

(1927) 01 CAL CK 0010
In the Calcutta High Court

Satis Chandra Bandopadhyaya and Others	APPELLANT
Vs	
Hashem Ali Kazi and Others	RESPONDENT

Date of Decision : 20-01-1927

Acts Referred:

Citation : AIR 1927 Cal 488 : 103 Ind. Cas. 124

Hon'ble Judges : Rankin, C.J.; Mitter, J.; C.C. Ghose, J

Bench : Full Bench

Judgement

Rankin, C.J.—This is a Letters Patent appeal from a difference of opinion arising at the hearing of a Second Appeal before my learned brothers Mr. Justice Cuming and Mr. Justice Page.

2. I agree with the view of Mr. Justice Page that the plaintiffs' suit must be dismissed on the ground that it is out of time by reason of Article 3 of Schedule 3 to the Bengal Tenancy Act; and in this view the other considerations which might have arisen for our attention do not require to be argued at the bar.

3. The facts of the case are not in dispute between the trial Court and the District Court. The position shortly is that there was a rent suit against the plaintiffs and also Defendants Nos. 3 and 4 brought by Defendants Nos. 1 and 2 on the 30th of May 1914. Defendants Nos. 1 and 2 were landlords of a holding of which the plaintiffs were co-sharer tenants. The rent suit was brought and was decreed on the 10th of November 1914 ex-parte. In that rent suit it appears that the Court without obtaining consent of the plaintiffs' mother appointed her as guardian to the plaintiffs and it is to my mind clear that in the three Courts before which this case has come the fact that the mother did not consent to that appointment was treated as plain. I consider that it sufficiently appears from the judgment of the trial Court. In these circumstances the decree having been passed on the 10th of November 1914, on the 15th of December 1915 the plaintiffs in that suit - Defendants Nos. 1 and 2 in the present suit - obtained symbolical possession of the land in question.

4. At sometime which is plainly before the 2nd of November 1916 there was an actual ouster of the plaintiffs from their land. This suit has been brought on the 25th of July 1919 - more than two year after that ouster, and it is argued before us on behalf of the landlords - Defendants Nos. 1 and 2 - and the new tenants whom they have put upon the land - Defendants Nos. 5 to 7 - that the suit is within Article 3 of Schedule 3 to the Bengal Tenancy Act.

5. On these simple facts it might be supposed that the question of the applicability of Article 3 was fairly free from difficulty. As a matter of fact, the decisions of this Court make the question a little complicated and the present case requires us to consider carefully the scope and meaning of the article, as to which there is much contradiction in the decisions.

6. Article 3 of Schedule III is clearly modelled upon Article 142 of the Indian Limitation Act. The description of suit is expressed thus - "To recover possession of land claimed by the plaintiff as a raiyat or an under-raiyat;" and there is little difficulty in seeing from that description that the article applies only where the plaintiff is asserting a subsisting tenancy right as against the person under whom he claims to hold. As applicable to such a person and such a person only, would one expect to find in this Act the not very precise language which one finds in column of that Schedule. On that question this Court, so far as I know, has not entertained any doubt. Starting, therefore, from the fact that the class of case we are considering is a suit brought by a person claiming a subsisting tenancy right under the defendant we come to consider the third column of the schedule. There the language is "the date of dispossession." In the corresponding column in Article 142 there is a reference to "discontinuance of possession"; and I put aside any question which may arise out of that slight change. It is clear, therefore, that the article contemplates a suit of the character I have already described based upon dispossession as part of the cause of action.

7. The next question which arises is this. Is it necessary and safe and right to add to the third column the words "dispossession by the defendant"? The defendant in such a case must be the alleged landlord. Is it to be taken as plain that the third column means that the defendant and no other person must have dispossessed the plaintiff? No such words are to be found, in the third column of Article 142, and in the ordinary way, the matter being left to the general law, such words would be misleading rather than necessary. It all depends upon the particular facts. If the plaintiff is ousted by trespasser A and trespasser B comes and overthrows A and proceeds to trespass, in a case of that sort the two trespassers' occupation cannot be tacked together and such a suit brought against B would be brought against B on the ground that B had dispossessed the plaintiff. On the other hand, if the plaintiff is dispossessed by trespasser A and trespasser B buys his right or claim of right from him and there is a privity in law, in act or in contract between the two, the suit against B might be based on a dispossession which was originally a dispossession by B's predecessor-in-title. All that is not expressed in the third column of Article 142 and is left to the general

law.

8. In this case I do not think it is necessary to express an opinion whether it is necessary or right to read the words "by the defendant" into the third column of Article 3. There is some serious reason to suppose that this may be the meaning, because otherwise a person on whose land a trespasser had come and against whom he had twelve years to bring his suit might by assigning to the landlord defeat the tenant's right of suit. "Whether, therefore, the words" the date of dispossession by the defendant should be taken to be the true meaning of the third column is a matter upon which I desire to reserve my opinion. But when one gets beyond that question one comes to the suggestion which can be found in some of the cases that the true way to read the third column is to say that it means "dispossession by the landlord as such" and by direct action. Some of the cases suggest that the third column of the article must exclude cases where the landlord dispossesses as auction-purchaser and other cases take the view that it excludes also cases of dispossession effected by the instrumentality of a Court of law.

9. I have myself a somewhat strong opinion that those two propositions are a complete misunderstanding and misinterpretation of this article and that there is no sufficient reason for adding anything to the words which have been used by the legislature except possibly adding the words "by the defendant" to the word "dispossession" in the third column. But the character of the plaintiffs' claim here is to assert as against the defendant that they have a subsisting tenancy right in the land held by the plaintiffs under the defendant; the relief asked is the recovery of the land accordingly; and it turns out that the only ouster in the case was effected not by the Court but at some date before November 1916 by the landlord. It is therefore not a case of ouster by the machinery of a Court of law and although I agree with Page, J., in the opinion that the meaning of dispossession is satisfied when the defendant landlord comes in against the will of the occupying tenant even by the machinery of a Court of law, the present case does not actually require us to decide that question. The delivery of symbolical possession operated nothing as against the plaintiffs.

10. As regards the contention that in order to avoid the operation of Article 3 it is sufficient to say that the landlord came into possession as auction-purchaser, in the capacity of auction-purchaser and not qua landlord, there, again, it seems to me that the words of the legislature are being seriously distorted. It is not a question of capacity, but of incapacity. The plaintiffs' case is - and what alone matters is the real character of the plaintiffs' suit - that the landlord's reentry was wrongful. Whether the landlord wrongfully claimed to re-enter for one reason or another is a matter which can only be imported by force into the words which the legislature has employed.

11. The view taken by Chamier, C.J., in the case of Jaimangalabati Misrain v. Jharu Lal Das Mozumdar [1917] 2 P.L.J. 567 is, I think, correct.

It has been held in a large number of cases that Article 3 applies only to a suit by a raiyat or under-raiyat against his landlord, including one or more of several landlords. I accept that construction of the article. So far it would appear that these suits are governed by this article. But it is contended on behalf of the appellant that the article applies only where the raiyat has been dispossessed by his landlord acting as such. In fact the argument went to the length that the article applies only when the landlord says either expressly or impliedly to the raiyat, "I am your landlord, you are my tenant. You must vacate the land," and then turns the raiyat out wrongfully. If this contention is correct, Article 3 does not apply to the present case; for although on the findings the appellant was one of the landlords of the respondents, she did not claim the plots in question as the landlord of anyone and certainly did not admit that the respondents were or ever had been her tenants in respect of the plots. She claimed that the plots were her kamat land by reason of the fact that she had purchased the share to which according to her they were appurtenant or attached. I am not prepared to place such a narrow construction on Article 3. It appears to me that if it is shown that the plaintiff raiyat is in fact a tenant of the defendant who dispossessed him, in respect of the land claimed in the suit, then Article 3 applies to the suit. The object of that article seems to provide a short period of limitation for a suit by a raiyat to recover a holding from which he has been dispossessed by his landlord. The reason or excuse, good, bad, indifferent, given or supposed to have been given by the landlord for dispossessing his tenant appears to have no bearing on the enactment and much confusion must ensue if the applicability of the enactment is made to depend upon such considerations.

12. It seems to me that that opinion is clearly right, because when you are applying the words of the article to a case which *ex concessis* is a case to the effect that the ouster by the landlord was wrongful, it cannot be reasonable to add to the third column not merely the words "by the defendant," not merely the words "by the landlord" but the words "by the landlord as such." There is, in, my opinion, some confusion of thought in such a suggestion. In the argument before us it was debated whether or not in a case where a guardian ad litem was appointed for a minor without his consent the decree was a nullity or was merely voidable; consequently whether in this case at the time when the execution sale of the holding was made and the landlord purchased it, the tenancy came to an end. The contention is on the one hand that the whole thing was void and the plaintiffs' tenancy went on as before and subsisted to the date of this suit. On the other hand, it is said that the decree was at most voidable, and until it was avoided, it stood; and, therefore, at the time when this sale was held, symbolical possession given, and the actual ouster was made, there was a subsisting decree, the plaintiffs' tenancy had come to an end and the dispossession was not by the landlord.

13. To my mind that consideration is altogether beside the point. First of all while it may be clear that the suit contemplated under Article 3 is a suit to assert, against a landlord a right of tenancy in the property sold, it is a matter requiring

some warrant to say that the dispossession must have been by a person who at that time was the landlord. But in any base, what does it matter whether this decree was void or voidable? The plaintiff brings his suit to establish that his tenancy right is still subsisting. If the plaintiff cannot make out that in law and in equity his tenancy right has as against the defendants continued from the beginning down to the date of his suit, then he has no case on the merits. He claims to show that by showing that the decree was one which he can in this proceeding ask the Court to disregard. In any event a decree set aside because it was improperly procured is set aside as though it had never been made so far as the parties are concerned.

14. I do not think it necessary to decide the question raised by the long and learned judgment of Mr. Justice Das in the case of *Ram Sundar and Another Vs. Amrit Pajiyar and Another*, , where he advances the theory that if no guardian is appointed or if a person who is not competent under the law to be the guardian is appointed for a minor, then the proceedings in the suit are null and void; but that if a person otherwise competent is appointed without his consent under the new Code the proceedings in the suit are irregular and are not necessarily void. That view of Mr. Justice Das is based really upon an interpretation of the case in the Privy Council of *Walian v. Banke Behari Pershad* [1903] 30 Cal. 1021. I am not satisfied that the learned Judge's interpretation of the Privy Council judgment is correct. I cannot read the Privy Council judgment except on the basis that the only defect which they under the old Code had to consider was the fact that while the Court had appointed a guardian a formal order to that effect had not been made at the time. It has been pointed out to us that in the course of the case the guardian did not contest the suit and that the decree was *ex parte*. That may very well be. Guardians who are validly appointed have good reasons sometimes for not contesting the claim. The Privy Council was satisfied that in spite of that fact the interest of the minor had been effectively protected by the mother as the guardian and it was on that ground alone that the Privy Council held that the suit and the decree were not void. The most that can be said with regard to the judgment of Lord Davey in the case of *Khia Rajmal v. Diam* [1904] 32 Cal. 296 is that it is not quite clear with regard to certain expressions with reference to the particular case of the minor *Amirbaksh* whether their Lordships were addressing themselves to the circumstance that the guardian had not been appointed or to the circumstance that the individual share of *Amirbaksh* was not really before the Court at all. I think myself that it was to the former. In my judgment there is, however, a passage in that case which Mr. Justice Das's judgment renders it desirable to bring into prominence. The passage is at page 312 of the case of *Khia Rajmal v. Diam* [1904] 32 Cal. 296.

Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But on the other hand the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record.

15. I only desire on this matter to say that I am not as at present advised prepared to assent to the proposition that while a decree will be void if no guardian is appointed or if the guardian is not a competent person, some different consequence will result where a person is appointed who never consented to act at all - the most useless possibly of all appointments.

16. For the reasons I have given I consider that the appeal in this case ought to be allowed and the plaintiffs' suit ought to be dismissed with costs in all the Courts.

C.C. Ghose, J.

17. I agree.

Mitter, J.

18. I entirely agree in the judgment that has just been delivered by my Lord the Chief Justice and have nothing further to add.