

CALCUTTA HIGH COURT

Promotha Nath Roy

Vs

Kishore Lal Saha

(Lancelot Sanderson, C.J. A Mookerjee, J.)

23.05.1916

JUDGMENT

Lancelot Sanderson, C.J.

1. In my judgment this appeal should be dismissed.

2. I intend to say very little about the facts of the case, because they are dealt, with fully by the learned Subordinate Judge. It seems to me that the learned Subordinate Judge has found two facts either of which is sufficient to defeat the appellants' case- He has found that 'the jote right existed prior to the acquisition of the putni and kayemi jote, but within about the last quarter of a century the malih defendants ignored such right and exercised only their more important tenure right.... On consideration of the above facts it seems to be probable that the malik defendants' predecessor allowed the minor jote right to merge in the larger right and, therefore, everything passed to the plaintiffs." When one comes to consider that the putni right was acquired at least some fifty years before the institution of the suit, I cannot help thinking that the learned Subordinate" Judge was right in coming to the conclusion that the minor right had been allowed to merge in the larger one. Then in order, to make the matter quite certain, the learned Judge goes on to say that even supposing that the minor right did not merge in the larger one, the plaintiff would be entitled to succeed unless the defendant could show that the lands in suit were comprised in his jote upon which he relies, and he finds as a fact that the defendant has not" discharged that onus of proof that the lands in suit were comprised in his jote. That in itself is sufficient to defeat the defendants' case. For these reasons I think the learned Judge was right in coming to the conclusion at which he arrived.

3. Then arises the other question upon the Statute of Limitation. It appears that the sale took place in 1893, and this suit was not brought until 1909 The Sale was an auction-sale under a certain decree. In 1895 a suit was instituted for the purpose of setting aside that decree and also the sale which was completed under it, and the suit was taken from one Court to another and finally to the Privy Council, whose decision was given in the year 1905, by which the plaintiffs were declared to be entitled to the land which they had brought in the year 1893. In my judgment, it is quite sufficient to say that Section 16 of the Limitation Act applies to this case, and if it does apply, all the time during which the proceeding to set aside the sale has been prosecuted should be excluded. It is obvious that the first part of this section applies to the suit in

question, because this was a suit by a purchaser at a sale in execution of a decree for possession of the land. The only point which is taken by the learned Vakil is that the suit which was instituted for the purpose of setting aside the sale was not a proceeding within the meaning of Section 16. I see no reason for limiting the word proceeding", which is a word of general meaning, to something which is not a suit. In my opinion it includes a suit. It would be a most unreasonable interpretation to put upon the word to say that if a proceeding to set aside a sale is instituted by a petition then the time which is occupied by that proceeding should be excluded, whereas if a proceeding to set aside a sale be instituted in the form of a suit, the time occupied by such a proceeding should not be excluded. I think this would lead to an unreasonable and unjust result. Therefore, in my opinion the time which was occupied in the prosecution of the suit to set aside the sale, namely from 1895 to 1905, ought to be excluded in the computation of the time under Article 138. Therefore, the suit was brought within time.

4. For these reasons I think that the appeal should be dismissed with costs.

Asutosh Mookerjee, J.

5. I agree that the decree which was made in favour of the plaintiffs by the Subordinate Judge and has been affirmed by Mr. Justice Mullick, cannot be successfully assailed.

6. The plaintiffs seek to recover possession of the land in dispute on the basis of title* acquired by purchase at a sale in execution of a decree in 1893. Their case was that, notwithstanding the sale, the defendants, who are the representatives of their judgment-debtor, have remained in occupation without right or title. The defence in substance was that the defendants had a two-fold interest in the land, namely, an interest as tenure-holders, and an interest as occupancy raiyats; that what the plaintiffs purchased in 1893 constituted their interest as tenure-holders and that accordingly, they were entitled to remain in possession by virtue of their occupancy right. The defendants further pleaded that the suit was barred by limitation under Article 138 of the Schedule to the Indian Limitation Act, inasmuch as the suit had not been instituted within 18 years from the date when the sale became absolute. The Subordinate Judge has overruled[^] these objections and has made a decree in favour of the plaintiffs.

7. As regards the first point, the Subordinate Judge has found that the defendants did not keep alive their original occupancy right distinct and separate from their right as tenure holders and that consequently they were not entitled to fall back upon their occupancy right on the allegation that the plaintiffs had purchased nothing beyond their right as tenure-holders. This view is obviously sound. No question of merger by operation of law arises here, and we are not called upon to discuss whether, against the will of the defendants, the subordinate had merged in the superior interest. The question really is, what has been the conduct of the defendants; have they kept alive and distinct the two interests which they possessed. From the circumstances set out in the judgment of the Subordinate Judge there can be no room for doubt as to the correctness of his conclusion that the defendants had not kept distinct the occupancy right from their right as tenure-holders. The defendants created an under-tenure on the property; if their occupancy right had been kept alive, they would have become tenants under the under-tenure-holder and would have been under an obligation to pay him rent; this they admittedly never did; their conduct is consistent only with the hypothesis that they treated the occupancy right as no longer existent. They cannot now turn round and set up the occupancy right to the detriment of the execution-

purchaser.

8. As regards the second point, the Subordinate Judge has assigned two reasons in support of his view that the suit is not barred by limitation, namely, first, that as the land remained actually vacant for ten years from 1895 to 1905, during pendency of litigation by the judgment-debtors to set aside the sale, time runs from 1905, and secondly, that, in any view, the plaintiffs are entitled, under Section 16 of the Limitation Act, to a deduction of the time during which the legality of the sale was under investigation in Court. In my opinion, each of these reasons is well founded on principle. It transpires that immediately after the execution sale, the defendants took proceedings to set it aside under Section 311 of the Civil Procedure Code, but were unsuccessful. They then instituted a suit in 1895 to set aside the decree on the ground of fraud and to have the sale cancelled as held pursuant to a fraudulent decree. The proceedings in that suit, which are reported as *Pran Nath Roy v. Mohesh Chandra Moitra*¹ *Radha Raman Shaha v. Pran Nath Roy*² *Khagendra Nath Mahata v. Pran Nath Roy*³ terminated on the 27th June 1905, when it was dismissed by the Judicial Committee. During these ten years, from 1895 to 1905, the land was unoccupied, and the plaintiffs could not have brought a suit for ejectment against the defendants; in the eye of the law, the possession vested in the plaintiffs, the rightful owners, as soon as the occupation of the defendants terminated in fact [*Secretary of State v. Krishnamoni Gupta*⁴]. Consequently, the dispossession, which affords the plaintiffs cause of action for this suit, dates back only to 1905, when the defendants took possession. This view is supported by high authority. Lord Macnaghten, in the case of *Trustee and Agency Company v. Short*⁵ quoted with approval the statement of Baron Parke in *Smith v. Lloyd*⁶ and Blackburne, C.J., in *McDonnell v. McKinty* 10 Ir. 514, that in order to bring a case within the Statute of Limitation, "there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute." The first reason assigned by the Subordinate Judge is consequently well-founded. The second ground is equally unassailable. Section 16 provides that: In-computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a proceeding to set aside the sale shall be excluded." We have been invited by the appellants to put a narrow construction upon the term "proceeding" and to limit it to an application to set aside the sale; but there is no good reason why the term "proceeding" should be so restricted. The term "application" occurs in other parts of the Limitation Act; if the Legislature had intended that Section 16 should be restricted to cases where an application had been made to set aside a sale, the word "application" might have been used instead of the term "proceeding." In my opinion, the word "proceeding" is comprehensive enough to include a suit as well as an application, and the obvious intention of the Legislature was to allow an exclusion of the period during which the validity of the sale is in controversy, whether the sale is impeached by a suit or by an application. The plea of limitation thus fails.

Cases Referred.

124 C. 546 : 12 Ind. Dec. (N.S.) 1032

228 C. 475 : 5 C.W.N. 757

329 C. 395 : 29 I.A. 99 : 6 C.W.N. 473 : 4 Bom. L.R. 363 : 8 Sar. P.C.J. 266

429 C. 518 : 6 C.W.N. 617 : 4 Bom. L.R. 537 : 29 I.A. 104 : 8 Sav. P.C.J. 260

5(1888) 13 A.C. 793 at p. 799 : 58 L.J. P.C. 4 : 59 L.T. 677 : 37 W.R. 433 : 53 J.P. 132

6(1854) 9 Exch. 562 : 2 C.L.R. 100 : 23 L.J. Ex. 194 : 2 W.R. 271 : 22 L.T. (O.S.) 289 : 96 R.R. 837 : 156 E.R. 240