

(1955) 09 PAT CK 0014
In the Patna High Court
Case No : A.F.O.D. No. 56 of 1947

Rudra Pratap Singh and Others

APPELLANT

Vs

Jagdish Maharaj and Others

RESPONDENT

Date of Decision : 06-09-1955

Acts Referred:

Bihar Tenancy Act, 1885 — Article 3
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Criminal Procedure Code, 1898 (CrPC) — Section 145, 145(4), 145(6)
Evidence Act, 1872 — Section 101, 102, 103
Limitation Act, 1908 — Article 47

Citation : AIR 1956 Patna 116 : (1955) 3 BLJR 595 : (1956) CriLJ 543

Hon'ble Judges : Raj Kishore Prasad, J; Rai, J

Bench : Division Bench

Advocate : Harinandan Singh and Ugra Singh, for the Appellant; Rai Parasnath and Kanhaiya Prasad Varma, for the Respondent

Final Decision : Dismissed

Judgement

Rai, J.—The plaintiffs instituted the suit, out of which the present appeal arises, for a declaration that the lands in suit are their raiyati lands and for possession of the same with mesne profits either from defendant 1 or from defendant 2. The case of the plaintiffs may be shortly stated as follows: Plaintiff 1 was the hereditary herald (kavi); of the family of the late Maharaja Harballabh Narain Singh, the maternal grandfather of defendant 1. Near about the year 1933 there cropped up. a litigation with respect to the properties left by Maharaja Harballabh Narain Singh.

His gotias claimed that the inheritance to the properties was governed by the rule of lineal primogeniture, while the present defendant 1 contended that there was no such custom in the family of the late Maharaja. During that litigation plaintiff 1 rendered valuable services to defendant 1 in lieu of which the lands in suit having an area of about 100 bighas 1 katha 5 dhurs set out in schedule 1 attached to the plaint were settled with him on an annual jama of Rs. 6-7-3

including cess. After the settlement, plaintiff 1 came in possession of the same.

On 2-12-1938, plaintiff 1 sold half of the settled lands to plaintiff 2 by means of a registered sale deed after which "the latter came in possession of the vended property. Some time in the year 1346 Fasli there cropped up a dispute with respect to the possession of the lands in question which ultimately resulted in a proceeding u/s 145, Criminal P. C.

This proceeding terminated against the plaintiffs and in favour of the present defendant 2 which necessitated the institution of the present suit.

2. The suit was contested by both the defendants. They denied the alleged settlement of the lands in dispute with plaintiff 1. They pleaded that the sale deed in favour of plaintiff 2 was a sham document According to these defendants, defendant 1 permanently settled the lands in dispute with defendant 2 in the year 1345 Fasli, and since the date of that settlement defendant 3 has all along been coining in possession of the same.

They averred that defendant 2 had been rightly held to be in possession by the criminal Courts. It was further pleaded by the defendants that the suit was barred by general and special law of limitation. On these and other pleas they asserted that the suit was fit to be dismissed.

3. The suit was heard by the learned Subordinate Judge, Madhipura, who accepted the version of the plaintiffs and held that the lands in suit had been settled with plaintiff 1. He also held that plaintiff 2 had acquired a valid title to one half of the said lands by virtue of the sale deed dated 2-12-1930. He held that the plaintiffs were in possession of the lands in suit till the "proceeding u/s 145, Criminal P. C.

According to him, the alleged settlement by defendant 1 with defendant 2 was a sham transaction, and that defendant 2 never came in possession of the lards in suit. The learned Subordinate Judge further held that the suit was not barred by limitation. On these findings the suit was decreed with costs. The amount of mesne profits was ordered to be ascertained in a subsequent proceeding.

4. Defendant 1 thereafter came up in appeal before this Court. Learned Counsel for the appellants contended that it was for the plaintiffs to establish by reliable evidence that the lands in suit, had been validly settled with plaintiff 1 and that he had acquired a tenancy right in them. Learned counsel did not challenge the finding of the Court below to the effect that the alleged settlement with defendant 2 was a sham transaction, and that she had never come in possession of the properties in suit under that alleged settlement.

But he submitted that in any case it is for the plaintiffs to establish their title before they can succeed in this action.

5. So the first question to be decided is whether the story of settlement with plaintiff 1 was a correct one. Plaintiff 1 who was examined on commission, said

in his examination-in-chief that the lands were settled with him orally in 1342 Fasli. A "parwana" was given by defendant 1 to Babulal Bhagat, tahsildar of village Kampa, to measure and demarcate the lands settled with plaintiff 1 out of the lands which had recently come out of water and were full of shrubs and "jhawas".

The lands settled with him were accordingly measured out. Plaintiff 1 thereafter came in possession of the same. He reclaimed 12 bighas out of the lands settled in 1342 Fasli and erected two tatti houses on the land. After receipt of the report of the tahsildar, defendant 1 granted to plaintiff 1 a receipt (Ex. 7) for the rent of the year 1343 Fasli and also a schedule showing the khata numbers, plot numbers and the area constituting the 100 bighas and odd lands settled with him,

This schedule was also called "sanad" which is EK. 6 on the record. In 1943 he further reclaimed about 28 bighas of land. The evidence of plaintiff 1 on the question of measurement, possession, and reclamation has been corroborated by P. W. 3, Sahasram Mandal and P. W. 9 pukhi Mandal. P. W. 3, Sahasram Mandal is a tenant of a piece of land in the vicinity of the lands in dispute.

The factum of his holding tenancy land in the village is further established by Ex. 11-e, an application for execution of a decree filed by the present defendant 1 against Sahasram Mandal in which the decretal amount was sought to be realised by sale of 4 bighas 10 kathas 14 dhurs of kaimi lands of the judgment-debtor situate in village Kampa.

P. W. 9, Dukhi Mandal, was a bataidar under plaintiff 1. I see no reason to disbelieve the evidence of these witnesses. In fact defendant 1 himself has admitted during his cross-examination that such was the practice prevalent in his zamindari. He said:

"If any land is settled with anybody report is sent to the Tahsildar of the circle concerned to get the lands settled with him measured. For the purpose of measurement khata, khasra, and boundaries are recorded in the report. Tahsildar after getting the lands measured sends report to me of compliance. Before issuing settlement receipt report containing khata. khasra and area is called for from the Talisildar."

6. The evidence of these witnesses of the plaintiffs to the effect that about 40 bighas of lands had been reclaimed by plaintiff 1 finds corroboration from the evidence of the defendants' witnesses as well. D. W. 4, Babulal Bhasrat, the tahsildar of village Kampa, admitted during his cross-examination that 60 bighas out of the lands in dispute were being cultivated before the settlement with defendant 2 which, according to the defendants, took place in Magh 1345 Fasli.

According to D. W. 4, however, these lands were cultivated by defendant 1 himself. He deposed to the effect that Maula Rai Kamait wrote an account of the produce of the kamait lands, but no such account has been produced in this case. D. W. 1. Jainarain Eingh, also deposed to the effect that before the settlement

with defendant 2. the lands were cultivated directly on behalf of defendant 1. But defendant 1 himself contradicted D. Ws. 1 and 4 on this point. He said during his cross-examination:

"At the time of settlement with Hardi Sahebaji (defendant 2) most of the lands settled were cultivated and some were jungle. Those cultivated lands were not cultivated on behalf of my estate."

Thus, it is clear that the cultivated lands out of the suit lands must have been reclaimed and cultivated at the instance of plaintiff 1, as has been deposed to by P. Ws. 1, 3, 6 and 9. In my opinion, the Court below has rightly believed the version of the plaintiffs regarding the settlement and the possession of the lands in suit until they were dispossessed during the proceedings started u/s 145, Criminal P. C.

7. Mr. Singh while challenging the case of the plaintiffs submitted that there was really no occasion for defendant 1 to settle such valuable lands with plaintiff 1 as alleged. He submitted that the case of the plaintiff that he had rendered valuable service to defendant 1 during the litigation for Sonbarsa Raj Property is not correct.

According to him, in fact there was no need for defendant 1 to ask plaintiff 1 for a genealogical table of the family of the late Rai Bahadur Harballabh Narain Singh as he had already filed three genealogical tables in Title Suit No. 13 of 1943.

In my opinion, there is no force in the contention of Mr. Singh. The fact that defendant 1 had called for a genealogical table from plaintiff 1 is established from Ex. 14. the summons issued to the present plaintiff 1 at the instance of the present defendant 1 in Title Suit No. 13 of 1943. In the summons Pandit Jagdish Maharaj, the present plaintiff 1 was required to go to Court with a genealogical table.

The case of the plaintiffs is further corroborated by the letter (Ex. 8-d), dated 13-12-1933, written by defendant 1 to plaintiff 1. This letter has not been denied to have been written by defendant 1. The letter runs thus:

"To

Pandit, Shri Jagdish Kavijee, you go every where "with the genealogy" and other papers whenever they are required in connection with cases and explain them to others.

Rai Bahadur Rudra Pratap."

Thus there is no truth in the denial of defendant 1 to the effect that he had not asked for any genealogical table from plaintiff 1 to be used in the title suit pending at Monghyr. In my opinion, the case of plaintiff 1 that he had rendered valuable services to defendant 1 in connection with Title Suit No. 13 of 1943 is correct and that as a reward for his services the lands in suit were settled with

him.

8. Mr. Singh also contended that the sanad (Ex. 6) was not a genuine document and it in fact does not disclose the factum of any settlement with plaintiff 1, He also submitted that Ajodhya Prasad had no right to settle lands. and hence any receipt granted by him cannot confer any title on plaintiff 1. In my view, there is no force in this argument of Mr. Singh as well.

The sanad (Ex. 6) which is really a schedule denoting the khata numbers, Plot, numbers and the area constituting the lands settled was written by Anurudh Das at the dictation of de-fondant 1 as has been deposed to by plaintiff 1. The plaintiff 1 further denoted that at the in-stance of defendant 1 himself Ajodhya Prasad granted the rent receipt for the lands settled for the year 1343 after plaintiff 1 paid the rent for that year.

P. W. 4. Bishwanath Kamatia, also corroborated plaintiff 1 on this point. In answer to Mr. Singh's argument that it was not the business of Ajodhya Prasad, who was an inspector, to grant receipt, learned Counsel for the plaintiffs-respondents directed our attention to other receipts granted by the said Ajodhya Prasad to other tenants. They are Exs. 7-d to 7-g.

The argument of Mr. Singh that Ex. 1 is not a genuine document as the year appears to have been changed from 1344 Fs. to 1343 Ps. also is without any foundation because in the middle of the receipt there is a mention oi the year 1343 without any alteration. Defendant I had, no doubt, denied in his evidence that Bish-wanath Kamait, P. W. 4, was never in his service but he admitted during his cross-examination that a register of the servants employed every year is maintained in his estate yet no such register has been filed to prove that Bishwanath Kamait was not a servant of defendant 1.

Thus, there is no substance in the denial of defendant 1. I see no reason to disbelieve the evidence of defendant 1 and P. W. 4 on this point.

9. Mr. Singh attacked the genuineness of Ex. 6 but its genuineness is established from the letter Ex. 8 admittedly written by defendant 1 to plaintiff 1. In this letter defendant 1 had specifically mentioned that a sanad had been executed in favour of plaintiff 1 though defendant 1 had in his evidence attempted to show that the sanad mentioned in Ex. A was another sanad, but he miserably failed to prove that the sanad referred to in Ex. 8 was not the sanad Ex. 6 produced by the plaintiffs.

During his cross-examination defendant 1 had really admitted that schedules like Ex. 6 containing the khata numbers, khasra numbers and the area etc. are granted to tenants. During his cross-examination he said.

"Generally no parwana is granted to tenants taking settlements. There is no practice of granting any parwana. If any occasion arises and the tenants require it for some purpose, a copy of the khata number, khasra number and area noted down in the settlement petition is granted to him under my signature and not

under my initial. During the course of settlement my initial only is sometimes done on certain papers."

Thus this statement of defendant 1 fully corroborates the case of plaintiff 1 that this schedule (Ex. 6) was granted to him to show what plots had been settled with him. In my view, Ex. 6 is . a genuine document.

10. Mr. Singh contended on the strength of the decision in the case of -- Mohammad Hanif and Another Vs. Khairat Ali and Others, that the grant of the receipt Ex. 7 and the sanad Ex. 6 amounted to merely an agreement to settle and that plaintiff 1 would not be deemed to have acquired any tenancy right until he succeeds in establishing his possession by virtue of that settlement. He contended that even according to the case of the plaintiffs, they had brought under cultivation only about 40 bighas of land.

On the strength of this decision he has urged that in any view of the matter the plaintiffs would not be deemed to have acquired any tenancy right over the remaining area. In my view, there is no force in this contention also of Mr. Singh. From the evidence of P. W. 1, P. W. 3 and P. W. 9 it is quite clear that the tahsildar measured out 100 bighas of land which had been settled with plaintiff 1.

These witnesses deposed that plaintiff 1 came in possession of the entire settled area and reclaimed portion of it in the year 1342Ps. and another portion in the year 1343Ps. In my opinion, the plaintiff will be deemed to have entered in possession of the entire area though he had reclaimed and brought under cultivation only a portion of the area in the first year and another portion of the area in the second year.

Possession of an area settled for the purpose of reclamation and bringing it under cultivation is really exercised in this way. The settlee may not, in the very first year, bring under cultivation the entire lands settled for the purposes of reclamation, yet he will be deemed to have come in possession of the entire area if it is measured out and demarcated for him, and he reclaims portion by portion in several years.

Thus the decision in Mohammad Hanif and Another Vs. Khairat Ali and Others, is not a bar to the plaintiff's acquiring tenancy right in the land in suit on the finding that he had established the case of oral settlement and possession. I may mention at this stage that as Mr. Harinandan Singh has not challenged the finding of the Court below to the effect that the story of settlement of the lands in dispute by defendant 1 with defendant 2 was a myth, and that she never came in possession of the lands in suit by virtue of that settlement, it is not necessary for me to discuss the evidence, oral and documentary led by the defendants on that point.

The defendant 2 has not even appealed against the decree of the trial Court. This further establishes the truth of the plaintiffs' case that defendant 1 had falsely set her up as his settlee.

11. Mr. Singh vehemently contended that the present suit was barred under Schedule III, Article 3, Bihar Tenancy Act. He based his argument on para 18 of the plaint which runs thus:

"That being encouraged by the order passed in the proceeding u/s 145, Criminal P. C., defendant 1 wrongfully dispossessed the plaintiffs in January 1941 from the lands mentioned in Schedule 1 of the plaint, which lands are the lands in suit."

Mr. Singh contended that the plaintiffs allege in this paragraph dispossession by defendant 1 in January 1941, and the present suit having been instituted on 6-12-1943, was barred by limitation. In my view, the provisions of Schedule III, Article 3, Bihar Tenancy Act. do not apply to the facts and circumstances of the present case.

In order to attract the operation of Schedule III, Article 3, Bihar Tenancy Act, it must be established that the tenant was dispossessed by the landlord qua the landlord. In the present case the plaintiffs were in fact dispossessed by the order of the Magistrate on 8-6-1939, when the lands in suit were attached u/s 145(4), Criminal P. C., vide Ex. 18-C. Ex. M, the judgment in Section 145, Criminal P. C., case shows that the proceedings terminated against the present plaintiffs on 23-12-1940 and they were prevented from going upon the land.

Thus on 5-1-1941. the plaintiffs, who were already out of possession by virtue of the order of the Magistrate will not be deemed to have been dispossessed by defendant 1 in order to attract the operation of Schedule III Article 3. A similar point came up for consideration in the case of -- Jurawan Singh and Others Vs. Ramsarekh Singh and Others, where Kulwant Sahay J., with whom Macpherson J. had agreed, observed as follows :

"Article 3, Schedule III, Bengal Tenancy Act, applies only to cases of actual dispossession by the landlord. 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 III, Bengal Tenancy Act, would not apply.

In order that there should be dispossession by the landlord there should first have been possession of the raiyats; 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 III, Bengal Tenancy Act."

Thus the present defendant 1 by entering into possession on 5-1-1941 will not be deemed to have dispossessed, the plaintiffs as the latter were not in actual possession of the lands on that date.

12. In this connection Mr. Singh directed our attention also to the following portion of the evidence of plaintiff 1:

Q, 26 : How long you and plaintiff 2 remained in possession of the suit land?

A : We were dispossessed from the suit land since 1348 Fasli after 12 or 13 days of the order u/s 145, Cr. P. C.

Q. 27 : Who dispossessed you and plaintiff 2 and who is in possession of the land?

A : We were dispossessed by the Government. Then he says, we were dispossessed by Rao Bahadur Rudra Pratap Singh defendant 1. Rao Bahadur Rudra Pratap Singh defendant 1 is in possession of the suit land."

In my view the answers given by plaintiff" 1, quoted above, do not establish that in spite of the attachment u/s 145(4), Criminal P, C., and in spite of the judgment and order of the Magistrate forbidding them to go upon the land, the plaintiffs continued in actual possession of the lands in suit up to 5-1-1941. on which date they were dispossessed by defendant 1. Plaintiff 1 did say that he was dispossessed by Government, that is to say, by the order of the Magistrate.

This dispossession referred to by P. W. 1 in his evidence as well as mentioned in paragraph 18 of the plaint really means a constructive dispossession. In AIR 1953 Pat 224 (B) Kulwant Sahay J. considered the case of constructive dispossession also. In this connection he observed:

"Similarly- in -- Rajani Kanta Biswas and Others Vs. Panchanon Mondal and Others, it was held that for Article 3, Schedule III to operate there must be actual dispossession by the landlord of the tenant and 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"".

In the present case P. W. 2, Suba Lal Yadav, who is plaintiff 2. said during his evidence:

"Then the said proceeding was converted into a proceeding u/s 145, Cr. P. C., and the entire disputed lands of this suit were attached by the Criminal Court. The order in the said proceeding u/s 145, Cr. P. C. was passed against the plaintiffs of this suit. After the passing of the order in the said proceeding I went to the disputed lands on 5-1-41 to bring materials of my said house on the land but we were driven away from the lands by the servant of defendant 1."

In my opinion, it was really In connection with this incident that the plaintiffs pleaded in para18 of the plaint about their dispossession in January 1941.

12A. Mr. Singh has in support of his argument on the question of limitation placed great reliance on the case of -- Abinash Chandra Chowdhury Vs. Tarini Charan Chowdhury and Others, He submitted on the strength of this decision that the attachment u/s 145(4), Criminal P. C., does not amount to dispossession of the plaintiffs, and that they will be really deemed to have been dispossessed on 5-1-1941, as was pleaded in para 18 of the plaint.

In my view this decision has no application to the facts and circumstances of the

present case. The facts in that case were as follows : One Nur Mohammad claiming himself as muta-walli of the waqf created by his father Dost Mohammad granted a permanent lease of the entire village Babhangaon to one Abdul Aziz in the year 1891. Two months later Abdul Azia granted a lease of 8 annas share of that village in Kaimi maurusi jote right to the predecessors of the plaintiff.

In the year 1898 a suit was filed against Nur Mohammad for declaration of title, administration of the estate and account etc. At that time in 1305 Ps. which is equivalent to 1898, one Alamgir claiming himself as the mutawalli of the waqf estate dispossessed the predecessors-in-interest of the plaintiffs. In the year 1311 Fs, (1904) the entire property including the village Babhangaon passed in possession of a common manager.

On 23-9-1915, the properties were attached u/s 145(4), Criminal P. C. On 21-5-1916 the Section 145, Criminal Procedure Code proceeding terminated in favour of the common manager. On 18-1-1917, the plaintiffs instituted the suit for declaration of their Kaimi maurusi jote right GO the 8 annas share of village Babhangaon and for recovery of possession thereof.

The defendants pleaded that as the plaintiffs were out of possession since the year 1305 Fasli which was equivalent to 1898 their title, If any, had been extinguished by lapse of time oh the date the suit was filed. The plaintiffs on their part contended that they should be deemed to be in possession during the time the property was under attachment u/s 145(4), Criminal P. C.

It was, however, held in that case that the possession of the Court during attachment u/s 145(4), Criminal P. C. will be deemed to be the possession of the successful party, that is the common manager in that case. It was further held that as the common manager was in possession of the property on the date of attachment and as he was declared to be in possession by the order passed u/s 145, Criminal P. C., the period of attachment will enure to his benefit and by no stretch of imagination it would enure to the benefit of that party who were not in possession on the date of the attachment.

It was held in that case that the plaintiff of that suit was out of possession for more than 12 years even on the date of attachment and had thereby lost all title by lapse of time. In my view, the decision in that case has no application to the facts and circumstances of the present case. The Section 145. Criminal P. C., proceeding in the present case terminated in favour of defendant 2 and not in favour of the plaintiffs; hence the possession of the Court during thai time can by no stretch of imagination be deemed to be possession of the present plaintiffs.

Thus, they will not be deemed to have continued in actual possession up to 5-1-1941, to attract the operation of Schedule III, Article 3, Bihar Tenancy Act.

13. Mr. Singh next contended that as the criminal proceeding was started at the instance of the landlord, any dispossession during that proceeding even by the order of the Court will amount to dispossession by the landlord. In support of his

argument he relied on the case cf-- "Sheikh Alam v. Atul Chandra Roy" AIR 1936 Cai 299 (E),

In that case the landlord had in execution of a decree purchased the holding and got delivery of possession through Court. The relevant portion of the judgment in that case runs thus:

"The defendants 1 to 5 are admittedly co-sharer landlords. "Dispossession" under Article 3, Schedule III, Bengal Tenancy Act, means dispossession by landlord. The fact that defendants 1 to 5 dispossessed the plaintiffs as auction purchasers cannot take the case from the operation of Article 3 inasmuch as it would not be reasonable to add to the third column not merely the words "by the defendants" not merely the words "by the landlord", but the words "by the landlord as such" ".

With great respect to the learned Judges who decided that case I am unable to follow that View as the question has now been set at rest by a Special Bench decision of this Court in the case of -- Gajadhar Rai Vs. Ram Charan Gope and Others, where a contrary view was taken. Thus the dispossession of the plaintiffs by virtue of the attachment u/s 145(4), Criminal P. C., would not, in my view amount to dispossession by the landlord in order to attract the operation of Schedule III, Article 3, Bihar Tenancy Act.

In my opinion, the present suit is not barred under Schedule III, Article 3, Bihar Tenancy Act. It is really covered by the provisions of Article 47, Indian Limitation Act, and. has been instituted within the period of limitation provided by this article.

14. The result is that the judgment and decree passed by the Court below are upheld, this appeal fails and is dismissed with costs payable to the plaintiffs-respondents.

Raj Kishore Prasad, J.

15. I agree that the appeal be dismissed, but would like to make a few observations of my own on the question of application of Article 3, Schedule 3, Part I, Bihar Tenancy Act.

16. The main plank of the argument of Mr. Harinandan Singh, on behalf of the appellants, is para 18 of the plaint, in which it is mentioned that being encouraged by the order passed in the proceeding u/s 145, Criminal P. C., defendant 1 wrongfully dispossessed the plaintiffs in January 1941 from the lands in suit. Mr. Singh's contention is that as the plaintiffs have admitted in the plaint that they were dispossessed by defendant 1, who is admittedly their landlord, the plaintiffs' suit for recovery of possession would be hit by Article 3, Schedule 3.

In support of his argument Mr. Singh has relied on a large number of decisions of this Court and some of the Calcutta High Court. The principles, which emerge

from the cases cited by Mr. Singh, are these: (1) Article 3, Schedule 3, applies to a suit to recover possession by a landlord, a raiyat or an under-raiyat. Such a suit has to be brought within two years from the date of his dispossession.

"Dispossession" of a raiyat in Article 3, Schedule 3, means dispossession by landlord as such. If in fact the relationship of landlord and tenant is found to exist, then Article 3, Schedule 3, will apply. Its operation is attracted the moment it is found that the dispossession of the raiyat is by his landlord, or at his instance.

If a landlord as such dispossesses a person in possession by his own act, or by the act of his agents, or servants, or if a third person as settler, or transferee from the landlord, dispossesses the person in possession by the active cooperation and aid of the landlord, Article 3, Schedule III, will apply see -- Kunti Dai Vs. Jharu Lal Das Mazumdar and Others, -- Har Dayal Bhagat Vs. Nathuni Bhagwat -- Bindeshwari Rai Vs. Ram Palak Singh, -- Mt. Deorati Kuer Vs. Dasarath Dubey and Another, -- Janak Singh and Others Vs. Adya Singh and Others, Jurawan Singh and Others Vs. Ramsarekh Singh and Others, and -- Jugal Singh Vs. Tripureshwari Prasad and Others,

(2). It is equally well settled as far as this Court is concerned that if such a dispossession is through the instrumentality of a Court, such as delivery of possession through Court by virtue of a purchase by a landlord in execution of a money decree, or a decree for arrears of rent, or by virtue of an order of a Court u/s 145 or Section 146, Criminal Procedure Code. Article 3, Schedule III, will not apply. But if a landlord takes a symbolical delivery of possession, and later on uses his own power in taking physical possession by his own force, Article 3, Schedule III, will apply see Gajadhar Rai Vs. Ram Charan Gope and Others, Jurawan Singh and Others Vs. Ramsarekh Singh and Others, -- Kapil Singh and Another Vs. Feda Ali and Others, and -- Bateshwar Prosad Vs. Sir Kameshwar Singh Bahadur and Others,

17. But the real question in the present case is, does Article 3, Schedule III, apply to the present suit at all? Dispossession obviously presupposes previous possession of the person dispossessed. If a person was never in possession, he will be said to be out of possession, but he cannot be said to have ever been dispossessed. Unless the possession of a person prior to his alleged dispossession is proved, he cannot be said to have been dispossessed.

The mere allegation of the plaintiffs, therefore, that they were dispossessed by defendant 1 will not be sufficient to attract the operation of Article 3, Schedule III. If it is found that the plaintiffs were not in possession on the date they allege to be dispossessed, their mere allegation of their dispossession will not bring their suit within the mischief of Article 3, Schedule III.

It is a well known fact that pleadings in Mufassil Courts in this country are loosely drafted, and as such a liberal construction has always to be given to such pleadings, and they should not be construed too strictly, nor can they scarcely be

scrutinised with the strictness with which pleading's should otherwise be construed see -- "Mahomed Zahoor Ali Khan v. Rutta Kooer" 11 Moo Ind App 468 (PC) (O); -- "Secy. of State v. Laxmi Bai" AIR 1923 PC 6 (P).

It is not open to the defendants appellants, therefore, to take advantage of a loose statement in the plaint to defeat the plaintiffs' suit. It has to be found out if on the evidence it can be said that the plaintiffs were in possession after 8-6-39 and on or before 5-1-41, which is the date of dispossession alleged by plaintiffs in their plaint.

18. The lands in suit were attached on 8-6-39 under the last proviso to Section 145(4), Criminal P. C. The final order u/s 145(6), Criminal P. C., was passed on 23-12-40, and the plaintiffs allege that they were dispossessed by defendant 1 on 5-1-42, that is, two weeks after the final order passed in the proceeding u/s 140, Criminal P. C. The question is if in the circumstances, stated above, the plaintiffs can be considered to be in possession from 8-6-39 to 5-1-41, so as to be dispossessed by defendant 1 on 5-1-41.

The order of attachment passed under the last proviso of Clause (4) of Section 146, Criminal P. C., amounts to dispossession of all the parties to the proceeding. It is true that the possession of the Court throughout the subsistence of such an attachment enures for the benefit of the party who is ultimately declared to be entitled to possession of the subject matter of the dispute.

But it cannot be said that during the continuance of the attachment, when the Court is in possession of the properties, or somebody else on behalf of the Court is in possession of such property, the parties to the proceeding, or either of them, is in possession of such a property.

In Nandkishore Prasad Singh Vs. Radhakishun, it was held by a Division Bench of this Court that the effect of an attachment under the last proviso of Section 145(4), Criminal P. C., is to bring the property under the custody or control of the Magistrate; and the parties have no longer any control or possession over the land, otherwise the above proviso to Section 145(4) would be meaningless. Chatterji J., who delivered the judgment of the Court and with whom Manohar Lall. J. agreed, observed:

"That proviso (last proviso to Section 145(4) Criminal P. C.) authorises an attachment only in case of emergency, that is to say in case where the apprehension of breach of the peace is so imminent that without any immediate attachment the breach of the peace cannot be averted. Such object can only be gained by preventing both the parties from going upon the land, and this is the effect of the attachment. If after attachment the parties are still left free to go upon the land, the very object of the attachment will be defeated".

Therefore, the effect of the attachment u/s 145(4), Criminal P. C., was to dispossess the plaintiffs even if they were in possession of the property prior to that date, and as such the plaintiffs cannot in the eye of law be considered to be

in possession from the date of attachment u/s 145(4), Criminal P. C.

19. The final order u/s 145(6), Criminal P. C., was passed, as I have stated above, on 33-12-40, and on that date defendant 2 was declared to be in possession of the land in dispute, and she was ordered to remain in possession until evicted therefrom in due course of law. The plaintiffs, therefore, cannot be considered to be in possession even from the date of the final order passed u/s 145(6), Criminal P. C., on 23-12-40 and the person who can be said to be in possession from that date till 5-1-41 is defendant 2.

In such circumstances it cannot be said that the plaintiffs were in possession of the disputed lands from 8-6-39 to 5-1-41. It is not easy to see in the circumstances of a case such as the present how it can be said that the plaintiffs were dispossessed by defendant 1. Much less does the question of the plaintiffs' dispossession on 5-1-41 at all arise. Nor can plaintiffs' allegation that they were dispossessed on 5-1-41 by defendant 1 at all. In the circumstances stated above, attract the operation of Article 3, Schedule III.

If, as I think, no dispossession occurred on 5-1-41, except on 8-6-39 due to the attachment u/s 1404. Criminal P. C., within three years before the commencement of the present suit, Article 47, Limitation Act, is the article applicable and not Article 3, Schedule III. Part I, Bihar Tenancy Act because the dispossession on 8-6-39 would be by the order of the Court, and not by defendant 1 or defendant 2, and on 5-1-41 there was no dispossession at all.

20. Mr. Singh has relied on the decision of Agarwala, J., in Udaibhan Singh and Others Vs. Paras Pande and Others, in which his Lordship, while considering the case of Jurawan Singh and Others Vs. Ramsarekh Singh and Others, referred to above, stated as follows :

"Now, can it be said that a person against whom an order u/s 145, Criminal P. C., has been passed has been dispossessed thereby? In this Court that matter has been considered by a Division Bench in Jurawan Singh and Others Vs. Ramsarekh Singh and Others, where Kulwant Sahay, J., delivering the judgment of the Court observed:

"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 III, 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".

"Now, this passage appears to me to mean that when an order u/s 145, Criminal P. C. is made affirming the possession of one party and forbidding the other party

from disturbing that possession nobody is dispossessed at all. Therefore, Article 2 of Schedule 3 does not apply to a suit, by a person against whom an order is made, for recovering possession.

The second conclusion to be deduced from the passage which I have quoted above is that if the order is to be regarded as dispossession of the person against whom it was made then it is not dispossession by a landlord as such. It follows from that that in no case can an order u/s 145 be regarded as dispossession by a landlord for the purpose of Article 3 of Schedule 3, Tenancy Act".

21. Mr. Singh relies on the earlier part of his Lordship's observation to the effect that "when an order u/s 145. Criminal P. C., is made affirming the possession of one party and forbidding the other party from disturbing that possession nobody is dispossessed at all". This observation of his Lordship is obviously an "obiter dictum", as will appear from his Lordship's own observations quoted above.

If, however, his Lordship intended to lay down that an order u/s 145, Criminal P. C. does not amount to dispossession of any party, then I may respectfully say, first, that this conclusion cannot be drawn from the Division Bench case in Jurawan Singh and Others Vs. Ramsarekh Singh and Others, referred to above, on which he relied: and, secondly, that this is not a correct interpretation of the effect of an order passed u/s 145(6) Cr. P. C., and, therefore, I would respectfully disagree with his Lordship in this observation of his.

This case went up in Letters Patent Appeal L.P.A. No. 52 of 1941. D/- 5-11-1942, (Pat) (S), in which Fazl Ali, C. J. and Varma, J. no doubt affirmed the aforesaid decision of Agarwala, J. but their Lordships did not rest their decision on the observation of Agarwala, J. that an order u/s 145, Cr. P. C., does not amount to dispossession of any party.

In Jurawan Singh and Others Vs. Ramsarekh Singh and Others, which case has been dealt with by my learned Brother elaborately, Kulwant Sahay, J., with whom Macpherson, J., agreed, clearly held that the effect of an order u/s 145 Criminal P. C., declaring the defendants first party of that suit to be in possession no doubt amounted to dispossession of the plaintiffs, who were tenants, but the question was whether such a dispossession of the plaintiffs of that suit amounted to a dispossession by the landlord, or by an order of the Court passed u/s 145, Criminal P. C.

Their Lordships held that as the plaintiffs were dispossessed by an order of the Court u/s 145, Criminal P. C., Article 3, Schedule III, Bihar Tenancy Act, would not apply to that case. But it was not disputed there, and it cannot be disputed, that the effect of an order passed u/s 145(6), Criminal P. C., amounted to dispossession of one of the parties to the proceedings against whom the order is passed, and if there has been a previous attachment u/s 145(4), Cr. P. C., then the order u/s 145(6) amounts to confirmation of the dispossession of one party and declaration of the other party to be entitled to possession.

Under Section 145(6), Cr. P. C., the Magistrate is not to enquire into title, but merely to ascertain who WPS in possession "de facto", and to retain him in possession.

22. Mr. Singh relied also on Abinash Chandra Chowdhury Vs. Tarini Charan Chowdhury and Others, for the proposition that possession of the Court during attachment u/s 145(4) Cri P. C. enures for the benefit of such party in whose favour a declaration u/s 145(6) Cri P C., is made declaring him to be entitled to retain possession.

This case does not help Mr. Singh at all, because in the present case it was defendant 2 who was declared to be entitled to retain possession u/s 145(6) Criminal P. C., and as such it would be defendant 2 and not plaintiffs who would be considered to be in possession from the date of attachment till the final order was passed or after it.

Therefore, in any view of the matter, plaintiffs cannot be considered to be in possession on 5-1-41, when they allege they were dispossessed so as to be considered actually dispossessed. Plaintiffs' possession prior to 8-6-39 is not material at all for deciding the question of application of Article 3 Schedule III Tenancy Act. to the suit. Mr. Singh's contentions must, therefore, be overruled.

23. I have also reached the same final conclusion, as my learned Brother has reached that the suit is not barred by Article 3. Schedule III, Part I, Bihar Tenancy Act, though on somewhat different grounds.