23 provides " that in the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues." In support of his contention the learned vakil for the Respondent placed reliance on the case in the Allahabad High Court, *Sadha v. Mussamud Bhagwani* 7 N. W. P. H. C. R. 53 (1875). That case is clearly distinguishable, as it was decided under Act IX of 1871. It must be remembered that sec. 23 of Act IX of 1871 was applicable to suits for the breach of a contract in cases of successive breaches, as also to suits in cases of continuous breach. Act XV of 1877, on the other hand, confines the application of sec. 23 to cases of continuous breach only. *Bhojraj v. Gulshar* I. L.

R. 4 All.493 (1882). Now, in the present case there is obviously no continuous breach. The tenant was under an obligation under the terms of his contract to cause measurement in 1876. When he failed to do so at the time prescribed by the lease, the breach was complete and he incurred the liability of forfeiture of the tenancy, though no doubt it was open to the landlord to waive the forfeiture. It is not necessary for us to consider in the present case whether he has waived the forfeiture or not; but it is clear that if he relies on the forfeiture and seeks on the basis of it to eject the Defendants he is barred by limitation.

5. It was suggested by the learned vakil for the Respondent that the effect of our decision might be practically to make a present of the lands rent-free to the Defendants. He apprehended that in a future action by him to recover rent from the Defendants in respect of these lands they might plead that they had acquired a good title by adverse possession against the landlord. There is, however, no foundation for any such apprehension, because it appears from the written statement of the Defendants that they did not deny tenancy under the Plaintiff and they did not deny their liability to pay rent to the Plaintiff in respect of the reclaimed lands. In the view we take of the matter, we must hold that this suit for ejectment is barred by limitation. The result, therefore, is that the appeal must be allowed, the order of the Court below reversed and the decree of the first Court restored with costs in all the Courts.