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**(1969) 09 CAL CK 0036**  
**In the Calcutta High Court**

Sasadhar Hazra and Others

APPELLANT

Vs

Pulin Chandra Kayal and Others

RESPONDENT

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**Date of Decision :** 08-09-1969

**Acts Referred:**

Criminal Procedure Code, 1898 (CrPC) — Section 144, 145

**Citation :** 74 CWN 438

**Hon'ble Judges :** A.K. Sinha, J;A.C. Sen, J

**Bench :** Division Bench

**Advocate :** Amarendra Mohan Mitra and Binode Behari Halder, for the Appellant;Asiranjan Mondal and Tarak Nath Roy, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Mr. A.C. Sen, J.—This second appeal is preferred by the Defendants landlords against the judgment and decree of the lower appellate Court reversing the decision of the trial Court dismissing the Plaintiff's suit.

2. The suit out of which the present appeal arises was instituted by the tenant Krishna Ch. Kayal inter alia for declaration of his title and recovery of possession against his landlords, the present Appellants and their bargadar Charu Chandra Purkait, the Defendant No. 1. The case of the Plaintiff briefly is that he is an occupancy raiyat of the disputed lands under the landlords-Defendants at an annual rental of Rs. 18.10.8 paid by him to them in instalments but the landlords being powerful and influential, did not grant him dakhilas. As the Plaintiff did not agree to the proposal made by the landlords' Officer, Nalini Kanto Kabiraj either for enhancement of rent or for surrender of the holding the landlords had a collusive document, viz., "Bhag Kabuliyat" executed by the Defendant No. 1, Charu Chadnra Purkait a relation of the said officer on 2nd Jaistha 1352 B.S. and tried to forcibly dispossess the Plaintiffs in the year 1354 B.S. when the paddy was ripe for harvesting the Plaintiff then instituted a proceeding against both the landlords and bargaders u/s 144 Code of Criminal Procedure and thereafter the landlords in their turn instituted a similar proceeding against him in the same

Court of local Sub-divisional Officer. During the pendency of these proceedings the standing paddy of 1354 B.S. was auction sold by the criminal Court and Defendant No. 1 the bargadar purchased it for Rs. 205/-. In 1355-56 B.S. to the same court leased out the lands to the Plaintiff at a rental of Rs. 100/- and Rs. 135/- respectively and thus he possessed the lands during those two years. Both the proceedings in the criminal Court eventually were converted into proceedings u/s 145 Code of Criminal Procedure which were finally decided by the criminal Court on 10.5.50 in favour of the bargadar Defendant No. 1 and thus from 1367 B.S. he began to possess the lands. It was also alleged that in the proceedings u/s 145 Code of Criminal Procedure the Defendants set up a plea of surrender by the Plaintiff of the disputed land to the landlords and that is how he felt aggrieved and was compelled to file the suit.

3. Both the landlords Defendants and the bargadars contested the suit by filing separate written statements. Their case substantially is that the Plaintiff surrendered the suit lands in 1342 B.S. and thereafter they had these lands cultivated by the successive Bargadars from 1342 B.S. to 1348 B.S. The Defendant No. 1 was inducted as Bargadar from 1349 B.S. and subsequently a Bhag Kabuliyat was executed by him in 1354 B.S. in respect of the disputed lands along with other lands. The Plaintiff's suit, it is further alleged, is barred both by general and special law of limitation.

4. The trial Court accepted both the pleas of surrender and of limitation and dismissed the Plaintiff's suit. On appeal the lower appellate Court reversed this decision in its entirety and decreed the Plaintiff's suit. It found on evidence as adduced by the parties that the case of surrender as put forward by the Defendants was not proved. On the point of limitation it took the view that even assuming that the Defendants would be deemed to be in possession of the disputed lands as a result of the proceeding u/s 145 Code of Criminal Procedure culminating in their favour during the period in which the disputed properties are kept under attachment it was clear that taking into account of the entire period during which such attachment subsisted in this proceeding, the suit was well within two years as provided under Article 3 schedule III of the Bengal Tenancy Act. It was further held that there being no evidence to prove the possession of the Defendants prior to 2nd Jaistha, 1354 B.S. the suit was also not barred by general law of limitations.

5. In the present appeal before us Mr. Amarendra Mohan Mitra learned Advocate for the landlord Appellants challenged the correctness of this decision of lower appellate Court on both the points as to surrender and limitation. On the question of surrender it was urged by Mr. Mitra that the finding of the lower appellate Court could not be sustained as valid. Firstly because, even though the tenant could not produce any rent receipt from 1342 B.S. it proceeded on mere probabilities and held that non-payment of rent, even if it was true, did not necessarily prove that the tenant surrendered the holding. It was submitted that the lower appellate Court further drew an adverse inference against the landlords

on mere surmise for not taking any action against the tenant for non-payment of rent or for not taking any written document for surrender. Secondly, it was argued that the lower appellate Court came to such a finding against the Defendants on shifting the onus wrongly upon the landlords. We cannot accept the correctness of either of these contentions made by Mr. Mitra. What we find is that on a review and reassessment of evidence and materials on record either direct or circumstantial the lower appellate Court found that the surrender as alleged by the Defendants was not proved which is in our view a finding of fact. In the second appeal we are unable to take a different view of the evidence to disturb that finding on a question, purely, of fact.

6. This brings us to the question of limitation. It was contended by Mr. Mitra that the Plaintiff's suit was clearly barred by limitation under Article 3 Schedule III of the Bengal Tenancy Act. Before we proceed to examine the correctness of this contention we must notice that the certified copy of the order-sheet of the proceeding u/s 145 Code of Criminal Procedure as relied on by both the Courts below (Ext.2) after disposal of the appeal in the lower Court was taken back by the Plaintiff on the usual undertaking to refile it at the time of hearing of the second appeal in this Court but this certified copy, it appears, has not been refilled. That is why Mr. Mitra has made an application under order 41 Rule 26 of the CPC for admission of another certified copy for additional evidence. This application was opposed by the Plaintiff by using a counter-affidavit to which there was no affidavit-in-reply by the Appellants. In this counter-affidavit it was stated in par graph 4 by the son of the tenant Plaintiff who was in the mean time dead, that he heard from his father that Ext. 2 was withdrawn for the purpose of showing it to the Estate Acquisition Act Authorities in connection with settlement operation in particular. Upon hearing that this certified copy was not found in the record, he tried by every means to find out the document but failed. It was also stated that the certified copy annexure A to the application apparently was not a correct copy of the order-sheet of the said case for it did not show that any proceeding u/s 145 Code of Criminal Procedure in respect of the disputed lands were ever drawn up. Mr. Mondal on behalf of the tenant Respondents pointed out that the certified copy produced did not also contain the serial numbers which were mandatory according to the Form No. (M) 20 appended to the "criminal rules and orders of the High Court, Calcutta Vol. I" and as other relevant orders of the proceedings referred to by both the Courts below were not there it was further urged that this copy could not be accepted as a true and correct copy of the order-sheet of the entire proceedings in Misc. Case No. 341 of 1947. We wanted to know whether the original records of the proceedings were still available but we are informed by both the learned Advocates that the records were already destroyed.

7. This then being the position, the question is whether this certified copy should be accepted as additional evidence by us. This certified copy as pointed out by Mr. Mondal did not contain orders dated 18.8.49 and 25.2.49 which according to the lower appellate Court were vital and in fact it came to the conclusion on the

basis and on construction of these orders passed on these dates on the question of limitations. It is not clear why this certified copy was taken after the disposal of the above appeal. If the Appellants wanted to dispute the correctness of the certified copy (Ext. 2), it was open to them to take another certified copy of the entire order-sheet in the said proceeding and produce it at any stage either before the trial Court or before the lower appellate Court for a proper decision in the matter but this was not done. In any case, the certified copy now being produced for admission as additional evidence not having been supplied with serial numbers and other particulars relating to the copies of orders according to the forms appended to the said criminal rules and orders, it will be altogether unsafe to rely on such a certified copy at this stage for a decision on questions raised before us. It is true that certified copy (Ext. 2) was withdrawn by the Plaintiff tenant with an undertaking to refile it at the hearing of this appeal but since then, the Plaintiff died and his sons who have been substituted as his heirs and legal representatives have stated in the counter-affidavit the circumstances under which in spite of their best efforts they could not find out the certified copy and the correctness of these statements have not been denied by the Appellant landlords by any affidavit-in-reply. That being so, the only alternative left is to proceed on the basis of the relevant orders u/s 145 as noticed by the lower appellate Court.

8. Now coming to the merits of the contention it appears that the lower appellate Court based its decision relied upon by the Respondents, landlords, on the proposition of law laid down in a Bench decision of this Court reported in *Arajali and Others Vs. The King-Emperor* which while considering the question as to the effect of a proceeding u/s 145 Code of Criminal Procedure on the question of possession of the respective parties for the purpose of limitation in a civil suit *Mukherji, J.* inter alia observed: "For the purpose of limitation possession during the period in which the disputed property is kept under attachment under Sub-section (4) of Section 145 Code of Criminal Procedure is in law possession of the party whom the Magistrate as a result of the proceeding finally declares to be entitled to retain possession as the party who was in possession at the date of the proceeding".

9. The position in law as indicated in the above decision has not been disputed on behalf of the Plaintiff tenant but the lower appellate Court on a scrutiny of the certified copy of the order-sheet (Ext. 2) found that though the Plaintiff was dispossessed forcibly from the disputed lands in 1354 B.S. he came to possess these lands after the commencement of the proceeding u/s 145 Code of Criminal Procedure in the years 1355 B.S. and 1356 B.S. under the order of the criminal Court. Then the proceeding u/s 145 Code of Criminal Procedure, it was further found, was actually drawn up on 18.8.49 and the disputed lands appeared to have been attached sometime between that date and 25th February, 1950. On a scrutiny of the certified copy and on perusal of the order-sheet lower appellate Court came to the conclusion that the date typed as 25.2.49 was a mistake. This date must be 25.2.50 as evidently the receipt of execution report of the

proceeding for attachment of the lands drawn up on 18.8.49 could not have been obtained on 25.2.49. Accordingly, it was held that the possession of Bargadar Defendant No. 1 in 1354 B.S. could neither be held as adverse to the Plaintiff nor could be taken into account calculating the period of possession in favour of the Appellant landlords or their Bargadar as the period of attachment commenced on 18.8.49 when the criminal Court drew up the proceedings u/s 145 Code of Criminal Procedure and ordered the relevant process to be executed. Thus, clearly, the suit having been filed on 24.2.51, it was held, was well within two years from 18.8.49. Mr. Mitra, however, disputed the correctness of this conclusion on an argument that since the criminal Court assumed the control of the lands by allowing the bargadars to reap the paddy in 1354 and thereafter, the Plaintiff for the year 1355 B.S. and 1356 B.S. it must be presumed that the proceedings of attachment of the lands must have commenced much earlier as it was not open to the Court without such attachment to assume control and possession of the disputed lands and lease out the lands to either parties in the proceeding or to any outsider for cultivation and for harvesting. This argument though attractive seems to have less of substance. Under Sub-section (8) of Section 145 Code of Criminal Procedure the Magistrate has enough power to make such order as may be necessary for proper custody or sale of such property or any crop or other produce of the disputed lands in a proceeding under this Section. In our opinion this provision is clearly independent of the third proviso to Sub-section (4) of Section 145 Code of Criminal Procedure under which the Magistrate in case of emergency has the power to attach "subject of dispute" pending his final decision.

10. In the instant case it seems clear that the Magistrate exercised his powers under the above Sub-section (8) by sale of paddy for the successive years from 1354 B.S. to 1356 B.S. before the attachment proceedings was actually drawn up and executed. Even assuming that it is not so, then also in this case there is no scope for any speculative argument for in fact the attachment proceeding as found by the Court of appeal below was actually drawn up on 18th August, 1949 and warrant of such attachment was executed subsequently. That being so, this contention cannot be accepted.

11. Mr. Mitra then contended that there was no provision either for drawing up separately attachment proceeding or for execution of warrant of attachment u/s 145 Code of Criminal Procedure We cannot agree. It is inconceivable how the disputed lands be under attachment by the Court without effective execution of warrant of attachment. There are other provisions as well in the Code of Criminal Procedure by virtue of which the Court is clothed with sufficient powers to issue warrants or suitable processes of attachment under different circumstances. Be that as it may, it is unnecessary, in the present case, to go into such question for it appears that the attachment proceeding was actually drawn up on 18th August, 1949 and effected between this date and 25th February, 1950. No objection on this score was ever raised by the landlord Appellants or the Bargadar Defendant in either of the Courts below. The lower appellate Court in

calculating the total period of attachment accepted this date as the starting point from which it was clearly found the suit was not filed beyond the period of two years. That being so, we are unable to accept this contention as correct. Lastly, it was argued by Mr. Mitra that the Plaintiff having been dispossessed from the year 1354 B.S. from the disputed lands by Bargadar of the landlords, the suit was clearly barred having been filed beyond two years from the said year. This argument is again misconceived. It is true that the Plaintiff was forcibly dispossessed in 1354 B.S. but the criminal Court in the said proceeding assumed control over the lands and allowed the Bargadar Defendant to auction purchase the paddy only for that year. Thereafter, the Plaintiff was allowed to possess for 1355 and 1356 B.S. equally under the orders of the Court. In such circumstances, it is clear that the Defendant ceased to have any possession in respect of these lands for the subsequent years. So, the only question that really crops up is the actual period of attachment which as found by the lower appellate Court even if excluded did not bring the Plaintiff's suit within the mischief of Article 3 Schedule III of the Bengal Tenancy Act. In our opinion, therefore, the lower appellate Court rightly held that the Plaintiff's suit was not barred either by general or special law of limitation.

12. A point was raised by Mr. Mondal on behalf of the Plaintiff Respondents that Bargadar was not an authorized agent of the landlords and, therefore, dispossession of the Plaintiff, if there be any, by such Bargadar in 1354 B.S. was not legal. Reliance was placed on a Bench decision of this Court reported in Kubir Malla Vs. On the death of Titu Bibi her heir Manik Mallik and Others, . We are not prepared to go into this question for this point was never raised either in the trial Court or in the Court of appeal below. This contention, therefore, is rejected.

The result is, the appeal fails but in the facts and circumstances of this case we make no order as to costs.

For the reasons already given we also reject the application of the landlord Appellant for additional evidence without costs.

A.K. Sinha, J.

13. I agree.