

(1956) 08 CAL CK 0014
In the Calcutta High Court
Case No : A.F.A.D. No. 18 of 1949

Provakar Roy and Others

APPELLANT

Vs

Bibhuti Bhusan Pal Choudhury and Others

RESPONDENT

Date of Decision : 28-08-1956

Acts Referred:

Bengal General Clauses Act, 1899 — Section 8
Bengal Tenancy Act, 1885 — Section 158A, 158A(2), 158A(8), 173, 173(3)
Civil Procedure Code, 1908 (CPC) — Section 100, 101
Limitation Act, 1908 — Section 22

Citation : AIR 1957 Cal 177 : 61 CWN 154

Hon'ble Judges : P.K. Sarkar, J; Lahiri, J

Bench : Division Bench

Advocate : Apurbadhan Mukherjee and Anil Kumar Sen, for Dwijendra Nath Mukherjee, for the Appellant; Provash Chandra Basu and Ganga Narayan Chandra, for the Respondent

Final Decision : Dismissed

Judgement

Lahiri, J.—This second appeal is by the heirs of the deceased plaintiff Tarapada Roy, The facts which are relevant for the purposes of this appeal may be shortly stated as follows. One Jatindra Prosad Roy Choudhury (defendant No. 7) held a tenancy under defendants Nos. 1 to 5, the Pal Choudhury landlords, at an annual jama of Rs. 29/4 as. The Pal Choudhury landlords obtained a rent decree against Jatindra in Rent Suit No. 1045 of 1929 of the Munsif's Court at Katwa, and in execution of that decree the defaulting tenancy was sold in Rent Execution Case No. 202 of 1931 and purchased by the plaintiff Tarapada Roy on the 17th April, 1931. This sale was confirmed on the 30th May, 1931. On the 16th May, 1939, this tenancy was again auction sold at a certificate sale held under the provisions of now repealed Chapter XIII(A) of the Bengal Tenancy Act at the instance of the Pal Choudhury landlords, and the certificate debtor against whom this proceeding was taken was Jatindra Prosad Roy Choudhury, the original tenant. At the certificate sale the tenancy was purchased by the Pal Choudhury landlords,

defendants Nos. 1 to 5. On the 21st December, 1939, the certificate sale was confirmed and the auction purchasers Pal Choudhuries took delivery of possession on the 15th August, 1941. On the 22nd March, 1942, Nisada Bala Devi alias Niroda Bala Devi (defendant No. 6) purchased the right, title and interest of the Pal Choudhury landlords as Shebait of the Deity Sree Sree Iswar Dakshina Kalika Devi by a private conveyance. The plaintiff Tarapada Roy instituted the suit out of which this appeal arises on the 30th May, 1943. In the plaint as originally filed defendant No. 6 was described as Nisada Bala Devi alias Niroda Bala Devi, wife of Bholanath Banerjee. By an amendment, dated the 4th March 1947, defendant No. 6 was described as Sree Sree Iswar. Dakshina Kalika Devi through Shabait Nisada Bala Devi alias Niroda Bala Devi, wife of Bholanath "Banerjee. According to the Case made by the plaintiff in the plaint, he "took delivery of possession after his purchase at the rent sale and he was in possession, throughout till he was dispossessed by the defendants in Aswin and subsequently in Agrahayan, Pous and Magh, 1348 B. S. The substance of the case made by the plaintiff in the plaint was that he was the purchaser at the rent sale held on the 17th April, 1931, and in spite of that the certificate proceedings were taken by the landlords not against the plaintiff but against the original tenant, and therefore, the plaintiff's title was not in the least affected by the certificate sale which took place on the 16th May, 1939. On these allegations the plaintiff sued for a declaration of his title and recovery of his possession of the property in dispute.

2. The suit was contested by defendants Nos. 1 to 5 by one written statement and by defendant No. 6 by another written statement. Both sets of defendants denied the title of the plaintiff alleged to have been acquired by the rent sale held on the 17th April 1931, and pleaded in the alternative that even if the plaintiff had acquired any title under the rent sale he was merely a benamidar of the original tenant Jatindra Prosad Roy Choudhury. The defendants further pleaded that the suit was barred by general limitation as well as by the special law of limitation under Schedule III, Article 3 of the Bengal Tenancy Act. " -

3. Both the Courts below have concurrently held that Tarapada Roy had purchased the holding at the rent sale held on the 17th April, 1931, but that he was merely a benamidar of the original tenant Jatindra Prosad Roy Choudhury, & the landlords "were justified in starting certificate proceedings under Chapter XIII(a) of the Bengal Tenancy Act against Jatindra Prosad Choudhury who was the real tenant, and the sale held in that certificate proceeding passed the title of the defaulting tenant. and the landlords as auction purchasers at the certificate sale had acquired a good title, against the tenant, and the defendant No. 6 by her subsequent purchase from the landlords had also acquired a good title. Both the Courts below again have concurrently held that the plaintiff's suit is also barred by limitation because so far as defendant No. 6 is concerned, she was brought on the record for the first time on the 4th March 1947, when the plaint was amended by impleading a new person, viz., the Deity Sree Sree Iswar Dakshina Kalika Devi, represented by her Shebait Nisada Bala Devi alias Niroda

Bala Devi. The Trial Court further held that the suit was also barred by the special law of limitation, but that finding has not been accepted by the Court of appeal below. As a result of the findings referred to above, both the Courts below have dismissed the plaintiffs' suit, and against the decree the plaintiffs have brought the present second appeal to this Court.

4. In spite of the great vigour with which Mr. Apurbadhan Mukherjee has argued this appeal before us we are unable to hold that there is any force in any of the contentions raised by him before us.

5. If A is the ostensible owner of a property of which the beneficial interest belongs to B, and if the beneficial interest of B is auction-purchased by C who repudiates the ostensible title of A, there can be no question that the ostensible title of A comes to an end. This is precisely the effect of the findings arrived at by the Courts below on the question whether the plaintiff Tarapada Roy was the benamidar of the original tenant Jatindra Prosad Roy Choudhary. Upon the findings, the plaintiff Tarapada Roy. was the ostensible owner and Jatindra Prosad Roy Choudhury the beneficial owner, and the landlords defendants Nos. 1 to 5, the Pal Choudhuries, are the auction purchasers of the beneficial interest of Jatindra. Realising this difficulty Mr. Mukherjee made a determined attempt to establish that it was not open to the landlords auction-purchasers, the Pal Choudhuries, to plead that Tarapada was merely the benamidar of Jatindra, and for this purpose" he strongly relied upon the provisions of Section 173 of the Bengal Tenancy Act, Sub-section (2) of which provides that the judgment-debtor shall not purchase the defaulting holding at a rent sale, and Sub-section (3) of which lays down that if the judgment-debtor purchases defaulting tenancy in the name of some other person, the Court, may if it thinks fit, on the application of the decree-holder or any other person interested in the sale, set it aside. According to Mr. Mukherjee, the Pal Choudhury landlords did not file any application to set aside the sale u/s 173(3) and as a result of this omission they are precluded from pleading that the purchaser at the rent sale was merely a benamidar of the original judgment-debtor, even though such a plea is raised by way of defence, as has been done in the present case. We are, however, entirely unable to accept this argument. All that Section 173 does is to confer a right upon the decree-holder or any other person interested in the sale to have it set aside on the ground that the purchase was really made by the judgment-debtor himself in the name of one" other person, and even upon such an application the Court has a discretion to set aside or not to set aside the sale, which again implies that such a sale is not void but" voidable. This is what has" been laid down by Ghose and Rampini JJ. in the case of Gopal Chunder v. Ramlal Gosain ILR 21 Cal 554 (A) which has been cited by Mr. Mukherj"ee in support of his contention. The effect of this decision, however, is not that the certified purchaser must under all circumstances be held to be the real purchaser, but that the sale stands till it is set aside. If the sale stands, we think that it stands with all its incidents, including the benami character of the auction-purchaser. We, therefore, "find no justification either in the language of Section 173 of the

Bengal Tenancy Act or in the authority cited by Mr. Mukherjee for holding that the decree-holders in the present case were precluded from raising the defence that the plaintiff Tarapada who purchased the holding at the rent sale was really the benamidar for Jatindra.

6. It may be interesting to note that even u/s 66 of the CPC which bars a suit against a certified purchaser on the ground that the purchase was really made on behalf of the plaintiff, such a defence would not be barred; because it is now well established that Section 66 only bars a suit, but does not bar a defence. The acceptance of the argument of Mr. Mukherjee would have the effect of attributing to Section 173 of the Bengal Tenancy Act a greater effect than Section 66 of the Code of Civil Procedure.

7. The second point urged by Mr. Mukherjee is to the effect that the finding arrived at by the Courts below on the question of benami is based on conjectures and surmises and not upon legal evidence. It is impossible for us to accept this argument. Both the Courts below have, pointed out that though the plaintiff Tarapada Roy purchased the tenancy at the rent sale, he was unable to produce the certificate of sale, and both the Courts below have found that there is - nothing to show that the certificate of sale was ever drawn up and handed over to the plaintiff Tarapada. The explanation for the non-production of the sale certificate which was given by Tarapada in the Trial Court has not been believed by it. Both the Courts below have pointed out that there is nothing to show that Tarapada ever took delivery of possession after purchasing the holding or paid rent to the landlords after his auction purchase. It has further been pointed out that when the landlords registered the name of Jatindra as the tenant of the holding in maintenance proceedings, Tarapada did not object to it, and what is more important is that when standing crops grown on the land were taken away in certificate proceedings, Tarapada did not raise any voice of protest. It is true that the defendants have failed to adduce any evidence as to the motive of the benami purchase, but the absence of such evidence does not negative the finding of benami which has been arrived at upon cogent materials which were before the Court. We are, therefore, entirely unable to hold that the finding on the question of benami is vitiated by any error of law or omission to take into account any relevant evidence.

8. The next question that has been strenuously argued, before us is the question of limitation. On this point there can be no doubt that the suit is to be governed by Article 142 of the Indian Limitation Act because the plaintiff came to Court with a case of possession and dispossession, his case being that he was in possession of the disputed land ever since the date of his auction purchase till he was dispossessed in the months of Aswin, Agrahayan, Pous and. Magh, 1348 B. S.

9. Both the Courts below, however, have concurrently found that the plaintiff has failed to prove that he was ever in possession of the disputed land. The plaintiff has not only "failed to prove that he took delivery of possession through Court after his auction purchase but the evidence adduced by the plaintiff to prove that

he was in possession through bhagidars has also been disbelieved. The result is that upon the findings the plaintiff has not been able to prove his possession at any time after the date of his auction purchase. The auction purchase took place on the 17th April, 1931, but the sale was confirmed on the 30th May, 1931, and the suit was instituted on the 31st May, 1943. Mr. Mukherjee has told us that the suit could not be instituted on the 30th May, 1943, because that was a Sunday; but the question of limitation does not really depend on that point. The property now is in the possession of defendant No. 6, Sree Sree Iswar Dakshina Kalika Devi, represented by her Shebait Nisada Bala Devi alias Niroda Bala Devi. This Deity was brought on the record of the case for the first time on the 4th March, 1947, when the plaint was amended. If it is held that the suit was instituted against defendant No. 6 on the date on which the amendment was, ordered there can" be no doubt that the suit is beyond twelve years from the date of the auction purchase of the plaintiff. Mr. Mukherjee "has, therefore, argued that the suit was instituted against defendant No. 6 on the 31st May, 1943, on which date the plaint was filed and the amendment that was effected on 4th March, 1947, was merely for the purpose of correcting a mis-description. His argument is that S. 22 of the Indian Limitation Act which provides that the suit shall be deemed to have been instituted against a party when he is added as a defendant has no application to the present case because the amendment was applied for and allowed merely for the purpose of correcting a misdescription.

10. We have already pointed out that in the plaint as originally filed defendant No. 6 was Nisada Bala Devi aims Niroda Bala Devi, wife of Bholanath Banerjee. After the amendment, defendant No. 6 is Sree Sree Iswar Dakshina Kalika Devi through Shebait Nisada Bala Devi alias Niroda Bala Devi. We have no doubt in our mind that as a result of this amendment the Deity Sree Sree Iswar Dakshina Kalika Devi who was not a party to the suit before was brought on the record on the 4th March, 1947. There is also nothing in the body of the plaint as originally filed to indicate that the plaintiff was proceeding against the Deity and not against Nisada Bala personally. Upon the plaint before its amendment the plaintiff was seeking his relief against Nisada Dala in her personal capacity, but in the plaint after the amendment the plaintiff is seeking bis relief against the Deity Sree Sree Iswar Dakshina Kalika Devi represented by her Shebait Nisada Bala Devi alias Niroda Bala Devi. Keeping in view these two aspects of the question we shall proceed to consider the authorities cited before us by Mr. Mukherjee.

11. A very large number of authorities have been cited before us by Mr. Mukherjee on this point. The first one is the decision of a Division Bench of this Court in Peary Mohan Mookerjee v. Narendra Nath, ILR 32 Gal 582 (B), which was affirmed by the Privy Council by its decision reported in Peary Mohun v. Narendra Nath, ILR 37 Cal 229 (PC) (C). From the decision of this Court it will appear that in the original plaint Raja Peary Mohun Mukherjee was impleaded as a defendant in a double capacity, -- first, as Receiver of the Debootar Estate of the Idols Gopaleswar and Shiva Thakurs, and secondly, in the personal capacity. By the amendment Raja Peary Mohun Mukherjee was described as Shebait of the

two Deities. This Court held that this, was a case of misdescription which did not attract the operation of Section 22 of the Indian Limitation Act. It is to be noticed however, that the estate of the Deities and the name of the Shebait were in the plaint. The Shebait was des-scribed as a Reciever instead of as a Shebait. In the case before us, however, the Deity was not on the record till before; the amendment, nor was there any indication in the plaint before the amendment that the plaintiff was seeking his relief against the estate of the Deity. This case, therefore, has no application to the facts of the case before us. In the decision of the Privy Council it was pointed out that the amendment directed by the High Court " did not alter the character of the suit and no new defendant was brought on the record. But that cannot be said in the present case.

12. The next case cited by Mr. Mukherjee in support of his proposition is a decision by Flectcher and Teunon JJ. in the case of Rani Kuarmanimoni Singha Mandhata v. Wasif Ali, 19 Cal WN 1193: (AIR 1916 Cal 164) (D). That was a case where the body of the plaint showed in what capacity the plaintiff was suing. At p. 1198 (of Cal WN): (at pp. 165-166 of AIR) it is pointed out that in the cause title of the suit as originally presented to the Court the character in which the plaintiff brought the suit with regard to two of the properties was not given though it was manifest from the body of the plaint and the prayers thereto that the plaintiff was suing to recover possession of the two properties " as Shebait of certain Idols. In those circumstances, it was held by this Court that Order VII, Rule 4 of the CPC did not re-quire that when the plaintiff sued in a representative capacity that fact should be stated in the cause title of the plaint although, no doubt, that was a convenient place to state it. It was further held that since from the body of the plaint it was quite clear that the plaintiff was seeking relief in a representative capacity, the amendment of the cause title of the plaint did not amount to an addition of a new party within the meaning "of Section 22 of the Indian Limitation Act. This case also has no bearing upon the facts of the present case, because in the present, case there is no allegation whatsoever in the body of the plaint that the plaintiff was seeking relief against the properties of the Deity.

13. The third case cited by Mr. Mukherjee is the decision in the case of Naba Kumar Chowdhury Vs. Higheazany, . In this case the plaintiff originally instituted the suit in his personal capacity, but by an amendment, he was allowed to sue as an administrator to the estate of a certain person, and this amendment was allowed after the expiry ,of the period of limitation. It was held by Suhrawardy and Chotzner JJ. that this did not amount to addition of a new party, but was merely an alteration of the description of the plaintiff. At p. 847 (of ILR Cal): (at p. 420 of AIR), the learned Judges make the following interesting observations:

""It ought not to make any difference-whether plaintiff takes the money with the right hand or the left, In short there has been no change of "persona", no change of the person to whom the money is payable though there may perhaps have been some change in the basis on which the debt is due." As no new person

was brought on the record their Lordships thought that this amendment did not have the "effect of addition of a new party. We have already said that this is not the case before us where a Deity has been brought on the record for the first time on 4th March 1947.

14. The next case cited by Mr. Mukherjee is Bidhu Sekhar Banerjee Vs. Kuladaprasad Deghoria, (F). In this case, Fletcher and Cumming JJ. repeated the principle which was laid down in 19 Cal WN 1193: (AIR 1916 Cal 164) (D), and observed that it was not necessary to state in the cause title the character in which the plaintiff was suing, provided that it was clear from the body of the plaint that the plaintiff was seeking relief not in, his personal but in a representative capacity, and it was further pointed out that it was not necessary to implead the Idol by name provided that the Shebait of the Idol was described as, such, and their Lordships held that this principle followed from the decision of the Judicial Committee in the case of Jagadindra Nath Roy v. Hemanta Kumari Debi, 31 Ind App 203 (PC) (G). It is not necessary for us to consider whether that principle can be legitimately deduced from the decision of the Judicial Committee in Jagadindra Nath's case (G), but it is enough to say that in the present case the Deity was actually brought on the record long after the expiry of the period of limitation. We are not concerned with the question as to what would have, happened if defendant No, 6 had been merely described as Shebait without naming the Deity.

15. It is not necessary for us to refer to some other decisions which have been relied upon by Mr. Mukherjee. It is enough to point out that the effect of the amendment in the present case is to bring on the record a new juridical person, viz., Sree Sree Iswar Dakshina Kalika Devi, and it is also clear on a perusal of the plaint that the plaintiff did not indicate anywhere that he was seeking relief against the estate of the Deity. For these reasons, we must hold that Section 22 of the Indian Limitation Act applies, and so far as defendant No. 6 is concerned, we cannot avoid the conclusion that the suit was instituted against her on the 4th March, 1947, which was long after the expiry of the period of limitation.

16. It is interesting to note that although in the plaint as originally riled, Nisada Bala Devi, was impleaded in her personal capacity, she filed a written statement on the 24th July, 1943, as the She-bait of the Deity Sri Sri Iswar Dakshina Kalika Devi, and the suit proceeded upon, that written statement without any amendment of the plaint, and it terminated in a decree against the plaintiff. The plaintiff filed an appeal against that decree, and the Court of appeal below remanded the suit for retrial, and the mistake remained uncorrected up to the Lower Appellate Court, and the application for amendment was filed after the conclusion of the argument and shortly before the delivery of judgment after remand. The laxity of the plaintiff in the matter of asking for amendment of the plaint is perhaps without any parallel. If the plaintiff had asked for amendment shortly after the defendant No. 6 had filed her written statement on the 24th July, 1943, and if it had been granted at once, even then the plaintiff's suit

would have been beyond twelve years from the date of his auction purchase. Upon a consideration of these facts we are unable to resist the conclusion that the finding of the Courts below that the plaintiff's suit is barred by limitation is correct and must be upheld.

17. In view of our decision on the question of the plaintiff's title and limitation, the next point raised by Mr. Mukherjee is not of much importance. But as it has been argued with great enthusiasm we proceed to record our views on the merits of that argument. This argument relates to the effect of repeal of Chapter XIII (A) of the Bengal Tenancy Act by the Bengal Tenancy (Amendment) Act, 1938 (Bengal Act 6 of 1938), which came into operation on the 18th August, 1938.

18. It may be recalled that the Pal Choudhury landlords initiated certificate proceedings against the original tenant Jatindra Prosad Roy Choudhury on the 14th March, 1938. In that proceeding the sale proclamation was published on the 5th April, 1939, and the sale was actually held on the 16th May, 1939, and it was confirmed on the 21st December, 1939. It is thus clear that the repealing Act came into operation after the initiation of the proceeding, but before the publication of the sale proclamation.

19. Mr. Mukherjee argues that the continuance of the proceeding under Chapter XIII (A) of the Bengal Tenancy Act after the coming into operation of the repealing Act was illegal and that the sale held in such a proceeding is a nullity. His argument is that the proceeding is not saved by Section 8 of the Bengal General Clauses Act (Bengal Act 1 of 1899) which applies only when the repealing statute purports to affect substantive rights as well as procedure, whereas Bengal Act 6 of 1938 relates to procedure only. Mr. Mukherjee has strongly contended that by the repeal of Chapter XIII (A) of the Bengal Tenancy Act, only the procedure for the recovery of arrears of rent has been altered by the Legislature, but the substantive right of the landlord to recover arrears of rent has not been affected in any way. It is accordingly argued that Section 8 of the Bengal General Clauses Act has no application to this case. In support of the contention that Section 8 of the Bengal General Clauses Act applies where the repealing statute affects substantive rights as well as procedure Mr. Mukherjee has relied on the decision in the case of Babu Dhirendra Nath Roy Vs. Ijjetali Miah and Others, , and a Full Bench decision of this Court in Jatindra Nath v. Jetu Mahato, 50 Cal WN 502: (AIR 1946 Cal 339) (I). Both these decisions undoubtedly support the contention of Mr. Mukherjee, and as a matter of fact, a plain interpretation of Clauses (c) and (e) of S. 8 of the Bengal General Clauses Act of 1899 also supports that view.

20. Section 8, Clause (c) provides that the repeal of any statute shall not "affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed" and Clause (e) provides that the repeal shall not "affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability" etc. The word "such" in Clause (e) refers to the right, privilege, obligation or liability referred to in Clause (c). Therefore Clause

(e) which authorises the continuation of the legal proceeding will come into operation only when such legal proceeding is in respect of the right, privilege, obligation or liability etc. referred to in Clause (c).

21. The question, therefore, in the present case is whether the repealing statute, i.e., Bengal Act 6 of 1938 affects merely the procedure for realisation of rent. Section 158-A occurring in Chapter XIII(A) of the Bengal Tenancy Act provides a special mode of recovery of arrears of rent under certificate procedure under the Public Demands Recovery Act. Sub-section (2) of this section authorises the Local Government to specify the terms and conditions on which an application by the landlord for recovery of arrears of rent under this section may be granted, and where such terms and conditions have been fulfilled by the landlord, the Local Government will permit a landlord to recover arrears of rent under the special procedure contemplated by this section, and when such permission is granted, the landlord may make a requisition in writing under the Public Demands Recovery Act. Under subsection (6) the person in whose favour a certificate is signed is to be deemed the certificate holder and the person against whom the certificate is signed is to be deemed the certificate-debtor. Under Sub-section (8) no landlord shall institute a suit in a Civil Court for recovery of arrears of rent during the pendency of any proceeding u/s 158-A. It is now well established that as soon as a certificate is signed by a revenue officer authorised in that behalf it has the effect of a decree. This has been laid down by the Judicial Committee in *Bajinath v. Ramdutt*, 23 Ind App 45 (PC) (J):

22. In the present case the certificate proceeding was initiated on the 14th March, 1938, about five months before the repeal of Chapter XIII (A) of the Bengal Tenancy Act by the repealing statute. The landlords, therefore, had obtained a decree against the tenant in the certificate proceeding, and they had also a right to put that decree into execution in the manner contemplated by the Bengal Public Demands Recovery Act. The repeal of Chapter XIII (A) of the Bengal Tenancy Act had the effect of wiping out the decree which the landlords had obtained before the coming into operation of the repealing statute. Moreover, under Sub-section (8) of Section 158-A of the Bengal Tenancy Act the landlord's right to institute a suit for recovery of arrears of rent had been taken away during the pendency of a proceeding u/s 158-A. We, cannot, therefore, hold that Section 158-A merely deals with procedure. It also deals with substantive rights. In any case, there can be no question that it conferred a "privilege" upon the landlord, because under Sub-section (2) of Section 158-A the landlord could obtain permission to realise arrears of rent by certificate procedure on fulfilment of certain terms and conditions prescribed by the Local Government. Section 8, Clause (c) of the Bengal General Clauses Act contemplated not only rights but also privileges, and as in the present case, the repeal of Chapter XIII (A) had the effect of taking away the special privilege conferred upon the landlord, there can be no doubt that the repealing statute comes within Clause (c) as well as Clause (e) of Section 8 of the Bengal General Clauses Act. For these reasons we are of the opinion that the proceeding which was started by the landlord under Chapter

XIII (A) of the Bengal Tenancy Act before the repeal of that Chapter could be validly continued even after its repeal u/s 8 of the Bengal General Clauses Act.

23. For these reasons we have come to the conclusion that the view taken by the Courts "below on the different points raised by the plaintiff are correct and this appeal must be dismissed with costs. In view of the fact that this appeal has been argued before us for nearly three days we assess the hearing fee at six gold mohurs.

P.K. Sarkar, J.

24. I agree.