

(1923) 01 CAL CK 0059
In the Calcutta High Court

Pahal Ghorai

APPELLANT

Vs

Haji Munshi Fazluddin Mahammad and Others

RESPONDENT

Date of Decision : 08-01-1923

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100
Limitation Act, 1963 — Article 11A

Citation : AIR 1924 Cal 97

Hon'ble Judges : C.C. Ghose, J

Bench : Division Bench

Judgement

C.C. Ghose, J.—Mr. Muzumdar who has opposed this appeal has said everything that could be said in this case; but for the reasons which are about to be given we are of opinion that this appeal must be allowed. It has arisen out of a suit for establishment of title in respect of a half share of plots Nos. 1 to 3 and the entirety of plot No. 4, for possession of a part and for confirmation in respect of another part of the same. The suit was decreed by the Court of first instance in this manner, namely, that the plaintiff's claim with respect to dag No. 684/2823 was dismissed; his title to an 8 anna share of plot No. 1 of the plaintiff with the exception of the dag referred to above and an 8 anna share of plots Nos. 2 and 3 and the entirety of plot No. 3 was declared, and a decree was further made in his favour for recovery of khas possession of the entirety of plot No. & on ousting defendant No. 1, and khas possession of plot No. 3 to the extent of an 8 anna share therein jointly with defendant No. 1, and possession of the tenanted plot No. 2 jointly with defendant No. 1 to the extent of an 8 anna share. As regards his possession of the 8 anna share in plot No. 1, he was confirmed in his possession. An appeal was laid against the decision of the Court of first instance by defendant No. 1 and the lower Appellate Court, for the reasons given in its judgment dated the 9th September, 1920, came to the conclusion that the plaintiff's suit was barred under Article 11-A of the first schedule of the Indian Limitation : Act and has accordingly dismissed the suit altogether. The plaintiff has now appealed to this Court.

2. It appears that defendant No. 1 who was the appellant in the lower Appellate Court purchased the land in suit in execution of a mortgage decree, and took delivery of the same through the Court. Thereupon the plaintiff, who, as stated above, claimed half of each of plots Nos. 1 to 3 and the entirety of plot No. 4 made an application under Order 21, Rule 100 of the Code of Civil Procedure. That application was dismissed on the 8th July, 1916 and in these terms. "On the applicant's (plaintiff's) side he examined himself. The opposite party is ready. It appears from the applicant's deposition that he is still in possession of the disputed plots of land. So there is no cause of action for his application under Order 21, Rule 100, Civil Procedure Code. Hence it is ordered that this case be dismissed with costs to the opposite party. Pleader's fees Rs. 2 only." The plaintiff did not bring any suit for recovery of possession within a period of one year from the date last mentioned, namely, 8th July, 1916. His present suit was instituted on the 7th March, 1918, that is, more than a year after the date of the order passed on the application under Order 21, Rule 100. His cause of action, so far as the present suit is concerned has been formulated by him in paragraph (6) of his plaint and it appears therefore, that after the date of the order passed on the application under Order 21, Rule 100 defendants Nos. 1 to 5 entered into a conspiracy and forcibly cut and took away the paddy reaped by the Bhag tenants of the plaintiff and thereby dispossessed the plaintiff. The plaintiff stated that thereupon, he instituted a suit being suit number 225 of 1917 in the Court of first Munsiff of Kantai. That suit was, however, allowed to be withdrawn by the Court, with liberty to institute a fresh suit and the present suit is the fresh suit which the plaintiff had the liberty to institute. A question has now arisen namely, whether for the purposes of limitation, the subsequent dispossession as alleged by the plaintiff in paragraph (6) of the plaint gave rise to the cause of action, after the suit had been withdrawn, for this present suit. On behalf of the respondents, Mr. Mazumdar as well as his learned leader Mr. Hazra has contended that the plaintiff not having brought the suit within the period prescribed by Article 11-A of the first schedule of the Indian Limitation Act, the present suit should be held to be barred by limitation, and have drawn our attention to the various cases where it has been held that in respect of orders made under Order 21, Rule 100 as also under Order 21, Rule 58, if a suit is not brought within a period of one year, the party against whom the orders are passed is not entitled subsequently to maintain a suit for recovery of possession or for a declaration of title. Each case must depend upon its own facts, and on the facts of this particular case as was remarked by this Court in the judgment in appeal from an appellate decree No. 1718 of 1920, it is the question of possession with which the plaintiff was concerned and he having remained in possession down to the date when, as alleged by him, he was dispossessed in the manner referred to in paragraph (6) of the plaint, he was not under any necessity, so far as we can see to go to a Civil Court for the useless formality of asking for confirmation of possession of the property in question when as a matter of fact he remained in possession thereof. That he remained in possession of the property is abundantly clear from the terms of the order made on the 8th

July, 1916. The fact of the subsequent "dispossession, dispossession which arose by reason of the present respondents along with other defendants taking away the crops grown on the property by the Bhag tenants of the present appellant" which has given rise to the cause of action is alleged in the plaint. Whether the cause of action as alleged in the plaint is true or not must depend on the decision of the matter on the merits. The present respondents if so advised, may take all pleas of limitation other than Article 11-A of the first schedule of the Indian Limitation Act.

3. But we are unable to say, having regard to the facts of this particular case, that the suit was barred by the statute of limitation as held by the lower Appellate Court.

4. In this view of the matter, the decree of the lower Appellate Court must be set aside and the case must go back to that Court to be determined on the merits.

5. Costs will abide the result.