

(1933) 01 PAT CK 0001
In the Patna High Court

Jurawan Singh and Others

APPELLANT

Vs

Ramsarekh Singh and Others

RESPONDENT

Date of Decision : 19-01-1933

Acts Referred:

Bengal Tenancy Act, 1885 — Article 3 Schedule 3
Criminal Procedure Code, 1898 (CrPC) — Section 145, 146
Limitation Act, 1963 — Article 47

Citation : AIR 1933 Patna 224

Hon'ble Judges : Macpherson, J;Kulwant Sahay, J

Bench : Full Bench

Judgement

Kulwant Sahay, J.—These two appeals are by some of the defendants in two suits which were instituted by a large number of plaintiffs for declaration of their title in respect of different parcels of lands which they claimed as their occupancy holdings in mauza Fatehpur Shahbazpur, bearing tauzi No. 2602 in the district of Muzaffarpur. Appeal No. 43 of 1927 arises out of title suit No. 28 of 1924, while Appeal No. 73 of 1929 arises out of title suit No. 3 of 1927, the first suit having been filed in June 1924 and the second in January 1927. The suits were tried by two different Subordinate Judges, but on the application of the defendants-appellants in both these appeals, to which the respondents made no objection, it was ordered that these appeals should be heard one after the other. There are many points common to both the appeals and, although we have heard the appeals separately one after the other, it will be convenient to deal with the points raised in both the appeals in one judgment.

2. The case of the plaintiffs in both the suits was that the lands in dispute formed their occupancy holdings and that they or their ancestors and predecessors in title were recorded in the record-of-rights as occupancy raiyats of the lands claimed by them. The village Fatehpur Shahbazpur lies between two rivers, the river Gandak being on the north of the mauza and the river Ganges to the south of it, and lands of the village frequently go under water. The defendants-first-party in both the suits were also occupancy raiyats in respect of several holdings

in the village. The plaintiffs or some of them and the defendants first party acquired proprietary interests in the village by purchase from the previous proprietors under whom they originally held the lands as raiyats. The purchases were made on different dates and by different instruments. The defendants second party are also some of the purchasers of the proprietary . interest but they had no raiyati holding in the village before the acquisition of their proprietary interest.

3. It appears that some time in 1901 or 1902 a large area of land in the north of the village went under water and remained submerged for about 13 or 14 years. About 400 bighas of the submerged lands re-appeared in 1914 and about 1,000 bighas in 1918. The two suits relate to portions of these lands which the plaintiffs claim as their old occupancy holdings to which they are entitled as raiyats. After the re-appearance of the first 400 bighas there was a dispute as regards possession and a proceeding u/s 145 of the Criminal Procedure Code was started, which resulted in an order made on the 15th December 1916. whereby the Magistrate attached the whole of the 400 bighas u/s 146, Criminal Procedure Code, being unable to find which of the parties was in actual possession of the land, and the Collector was appointed as the receiver. Similarly, disputes arose as regards the 1000 bighas of land which had reappeared in 1918 and proceedings were again started u/s 145 of the Code of Criminal Procedure, which resulted in an order, dated the 8th July 1931; by this order 200 bighas was declared to be in possession of the defendants-first-party as landlords, while the remaining 800 bighas was attached u/s 146 of the Code. Thus 1400 bighas of land formed the subject matter of the two proceedings; and the plaintiffs in the two suits claim portions of each of the three blocks of lands, viz., the blocks of 400 bighas attached in 1916, the 200 bighas declared to be in possession of the defendants-first-party, and the 800 bighas attached in 1921.

4. The lands claimed by the plaintiffs in each of the suits are set out in the schedules attached to the plaints. The lands claimed in the first block of 400 bighas are set out in schedule No. 1, those claimed in the block of 200 bighas are set out in schedule No. 2, while those claimed in the third block of 800 bighas are set out in schedule No. 3. The Collector was appointed the receiver also of the 800 bighas which was attached in 1921. The Subdivisional Officer of Hajipur, acting for the Collector as receiver, settled the attached lands, set out in schedule No. 1, with the defendants-fourth-party, and these defendants now claim the lands as occupancy tenants or, in any events, as non-occupancy tenants under the settlement made by the receiver. The lands set out in Schedule No. 3 were similarly settled by the receiver with the defendants fifth party; but these defendants do not now claim any tenancy right in the lands under the settlement. The defendants-third-party have obtained leases of some of the lands from defendants first or second party.

5. The suits were contested by the defendants first and fourth parties and also by some of the defendants third party. The defence of the defendants-

first-party in each case was that the plaintiffs had no subsisting raiyati interest in the lands in dispute; that the plaintiffs abandoned their holdings when the lands went under water; that after re-appearance of the lands the plaintiffs and the defendants took possession as landlords treating the lands as their bakasht lands; that they amicably divided the lands amongst themselves as proprietors; and that the plaintiffs had, therefore, no subsisting title as raiyats and are not entitled to take possession of the lands in dispute as such.

6. Questions of limitation, abandonment and the identity of the lands in dispute with the original occupancy holdings were raised in the Court below as well as in this Court. The defendants-fourth-party claimed that they were settled raiyats of the village and as such had acquired occupancy right under the settlement made with them by the receiver. Suit No. 28 giving rise to Appeal No. 43 has been decreed substantially as claimed by the plaintiffs; while suit No. 3 giving rise to Appeal No. 73 has been in part decreed by the Subordinate Judge. The defendants have accordingly preferred the present appeals. I shall first deal with Appeal No. 43. This appeal is by defendants Nos. 1, 7, 8, 9, 81 and 111 of the defendants-first-party and by the defendants-fourth-party. The plaintiffs in this case own 2 annas 19 gandas proprietary interest, while the defendants first and second parties are the owners of the remaining 13 annas 1 ganda.

7. The first point raised by the learned Advocate for the appellants was the question of limitation. The order for attachment of the 400 bighas of land, out of which the lands claimed by the plaintiffs are set out in schedule No. 1, was made on 15th December 1916, and the order in the second proceeding u/s 145, relating to the 1000 bighas of land was made on 8th July 1921. Out of the 1000 bighas 200 bighas was declared to be in possession of . the defendants-first-party and 800 bighas was attached u/s 146 by the second order. The suit giving rise to Appeal No. 43 was instituted on 7th July 1924. It is contended on behalf of the appellants that as regards the lands claimed in schedule No. 2 of the plaint the suit was barred under the special limitation of two years under Article 3, Schedule 3, Bengal Tenancy Act. The plaintiffs contend that the period of limitation was three years from the date of the order u/s 145, under Article 47, Limitation Act. It is to be noted that although an issue was raised on the question of limitation, yet at the hearing of the suit before the Subordinate Judge the question was not pressed by the defendants, and the learned Subordinate Judge observed that in fact the question did not at all arise in the suit. Moreover, the special limitation under Article 3, Schedule 3, Bengal Tenancy Act, was not pleaded by the defendants-first-party in their written statement, the plea taken being a general plea of limitation. The guardian-ad-litem of some of the minor defendants did raise the plea in the written statement that the suit was barred by the general and special law of limitation but, as I have said, the point was not pressed at the hearing. It is, therefore, contended on behalf of the plaintiffs-respondents that as the plea of special limitation was not specifically taken the plaintiffs did not give evidence on this . point.

8. I would therefore discuss this question only in so far as it raises a point of law and would not enter into the question in so far as it raises a question of fact.

9. The question of law raised is that the effect of the order u/s 145 declaring the defendants-first-party to be in possession of the 200 bighas of land amounts . to dispossession of the plaintiffs by the landlords and, therefore, the suit, having been filed more than two years after the date of the order, was barred under Article 3, Schedule 3, Bengal Tenancy Act. In my opinion this contention is not sound. The fact that the defendants-first-party were declared to be in possession did not amount to a dispossession by the landlord. If the dispossession was caused by the order of the Magistrate it cannot be taken to be a dispossession by the landlord. It has been held that in order to attract the special limitation provided in Article 3, Schedule 3, Bengal Tenancy Act, the dispossession of the raiyat must be by the landlord or at his instance.

10. Although there are conflicting rulings on the point, yet the question is settled so far as this Court is concerned, by the Full Bench decision in Gajadhar Rai Vs. Ram Charan Gope and Others, . It is, however, contended that the fact that the defendants-first party were declared to be in possession of the 200 bighas by the Magistrate was evidence of the fact that these defendants were in fact in possession of the lands on the date of the proceeding and, that they came into possession after dispossession of the plaintiffs. In this connection it is important to notice that the case of the defendants was that the plaintiffs had abandoned their holdings when the lands went under water and that after re-appearance in 1914 and 1918 the tenants did not take possession of their holdings, but that the parties took possession as landlords treating the lands as their bakast and not as their raiyati holdings. If that is so, it is clear that there was no dispossession of the plaintiffs as raiyats by the defendants as landlords. Article 3, Schedule 3, Ben. Ten. Act, applies only to cases of actual dispossession by the landlords. If the possession of the tenants ceased on account of the land being submerged under water, and if after re-appearance of the land there was no actual taking of possession by the raiyats and no dispossession by the landlords, Article 3, Schedule 3, Ben. Ten. Act., would not apply. In order that there should be dispossession by the landlord there should first have been possession by the raiyat; but where the plaintiff had not taken possession after re-appearance the fact that the defendant succeeded in taking possession would not amount to a dispossession within the meaning of Article 3, Schedule 3, Ben. Ten. Act.

11. In Srish Chandra Bhaduri and Others Vs. Brojobashi Pramanik, , it was held that where the plaintiff had never been in possession, the fact that the defendant had continued in possession did not amount to dispossession within the meaning of Article 3.

12. Similarly, in Rajani Kanta Biswas and Others Vs. Panchanon Mondal and Others, it was held that for Article 3, Schedule 3, to operate, there must be actual dispossession by the landlord of the tenant land that it did not apply where the landlord refused to allow the plaintiff to take possession of the land

and there has thus been what may be described a constructive dispossession by the landlord.

13. In *Panchoo Kapali v. Jajneswar Majhi* AIR 1920 Cal 348 Mookerjee, Ag. C.J., observed that the term dispossession implies the going out of the person in possession and his being followed into possession by another. In that case the plaintiff took a lease of 12 kathas of land from the defendants but they obtained possession of 7 kathas only and the defendants agreed to vacate the remaining 5 kathas after three months. The defendants, however, continued in possession of the 5 kathas notwithstanding the lease and it was held that this fact did not amount to a dispossession under Article 3, Schedule 3, Ben. Ten. Act, the learned Judge observing:

We cannot possibly accept the argument that there was dispossession in law though not in fact, for this Court has emphatically discouraged recourse to the fiction of constructive dispossession which however attractive has tended to create much confusion.

14. The same view was expressed in *Rakhal Das Nepal Pramanik Vs. Khirode Bandhu Nandi and Others*, . In that case there was an abandonment of the holding upon which the landlord took possession. The tenant brought a suit for possession and it was held that the discontinuance of possession by the plaintiff did not amount to dispossession by the landlord such as to attract to the operation of Article 3, Schedule 3. I am therefore of opinion that having regard to the fact that there was no actual possession of the raiyati holding by the plaintiffs after re-appearance, and no actual dispossession by the landlords in the present case, the special limitation of two years under Article 3, Schedule 3, Bengal Tenancy Act, did not apply in respect of the lands claimed in Schedule 2 of the plaint, and that the period of limitation applicable is that provided in Article 47, Limitation Act, and as such the suit is within time. It is contended that the claim of the plaintiffs as regards the lands attached u/s 146, Criminal P.C., is also barred by limitation.

15. The contention of the defendants-appellants is, that the plaintiffs were dispossessed from the Schedule 3, lands at least by the beginning of January 1921, before the order u/s 146, Criminal P.C., was passed on 8th July 1921; and limitation having commenced to run the subsequent attachment will not affect the question and enlarge the period of limitation. If limitation began to run before the date of the order of attachment, it is clear the plaintiffs could not have a fresh start of limitation from the date of the subsequent attachment: see *Deo Narain Chowdhury v. C.R.R. Webb* (1901) 28 Cal 86.

16. The question however is whether the defendants have established that the plaintiffs were actually dispossessed in the beginning of 1921. The defendants refer to certain kabuliyats for the purpose of showing that there was such dispossession. (His Lordship here considered some of the documents bearing on the point and proceeded). As these documents bear dates prior to the date of the

order of attachment, the defendants contend that they show that the plaintiffs had been dispossessed of their raiyati interest in these lands before the order of attachment. They thus contend that the actual ouster of the plaintiffs took place in the year 1920 or in the beginning of 1921, and the attachment being in July 1921, there had been dispossession before the attachment and therefore the limitation of two years began to run from before the attachment.

17. The plaintiffs-respondents on the other hand, contend that there was no actual ouster of the plaintiffs at any time before the attachment. They refer to the written statement filed by the defendants in which they stated that the lands were attached because they were then jungle, sandy, and waste lands. Para. 13 of the written statement of Jurawan Singh (defendant 1) and others contains the statement that the Subdivisional Officer attached the first block of 400 bighas in view of the fact that the lands were then jungle, sandy and waste lands. Similarly in Para. 16 of the said written statement it is alleged that the 800 bighas were attached by the Subdivisional Magistrate in view of the fact that they were then jungle and sandy lands. The attached lands being jungle, sandy and waste lands were not capable of actual possession by either party and therefore there was no actual possession by the plaintiffs and dispossession by the defendants after the re-appearance of the lands. The entire 1,400 bighas admittedly went under water between 1901 and 1903 and the raiyats lost possession on account of the submersion, and it is therefore contended that as there was no actual possession by the plaintiffs and dispossession by the defendants, Article 3, Schedule 3, Bengal Tenancy Act, did not apply.

18. It is further contended on behalf of the plaintiffs-respondents that the case of the defendants is, that after re-appearance all the proprietors, including the plaintiffs, came into and remained in possession of the lands by some rearrangement among themselves, and thus it is admitted by the defendants that the plaintiffs were not actually ousted from the lands though no doubt, it is contended, that the possession was in the capacity of proprietors and not of raiyats, but the fact of possession is admitted. If the parties treated the lands as bakast the defendants did not dispossess the raiyats and, in fact, there was no intention to dispossess them, and thus it is contended there was no actual dispossession before the order of attachment. As regards the kabuliyats and puttass relied upon by the defendants--appellants the case of the plaintiffs is that these documents came into existence with the ulterior object of preventing the lands from being attached by the Magistrate in the proceeding u/s 145 and as a matter of fact, those pattas and kabuliyats were never acted upon.

19. The learned Subordinate Judge has held that these documents came into existence for the purpose of the proceeding u/s 145 and that they were never acted upon. There is no reliable evidence on the record of actual possession of the persons with whom the lands were settled or of any realization of rents from those persons on the basis of these kabuliyats and pattas. I am therefore of opinion that the defendants have failed to prove that there was actual

dispossession of the plaintiffs-raiyats from their holding before the order of attachment was passed by the Magistrate. The dispossession of the plaintiffs on account of the attachment of the lands by the Magistrate was clearly not a dispossession by the defendants landlords.

20. I have already referred to the Full Bench decision of this Court in Gajadhar Rai Vs. Ram Charan Gope and Others, according to which in order to attract the operation of Article 3, Schedule 3, Bengal Tenancy Act, the dispossession must be by the landlord and a dispossession under an order of Court is not dispossession within the meaning of the article. Even assuming that the cases which decide that a dispossession of a riyat at the instance of the landlord even if it be under process of a Court, is a dispossession within the meaning of the article are correct, it is clear that in the present case the dispossession as the effect of the attachment cannot be held to be a dispossession at the instance of the landlord. The possession both of the landlords and of the tenants was under consideration of the Magistrate and the Magistrate merely found that neither party had succeeded in establishing its possession. In this view of the case it is clear that no part of the claim of the plaintiffs is barred by limitation and this contention of the defendants-appellants must therefore be overruled.

21. The next point taken on behalf of the defendants-appellants is one of abandonment. The plea is that the tenants-defendants abandoned their holdings soon after submersion when they thought that the lands were not likely to come out of the water in the near future. They contend that the abandonment of the holdings is proved by non-payment of rent from the time of submersion to the date of suit and by the conduct of the parties after re-appearance of the land. As regards abandonment by non-payment of rent from the time of submersion, it is no doubt true that the evidence goes to show that no rent was ever paid after the submersion, but the non-payment of rent under such circumstances cannot be treated as evidence of abandonment.

22. The learned advocate for the appellants has relied upon an old decision of the Calcutta High Court in Hemnath Dutt v. Ashgur (1879) 4 Cal 894. This decision no doubt supports the contention of the appellants. It was held in this case that where land held by tenants with rights of occupancy was completely submerged for a number of years and during the period of such submersion no rent was paid by the tenants, the tenants had by non-payment of rent forfeited their rights of occupancy.

23. But this case was dissented from by the Allahabad High Court in Mahzar Rai v. Ramgat Singh (1896) 18 All 290, where it was held that mere non-payment of rent when the lands had become submerged by the action of the river does not of itself determine the tenancy; and this view was accepted as correct by the Privy Council, in Arun Chandra Singh . v. Kamini Kumar (1918) 41 Cal 683, where their Lordships observed that they did not find themselves in accord with the rule of law expressed in the case of Hemnath Dutt v. Ashgur Sindar (1879) 4 Cal 894 and approved of the decision in Mazhar Rai v. Ramgat Singh (1896) 18

All 290, as correctly enunciating the principle applicable to this class of cases. The question of abandonment is a question of intention on the part of the tenant.

24. The tenants had acquired a fractional proprietary interest in the lands, and the evidence goes to show that they claimed to set off the rent payable to the other proprietors as against the rent receivable by them from those proprietors as raiyats. This is evident from the judgment Ex. 8 in a rent suit instituted against some of the tenants, in which the defence taken was that the rent for the shares sued for had been paid off by set-off for rents due to the defendants as maliks of a portion of the said share. Ex. 3 is a written statement in the proceeding u/s 145 on behalf of Amar Singh and others, and in para. 3 thereof it is stated that the jama or the rent as stated in the record-of-rights used to be set off amongst the proprietors. There is no evidence from which an intention can be gathered on the part of the raiyats to abandon their holdings during the period of submersion.

25. On the other hand, we find that as soon as the lands re-appeared and before they became fit for cultivation the plaintiffs and other raiyats claimed their occupancy holdings and disputes arose between the parties as regards possession. The intention therefore of the raiyats appears to have been to keep their occupancy holdings intact. (After meeting the contention that the conduct of the parties after re-appearance, in effecting a partition of the proprietary interest proved abandonment of the raiyati holdings and after exhaustively considering the contention that the plaintiffs had failed to prove the identity of the lands claimed by them with their old occupancy holdings his Lordship concluded that the decree as prepared was correct and there could be no valid objection on the ground that the area decreed was in some cases in excess of the area claimed even after the amendment that the area claimed was the whole of the holdings as they originally stood and which formed the subject-matter of the two criminal proceedings, and that there was only a misdescription thereof as regards the boundaries of the plot numbers of the areas and proceeded).

26. I now come to the case of the defendants-fourth-party. They are the persons with whom the block of 400 bighas was settled by the receiver. They claim to be settled raiyats of the village and as such to have acquired occupancy rights by virtue of the settlement made by the receiver.

27. The possession of a person taking settlement of lands attached u/s 146, Criminal P.C., from the receiver appointed under that section cannot in my opinion be such as to affect the rights of the person whose title may be declared by the civil Court. An attachment is made u/s 146, for the purpose of preventing a breach of the peace, and the attachment is to last until a competent Court has determined the rights of the parties to the land in dispute or the person entitled to possession thereof. When a competent Court has determined the rights of the parties or the person entitled to possession of the lands in dispute, it is the duty of the Magistrate to withdraw the attachment and to make over possession to such party. Any act done by the receiver appointed u/s 146 during the period of

attachment cannot and ought not to prejudicially affect the rights of the party found by the Court to be entitled to possession of the land in dispute. The settlement made by a receiver of attached land can enure only during the period of such attachment and no right can be created under such settlement which might prejudicially affect the rightful owner of the land, otherwise it may lead to future complications. Suppose for instance, that a dispute as to possession of a piece of land arose between a person who claims the land as proprietor affirming title to possession of the land as his bakast, and a person who claims the said land as his occupancy holding; the Magistrate on account of such dispute attaches the land in dispute u/s 146, Criminal P.C., and appoints a receiver, if the receiver settles the land with a third person who happens to be a settled raiyat of the village, can it be said with any show of reason that such settlement-holder would acquire occupancy rights by virtue of such settlement from the receiver?

28. If it be held that he does acquire occupancy right the result would be that the claim of both the contesting parties would be defeated. A competent Court may declare the land to be the bakast land of the landlord who may be declared to be entitled to possession of it, yet the decree made by the competent Court becomes infructuous if the settlement-holder can successfully set up a right of occupancy to the land. Similarly, if the competent Court holds that the party who claims a tenancy right as an occupancy raiyat is entitled to possession as such, the decree will again become infructuous if the settlement-holder from the receiver can set up his right of occupancy to the land. Such a result cannot be held to have been contemplated by the legislature in providing for the appointment of a receiver u/s 146, Criminal P.C.

29. In my opinion the rights of the parties in whose favour the competent Court may make a declaration, cannot be affected by any act done by the receiver and such party is entitled to possession of the land as it was at the time of the attachment.

30. It is contended on behalf of the defendants-fourth-party that, in any event, they acquired the rights of an under-raiyat. I am unable to accede even to this contention. The utmost that they can ask for, is a declaration that they are entitled to retain possession up to the end of the agricultural year in which the decree is pronounced by the civil Court, but beyond that they can go no further and they are not even entitled to a notice to quit before they can be ejected. Their possession is merely that of a licensee or a farmer and they are bound to give up possession as soon as the attachment is withdrawn as an effect of the decree of the competent Court.

31. Reliance has been placed on behalf of the defendants-fourth-party upon an unreported decision of this Court in *Raja Kamaleshwari Prasad Singh v. Biseswar Rai* (Second Appeal No. 1044 of 1915), which was decided on 24th July 1916. In that case it was held by a Division Bench of this Court that the receiver during the time of his management of the property u/s 146, was in the position of the party to whom the land was afterwards made over and everything done by him

bound that party as an act done by the landlord for the time being, and it was held that the status of the person taking as settlement of the land for agricultural purposes from the receiver was at the very least that of a non-occupancy raiyat. With very great respect to the learned Judges, I am unable to agree with this view. The status of such a settlement-holder as a non-occupancy raiyat can be maintained only as against the receiver, if at all, and not against the rightful owner.

32. Reliance has next been placed upon the decision in *Madhu v. Sabar Ali* (1910) 11 Cr LJ 288. That was an entirely different case in which the question raised was, whether the receiver u/s 146 was entitled to settle lands which had accreted to the attached lands after the order of attachment u/s 146, and it was held that he was entitled to do so. The question was not raised as between the person with whom the receiver had settled the land and the party whom the civil Court had ultimately declared to be entitled to the land. I am therefore of opinion that the defendants-fourth-party acquired no title by virtue of the settlement as against the present plaintiffs and the plaintiffs are entitled to possession of the lands in the condition in which they were at the time of the attachment, in other words, free from the settlement made by the receiver.

33. It is next contended that there was no prayer in the original plaint for a decree for delivery of possession of the lands as against the defendants-fourth-party. In para. 11 of the plaint however it was clearly stated that the defendants-fourth party were bound to withdraw their possession in favour of the plaintiffs, and in the application for amendment of the plaint, already referred to, a prayer was made for a decree awarding possession to the plaintiffs as against the defendants-fourth-party. This amendment was rightly allowed and the decree for possession made against the defendants-fourth-party is right. As the title of the plaintiffs has been established, they are entitled to possession of the lands as well as to the money held in deposit by the receiver on account of the profits arising out of the lands in dispute since the time of the attachment by the criminal Court. This disposes of all the substantial points raised in the case. There are however certain minor points which may be disposed of in a few words. (After disposing of these points, his Lordship concluded).

34. The result is that Appeal No. 43 must be dismissed with costs; except as between the appellants and plaintiffs 63 to 71 (respondents) who have entered into a compromise; and as between them the decree will be in terms of the petition filed on 11th November 1932.

35. I now take up Appeal No. 73 of 1929. This appeal arises out of Suit No. 3 of 1927 in which the plaintiffs claimed 136 bighas in Schedule 1 which relates to the 400 bigha block, 48 bighas in Schedule 2 which relates to the 200 bigha block, and 293 bighas in Schedule 3 which relates to the 800 bigha block involved in the two proceedings u/s 145. These plaintiffs have acquired one anna 11 gandas proprietary interest in the village. The appeal is by some of the defendants-fourth-party, and some of the defendants-third-party. Most of the

points raised in this appeal are the same as those raised in Appeal No. 43. It is necessary only to refer to the additional points or such additional arguments on the common points as have been advanced in this appeal.

36. At the outset I may dispose of the few preliminary objections raised on both sides. An objection was raised on behalf of the plaintiffs-respondents to the effect that the appeal was incompetent inasmuch as the memorandum of appeal had not been sufficiently stamped, the court-fee paid being only Rs. 15 and not upon the valuation of the suit which was Rupees 6,700. In this suit the learned Subordinate Judge, who was an officer different from the one who decided the other suit, has held that the plaintiffs' claim as regards the lands comprised in Schedule 2 of the 200-bigha block was barred by limitation, that as regards the lands claimed in Schs. 1 and 3 the plaintiffs were entitled only to a decree declaring their title to the lands in dispute which has been established and not to a decree for recovery of possession, his finding being that the defendants third and fourth parties, who had taken settlement of the Schedule 1 and 3 lands, had acquired the status of under-raiyats and could not be ejected without a notice to quit. The defendants-appellants therefore appeal against the declaration made in favour of the plaintiffs and paid a court-fee of Rs. 15 only.

37. The Subordinate Judge further made a decree in favour of the plaintiffs entitling them to recover the amount of rents and profits of the period during which the receiver was in possession under the attachment which was held in deposit by the receiver, and the contention of the respondent is that ad valorem court-fee ought to have been paid upon this. It is clear that there is no substance in this objection. So far as the right of the plaintiffs to recover the sum held in deposit by the receiver was concerned there could be no decree as against the defendants. The mere declaration of title in favour of the plaintiffs was sufficient to entitle them to ask the receiver to make over the sum held in deposit by him to the plaintiffs. The memorandum of appeal was therefore sufficiently stamped and the appeal is competent. (After dealing with certain objections the judgment proceeded to deal with the case on merits). The learned Subordinate Judge has held that Section 178, Ben. Ten. Act, operates as a bar in favour of the plaintiffs.

38. It is contended on behalf of the defendants-appellants that there is nothing in Section 178 to prevent the raiyat from surrendering his holding, and that the agreement between the parties to divide the lands as bakasht lands and to abandon the raiyati lands was an agreement between two sets of landlords and not an agreement between landlords and tenants and, therefore, Section 178, Bengal Tenancy Act, had no application. This contention is sound but it does not affect the merits of the case. (Here the judgment dealt with the identity of the lands claimed and proceeded). The next question raised is one of limitation. The suit was instituted more than six years after the order passed by the Magistrate in the second proceedings u/s 145. The claim of the plaintiffs, therefore, as regards the 200 bighas comprised in Schedule No. 2 was clearly barred under Article 47, Indian Limitation Act.

39. As regards the claim to the attached lands, it is sufficient to refer to the decision of the Calcutta High Court in *Brojendra Kishore v. Sarojini Ray* (1916) 27 IC 647. The question has been exhaustively dealt with in that case and I entirely agree with the decision therein, This is a case of continuing wrong u/s 23, Indian Limitation Act, and the right to sue accrues from moment to moment so long as the attachment lasts, and the suit cannot be held to be barred by lapse of six years from the date of the order.

40. The decision of the Madras High Court in *Raja of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad 410, upon which reliance has placed by the learned advocate for the appellants, was considered in the decision of the Calcutta High Court in the case just cited. Although the Madras Court held that a suit for declaration of title to the land was barred under Article 120, yet it was held that such bar affected only the remedy or relief by way of declaration and did not extinguish the right and title of the true owner to the property, that the right of the true owner continues however long the attachment may last, that the rightful owner has the right to sue for the rents and profits accrued within the period of limitation, and that in determining the right of the true owner to the rents and profits his title to the land under attachment will have necessarily to be determined. This case therefore does not really help the defendants-appellants.

41. I am therefore of opinion that the claim of the .plaintiffs in so far as his right to a declaration to the lands comprised in Schs. 1 and 3 are concerned is not barred by limitation.

42. It is contended that the claim of the plaintiffs to the lands has not been proved and they cannot get a decree in respect of the whole of the khata claimed by them. This point has already been dealt with in Appeal No. 43 and need not be considered again. These were all the points raised on behalf of the defendants-appellants and, with the exception of the preliminary objection as regards the defendant 58, there is no substance in any of the points raised on behalf of the appellants.

43. On behalf of the plaintiffs-respondents it has been argued that the decision of the Subordinate Judge declaring that the defendants third and fourth parties have acquired the status of under-raiyats and rejecting the claim of the plaintiffs for a decree for delivery of possession to them as against these defendants was erroneous and, although no appeal or cross-objection had been filed by the plaintiffs-respondents against this portion of the decree of the Subordinate Judge, this Court ought to grant them relief and set aside that portion of the decree under Order 41, Rule 33, Civil P.C.

44. On behalf of the defendants-appellants, it is contended that Order 41, Rule 33 was never intended to give relief to parties under the present circumstances, it gave discretion to the Court of appeal in order to further the ends of justice and not to favour one party as against another; and that the provisions of the Court-fees Act and the Limitation Act would be defeated if the decree of the

Subordinate Judge is reserved in favour of the plaintiffs and against the defendants third and fourth parties.

45. In my opinion the objection raised by the defendants-appellants is sound and this is not a case in which this Court will be justified in acting under Order 41, Rule 33 and reversing a portion of the decree, in so far as it is in favour of the defendants third and fourth parties, and against the plaintiffs.

46. The result is that with the slight modification as regards defendant 58, as stated above, this appeal must be dismissed with costs.

Macpherson, J.

47. I agree.