

(1924) 03 CAL CK 0023
In the Calcutta High Court

Hamid Ali and Others

APPELLANT

Vs

Ram Charan Goldar and Others
 Abdul Mazid Mir and
Others Vs Goshai Das Bachar and Others

RESPONDENT

Date of Decision : 12-03-1924

Acts Referred:

Citation : 79 Ind. Cas. 569

Hon'ble Judges : Suhrawardy, J;Chotzner, J

Bench : Division Bench

Judgement

1. These appeals are directed against the orders of the Court of Appeal below remanding the cases to the Court of first instance for the trial of issues other than the issue of limitation. The facts are that the plaintiffs brought two suits for recovery of possession of certain Char lands against the Muhammadan tenants who were in actual occupation of the lands as principal defendants and the landlords as pro forma defendants. The Court of first instance held that the suit was barred by special limitation under the Bengal Tenancy Act. On appeal by the plaintiffs the learned Additional District Judge, disagreeing with the finding of the first Court, allowed the appeal and remanded the cases to be tried on the merits. The present appeals are against the orders of remand. In these appeals the principal defendants as well as the pro forma defendants have all been made party respondents--the respondents who were pro forma defendants being 101 in the one case and 84 in the other. Some of them (about three in one case and two in the other) died during the pendency of the appeals and their legal representatives were not brought on the record.

2. Dr. Basak on behalf of the principal defendants-respondents has raised a preliminary objection that as some of the landlords in whose presence the decree of the lower Appellate Court was passed have not been made parties to the appeals, these appeals cannot be decided in their absence. The point is elaborated and it is urged that the plea of special limitation is available by the landlord and the decision of the Court of Appeal below holding that the suit was

not barred by two years" limitation was passed in the presence of the landlords who are not on the record of these appeals, and, therefore, the decree of the Court below should still remain binding on them. The contesting appellants claiming through these landlords and others must be held to be bound by the decision which is binding on these landlords. If that be not so, there will be two decisions if these appeals succeed, one binding on the landlords, namely, that the suit is not barred by the special rule of limitation and the other that it is in favour of their tenants, the defendants. We do not think that, in the circumstances of this case, we should give effect to this objection. It has been held in a number of cases that the plea of special limitation under Article 3, Schedule III, Bengal Tenancy Act, is available not only to the landlord but also to persons claiming under the landlord. Reference in this connection may be made to the cases of *Bheka Singh v. Nakchhed Singh* 24 C. 40 : 12 Ind. Dec. (N.S.) 692, and *Sekunder Sheik v. Arun Sarkar* 38 Ind. Cas. 69. That being so, the question relating to special limitation may be enquired into even if the landlords were not parties to the suit, or if the landlords being made parties did not appear and contest the suit, or if the landlords did appear and contest the suit but were satisfied with the order passed by the Court below and did not challenge it on appeal. But it is argued that though the landlords may not be necessary parties in this suit, they were necessary parties in all subsequent stages of the suit where they were made parties. There is no force in this contention. The facts of the case in *Bheka Singh v. Nakchhed Singh* 24 C. 40 : 12 Ind. Dec. (N.S.) 692, are not quite similar to the facts of the present case; but the principle which that case lays down may very well apply to the present case. In that case the suit was brought against the Secretary of State as landlord and his tenants who had taken settlement from him. The Secretary of State did not contest the suit and it was stated on his behalf that he had no objection to the registration of the plaintiff's name and that the Court might award possession to the plaintiffs if it thought proper. The first Court found that the plaintiff was an occupancy raiyat and, therefore, the suit was barred by two years limitation, under Article 3, Schedule III, Bengal Tenancy Act. The plaintiff appealed and the appeal was dismissed by the Court of First Appeal on the ground that the Secretary of State who was defendant in the first Court was not made a party to the appeal. On appeal to this Court it was held that the Secretary of State was not a necessary party to the appeal. Though it was observed in course of the judgment that the Secretary of State has disclaimed all interests in the subject-matter of the suit and was perfectly indifferent to the result of it. The decision did not rest on this circumstance alone. The real question between the parties to this litigation is whether the plaintiffs are entitled to recover possession from the defendants who are in actual possession of the land. The defendants took advantage of the plea of special limitation which is also available to the landlord on the ground that they had dispossessed the plaintiffs, if they did so after taking settlement from the landlords. This question, in our opinion, may be agitated between the parties without the landlord and the fact that the landlord was originally a party to the suit and was subsequently given up on appeal does

not affect this question as between the necessary parties to the appeal. We may further add that the landlords have ceased to take any interest in this case, since no one has appeared on their behalf in these appeals. On these grounds, we are of opinion, that the preliminary objection ought not to prevail.

3. We now come to consider the judgment of the lower Appellate Court. It is contended by the appellants that the learned Judge has not considered the whole evidence in the case and that he has to a certain extent misread the judgment of the Subordinate Judge. We think that the judgment of the learned District Judge is not what it should be. The learned Subordinate Judge has referred to various pieces of evidence on the record. He has referred to Paragraph 6 of the plaint which does to a certain extent admit some of the facts which go to support the defendants' case. The learned Subordinate Judge has also referred to the evidence of these witnesses where there is an admission that the plaintiffs were dispossessed 4 or 5 years ago. The Subordinate Judge, no doubt, laid great stress upon the Assistant Settlement Officer, dated the 13th April 1917, in which that officer stated that he found on that day that the defendants were in possession of the property; but on this and other materials on the record he came to the conclusion that the plaintiffs were out of possession for more than two years before the institution of the suits. Having found that, that Court proceeded to consider whether the dispossession was by the landlords. Relying upon some of the evidence for the plaintiffs and certain other evidence as well he came to the finding that the dispossession was by the landlords. The District Judge has proceeded upon the assumption that the judgment of the first Court was based solely upon the report of the Assistant Settlement Officer and that it should now consider the other issues. He thinks that the plea of special limitation was not specifically taken and, therefore, should not be enquired into. He has not given any reason why he differed from the judgment of the Court of first instance as to the inference drawn by that Court from the facts stated by it; but he ends his judgment with the observation that the onus of having special limitation was surely on the defendants and this onus they had not discharged. We do not think that this is the proper way in which such questions should be decided. The question of limitation may be taken at any time if it can be maintained on the materials on the record and we find that there is evidence on the record to support the judgment of the Court of first instance which has not been considered by the learned Judge. He has not decided the question whether the dispossession was by the landlord and he has not considered it as a question apart from the other questions, viz., possession of the land within the period of limitation. On the whole, we are not satisfied that the judgment of the lower Appellate Court gives any indication that the learned Judge has considered the whole evidence in the case and has come to a finding upon it.

4. We are, therefore, of opinion that this appeal should be re-heard.

5. The result is that these appeals are allowed, the orders of the Courts below are set aside and the appeals sent back to the lower Appellate Court for re-

hearing according to law. Costs will abide the result. We assess the hearing fee at three gold mohurs in each case.