

(1918) 05 CAL CK 0019
In the Calcutta High Court

Kedar Nath Mondal and Others

APPELLANT

Vs

Mohesh Chandra Khan and Others

RESPONDENT

Date of Decision : 23-05-1918

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 2

Citation : AIR 1919 Cal 1025 : 46 Ind. Cas. 787

Hon'ble Judges : Syed Shamsul Huda, J; Fletcher, J

Bench : Division Bench

Judgement

Fletcher, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Burdwan, dated the 2nd September 1916, reversing the decision of the Munsif of Assansole. The plaintiffs brought the suit to recover possession of certain lands alleging that they were entitled to the same as permanent tenants. The case set up was that the property originally belonged to one Dharmadas Khan, that, on his death, it went to his widow, who died in February or March 1913, and that on her death the present plaintiffs who were the reversioners became entitled to it. The defendants Nos. 10 and 11 filed a written statement in which they alleged that neither Dharmadas Khan or his widow Bama Sunderi nor the plaintiff had anything to do with the lands at all and that their tenants, the defendants Nos. 1 and 2, had been in possession thereof for many years. They also alleged in their written statement that, as neither the plaintiffs nor their alleged predecessors-in-title ever had any sort of right or possession over the lands in suit within twelve years, the plaintiffs' claim was barred by limitation. The case came to trial. No issue was settled as to whether the special rule of limitation mentioned in Article 3 of Schedule III to the Bengal Tenancy Act applied to the case. The first Court decreed the suit. The lower Appellate Court has dismissed the plaintiffs' suit on the ground that the defendants Nos. 10 and 11 had dispossessed Bama Sundari more than two years prior to the institution of the suit and that, therefore, the plaintiffs' suit is barred by limitation under the provisions of Article 3 of Schedule III of the Bengal Tenancy Act. Personally, I have very much doubt whether, on the facts found, the

judgment of the lower Appellate Court can stand because the suit was really brought against the defendants Nos. 1 to 9 who were in possession of the property to recover possession. It was the ordinary case against the persons actually in possession to recover possession. The landlords, the defendants Nos. 10 and 4, were wholly unnecessary parties to the suit and in that view, if the dispossession had been by the tenants who dispossessed under an authority conferred by the landlords, I am inclined to think that it would come within Sir Lawrence Jenkins' observations in the case of *Basant Kumari v. Nanda Ram* 20 Ind. Cas. 350 : 18 C.L.J. 86 : 17 C.W.N. 1149, and, if that is so, the real contest is not between the landlords and the tenants but between the plaintiffs and the defendants who ate in actual possession of the lands. However that may be, this case ought never to have been permitted to be gone into at all. The case set up by the defendants was that Dharamdas or the plaintiffs had never been in possession and that was the case they elected to go to trial. It is quite clear that having set up such a case they could not possibly with any chance of success set up an absolutely contradictory case that although these people had never been in possession they were dispossessed by the defendants acting as landlords, so that the case would be barred under the provisions of Article 3 of Schedule III of the Bengal Tenancy Act. As a matter of fact, the present Civil Procedure Code, Order VIII, Rule 2, requires that the case of limitation should be specially pleaded. In the present instance, that case not having been specially pleaded and the facts not being apparent on the face of the record, the Judge had no jurisdiction to go into the matter and enquire whether on certain facts that he, had found the suit was barred. Moreover, not only was the special plea of limitation not pleaded but the plea of limitation pleaded was the general plea of limitation that the suit was barred under the twelve years' rule. That being so, the learned Judge of the lower Appellate Court could not, by arriving at certain conclusions of fact, deprive the plaintiffs of the right to have this issue properly tried, namely, to have an issue framed and evidence adduced in support of the plaintiffs' case and also to have the defendants' evidence in support of their case. I think that the plaintiffs must have been taken by surprise, this question having been raised in the lower Appellate Court for the first time. If the defendants had intended to rely on this question, an issue ought to have been settled in the first Court and evidence adduced in support of that view. In my opinion, we ought to set aside this finding that the plaintiffs' suit is barred under Article 3 of Schedule III of the Bengal Tenancy Act. On the other issues, apart from that finding, it is quite clear on the findings made by the learned Judge of the lower Appellate Court that the plaintiffs are entitled to recover possession of the lands sued for. I think we ought to set aside the judgment and decree passed by the learned Judge of the lower Appellate Court and restore the decision of the Munsif with costs both in this Court and in the lower Appellate Court.

Syed Shamsul Huda, J.

2. I agree.