

(1921) 05 CAL CK 0007
In the Calcutta High Court

Krishna Das Ray and Another

APPELLANT

Vs

Mohendra Chandra Sil and Others

RESPONDENT

Date of Decision : 31-05-1921

Acts Referred:

Bengal Tenancy Act, 1885 — Section 151
Limitation Act, 1963 — Article 32

Citation : (1921) 05 CAL CK 0007

Hon'ble Judges : Newbould, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit for mandatory injunction upon the defendants to fill up a tank, which had been excavated on a portion of the land comprising the tenancy (which is found by the Courts below to be a tenure), held by some of the defendants under the plaintiffs, in breach of a condition in the kabuliyat; for compensation, and for ejectment of the defendants therefrom.

2. It was alleged that the notices u/s 155 of the Bengal Tenancy Act were served upon the defendants. It is found, however, that the notice was defective and not served upon all the defendants. The suit, moreover, was instituted more than a year after the excavation of the tank. The Court of first instance (the Subordinate Judge) accordingly disallowed the claim for ejectment. He also found that the tank supplies good drinking water to the people of the locality, has supplied a great want and is a work of great public utility, that the tank and ghats have been made at a considerable cost, and in fact that the tank is an improvement on the property, and having regard to these facts and the fact that the plaintiffs were not prompt in coming to Court, he disallowed the mandatory injunction. He, however, held that plaintiffs should get Rs. 1,000 as compensation, and made a decree accordingly. On appeal the Court of Appeal below agreed with the Subordinate Judge on the first two points, but held that the whole suit was barred under Article 1, Schedule III of the Bengal Tenancy Act. The plaintiffs have appealed to this Court.

3. As stated above, the notice u/s 155, Bengal Tenancy Act, was defective, and the suit was brought more than a year after the excavation of the tank. The claim for ejectment could not, therefore, be sustained. Both the Courts below have also given good reasons why the claim for mandatory injunction should be disallowed, and these questions have not been raised before us. The only contentions raised before us relate to the question of compensation. The Court of Appeal below was of opinion that the claim for compensation was merely ancillary to the claim for ejectment, and in that view held that as the suit for ejectment was barred by the one year's rule of limitation contained in Article 1, Schedule III of the Bengal Tenancy Act, the whole suit was barred. We are of opinion, however, that the claim for compensation was independent of the claim for ejectment, although the wording of the plaint may lend colour to the contention that the suit was framed as one u/s 155, Bengal Tenancy Act. In the third paragraph of the plaint the plaintiffs asserted that they were entitled to have the land restored to its former condition, to recover reasonable compensation and to get khas possession. The first prayer in the plaint was for mandatory injunction, the second for reasonable compensation and the fourth for khas possession. The first two are claimed independently of the claim for khas possession, and we are of opinion that the claim for compensation can be maintained even though the claim for ejectment fails.

4. Two questions, therefore, arise for consideration, first, whether the claim for compensation is barred by limitation; and secondly, if not barred, what compensation are the plaintiffs entitled to.

5. The limitation applicable to a suit for compensation in a case like this is two years, as provided in Article 32 of the Limitation Act. In the case of Sharoop Dass Mondal v. Joggessur Roy Chowdhury 26 C. 564 (F.B.) : 3 C.W.N. 464 : 13 Ind. Dec. (N.S.) 962, where in a suit brought by a landlord against a tenant the primary relief sought was a mandatory injunction directing the defendant to fill up a tank excavated by him in contravention of the terms of the tenancy, and to pay damages to the plaintiff for his wrongful act, and where the secondary relief sought was ejectment, the defence (inter alia) was that the suit was barred by limitation, it was held by the Full Bench that Article 32 of the Limitation Act applied, and that the suit was barred.

6. Article 32 of the Limitation Act provides that in a suit "against one who having a right to use property for specific purposes perverts it to other purposes," the period is two years and it runs from "when the perversion first becomes known to the plaintiff injured thereby." The plaintiffs in their plaint stated that they became first aware of the excavation of the tank on the 21st Asar 1319 B.S., i.e., within two years of the institution of the suit (12th Asar 1321). The Court of first instance found that it was so. The Court of Appeal below, however, has not come to any finding on the point, as it held the whole suit was barred by the one year's rule of limitation contained in the Bengal Tenancy Act. The case must, therefore, go back for a finding on the point.

7. The next question is what compensation are the plaintiffs entitled to if the suit is not barred. But before discussing that question we may dispose of a point raised by the respondents, viz., that as the kabuliyat provides a remedy (by ejectment), the plaintiffs are not entitled to any compensation. That, however, is not the only remedy, and there is nothing to take away the right to compensation on breach of covenant under the general law. It is found that the tank is an improvement on the property and supplies good drinking water to the people of the village. But the tenancy is found to be a tenure, and there is an express stipulation that the tenant would not excavate tanks without the permission of the landlord. The defendants have acted in breach of the contract, and the plaintiffs are entitled to some compensation for vindication of their rights. The damages in the circumstances of the present case, however, might have been nominal, but it is stated that the landlord gets nazar in such cases from tenants for giving permission. The Court of first instance assessed all the damages at Rs. 1,000. The Appellate Court held that it should have been assessed at the most at Rs. 500. The land of the tenancy included in the tank is only 9 cottas, and as stated above the tank is an improvement on the property. In the peculiar circumstances of the case, therefore, the compensation should be only a nominal one (say five rupees), plus the amount of nazar which the landlord could reasonably get for giving permission to excavate a tank on 9 cottas of land. The Court of Appeal below did not go fully into the matter in view of his finding that the suit was barred by limitation. We think that he should assess the damages as indicated above.

8. The case will accordingly go back to the lower Court, in order that it may come to findings upon the questions stated above and dispose of the appeal according to law. Costs will abide the result.

9. The Courts below have found that the defendant No. 26 acted bona fide, and the appellant does not press the appeal against him. The defendant No. 15 is not recognised as tenant and there can be no decree against him. The appeal against defendants Nos. 16 to 43 has been given up. The appeal against these defendants, therefore, will be dismissed with costs, payable to defendants Nos. 15 to 26, the costs of the defendant No. 38 having been paid already and the other defendants not having appeared in this Court. The decree, if any, will be against the defendants Nos. 1 to 14 only, and the costs so far as they are concerned will abide the result.