APPELLATE CIVIL.

Before B. B. Ghose and S. K. Ghose JJ.

JOGENDRANATH SEN

v.

NIRADASUNDARI DASYA.*

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Aug. 26.

Limitation—Suits for khâs *possession by* râiyats, *one of the defendants being co-sharer landlord—Whether special limitation of two years applicable—Retention of defendants in possession in proceedings under section 145, Code of Criminal Procedure—Effect of magistrate's order regarding fixing of date of plaintiff's dispossession—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3.*

After the termination of proceedings, under section 145 of the Code of Criminal Procedure, instituted on 12th August, 1920, wherein, by the final order passed on 14th April, 1921, the magistrate retained the defendants in possession of the plots, the plaintiffs sued, on the 9th and 11th April, 1923, for recovery of possession of them. The defendants claimed title as purchasers of interests of lessee of a person other than the persons, through whom the plaintiffs derived title, but one of the defendants was a co-sharer landlord of the *mouzâ* within which the plots were proved to be situated.

Held that the special limitation prescribed in Schedule III, Article 3 of the Bengal Tenancy Act, 1885, will apply, notwithstanding that such defendant does not put in appearance and does not plead the special limitation. The theory of a landlord dispossessing a *râiyat* or an under-*râiyat* as such, in order to bring the special law of limitation into operation, is now an exploded one.

Satish Chandra Banerji v. *Hasemali Kazi* (1) referred to.

Held, also, that the order of the magistrate retaining the defendants in possession of the plots in dispute is admissible as evidence of the fact of possession by the defendants.

Dinomoni Chowdhrani v. *Brojo Mohini Chowdhrani* (2) relied on.

Held, further, that, as between the parties to the proceedings, such an order is evidence as regards possession before two months of the date of the preliminary order, and hence, in this case, the plaintiffs had not succeeded in establishing that their dispossession was within two years before the suits.

*Appeals from Appellate Decree, Nos. 1753 to 1755 of 1926, against the decree of N. R. Guha, Additional District Judge of Jessore, dated March 29, 1926, confirming the decree of Sarada Prosad Dutta, Munsif of Narail, dated June 23, 1924.

(1) (1927) I. L. R. 54 Calc. 450. (2) (1901) I. L. R. 29 Calc. 187; L. R. 29 I. A. 24.

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The contesting defendants had pleaded in the written statement that they were co-sharer landlords of the village and there was no evidence on the plaintiffs' side directly denying that fact. In the record-of-rights, while the defendants' names were so entered, it was stated that the plaintiffs were liable to pay rent to certain other persons and nothing was stated as to their liability to pay rent to the contesting defendants. It was found by the trial court that the defendant No. 4 was a co-sharer *mâlik* of the *mouzâ*, that the contesting defendants were recorded as such and the defendant No. 4 was the *benâmdar* of the contesting defendants.

Held that the contesting defendants must be considered as co-sharer landlords with regard to the *mouzâ* within which the plaintiffs claim to hold as *râiyats* or under-*râiyats*.

Annada Sundari Chandalini v. *Kebulram Changa* (1) and *Nabin Chandra Saha* v. *Sheikh Wajid* (2) referred to.

SECOND APPEALS by defendants Nos. 1 to 3.

The facts and arguments of both sides appear fully in the judgment.

Mr. Brajalal Chakravarti and *Mr. Radhikaranjan Guha*, for the appellants.

Mr. Gunadacharan Sen and *Mr. Pashupati Ghosh*, for the respondents.

B. B. GHOSE J. These appeals are by the defendants Nos. 1 to 3 in the suits which have been decreed by the Additional District Judge, affirming the decision of the Munsif. In all these suits, the plaintiffs claimed as under-*râiyats* of a certain holding in a village called Chorekhali. The lands in all the suits comprise the *chittâ* survey plots Nos. 3, 4 and 5. The plaintiffs alleged that they were in possession of the lands through their *bargâdârs*, and that in the month of Srâban, 1327 B. S., one of the plaintiffs Rameshchandra Das Gupta, in one of the suits, raised a hut on plots Nos. 3 and 4, which led to the institution of proceedings under section 145, Criminal Procedure Code, between the plaintiffs and defendants Nos. 1 to 4, in which an order was made in favour of the defendants. The plaintiffs, thereupon, were prevented from going upon the lands and the suits were, therefore, brought for

(1) (1903) 7 C. W. N. 542. (2) (1919) 24 C. W. N. 382.

recovery of *khas* possession against the defendants. The defendant No. 4 did not put in appearance. Defendants Nos. 1 to 3 pleaded that the lands in question belonged to one Judisthir Nashkar and not to the person from whom the plaintiffs claimed to have purchased, that those defendants purchased the interest of Judisthir and had been in possession of the lands in question for a considerable number of years, much beyond 12 years. Several issues were raised in the court below and one of the issues was whether the suits were barred by special law of limitation under Article 3, Schedule III of the Bengal Tenancy Act. The defendants Nos. 1 to 3 claimed to be co-sharer landlords of *mouzâ* Chorekhali. In paragraph 15 of the written statement they stated that fact. In other paragraphs following (16 and 17) of the written statement, these defendants said that they were also the co-sharer landlords of the neighbouring *mouzâ* Bardiahat, within which there was a *mirâsh* tenure and that their vendor Judisthir used to hold these lands under that *mouzâ*. Both the courts below have found that the lands are not within *mouzâ* Bardiahat, but within Chorekhali, and that the persons from whom the plaintiffs professed to have derived their title were *râiyats* on the lands. Both the courts have also found that the plaintiffs had proved that they were in possession within 12 years before the suits. Mainly on all these findings, the suits were decreed. Proceedings under section 145, Criminal Procedure Code, were started on the 12th August, 1920, and the final order of the magistrate, retaining the defendants in possession of the lands in suits, was made on the 14th April, 1921. The suits, out of which these appeals have arisen, were instituted between 9th and 11th of April, 1923. The question that has been pressed before us on behalf of the appellants is that the plaintiffs' suits were barred by the special law of limitation under the Bengal Tenancy Act. The learned Additional District Judge rejected this contention of the defendants by the

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following observations: "The defendant-appellant "claimed title to the land not as co-sharer *mâliks*, "but as purchaser of a lease of Judisthir's holding, "and he is, therefore, not in a position to raise any "question of transferability:" and lower down he observes, "As regards special limitation, I have "already expressed the view that the possession of the "defendant was not in the capacity of a co-sharer "landlord and there can consequently be no question "of special limitation." Babu Brajalal, on behalf of the appellants, contended that the view of the Additional District Judge, in affirming the Munsif's judgment, that, in order to bring into play the special limitation, as provided in the Bengal Tenancy Act, it is necessary to establish that the defendants dispossessed the plaintiffs in the capacity of co-sharer landlords, is erroneous. Now this theory of the landlord dispossessing a *râiyat* or an under-*râiyat* as such, in order to bring the special law of limitation under the Bengal Tenancy Act into operation, is an exploded one. It is not necessary to refer to the long line of cases dealing with this point, as it is sufficient to draw the attention of the learned District Judge to the case of *Satish Chandra Banerji* v. *Hasemali Kazi* (1); and, many years previous to this, Sir Lawrence Jenkins took exception to the expression used in some of the cases about the dispossession by a landlord "as such." The view of the learned Additional District Judge being obviously erroneous, the question then arises whether the plaintiffs' suits were barred under the special law of limitation. In the view taken by the learned Additional District Judge that the rule of special limitation did not apply, he did not come to any finding on the question. The Munsif also came to no finding, on the special law of limitation, as he held that this was not a case of dispossession by a landlord. He expressed his view in the following words: "Defendant No. 4 is a co-sharer *mâlik* of Chorekhali. "He has not entered appearance in this suit though

(1) (1927) I. L. R. 54 Calc. 450.

"duly summoned. He does not come forward and "plead special limitation. Only the defendants Nos. "1 to 3 have entered appearance. They are the "*de facto mâliks* of the Bardiahat. Defendant No. 4 "is very likely their *benâmdâr*. So I hold that the "suits are not barred by special limitation." It is contended by the learned advocate for the appellants, that this finding means that defendant No. 4 was the *benâmdâr* of defendants Nos. 1 to 3, with regard to both the properties. On the other hand, it is contended by the learned advocate for the respondents, that the Munsif meant that defendant No. 4 was a *mâlik* of Chorekhali, but he was the *benâmdâr* of defendants Nos. 1 to 3 with regard to Bardiahat. With regard to this question, I will make my observation later on.

The important question that we have to decide, having regard to the fact that no finding has been arrived at by either of the courts below as to the possession of the plaintiffs of the lands in dispute within 2 years of the suits, is whether such possession has been established or not. The learned advocate for the respondents asks for a remand; but as these cases have been pending here from 1926, we think it advisable and, in the interest of the parties, to deal with the matter under section 103, Civil Procedure Code, upon the evidence, as the fact has not been determined by the lower appellate Court, as to whether the plaintiffs were in possession within 2 years of the suits or not. On that account, after the first day of hearing, we allowed time to the learned advocate for the respondents to go through the evidence and place the evidence before us on this point. As I have already pointed out, the final order in the case, under section 145, Code of Criminal Procedure, was made on the 14th April, 1921. There is no question that the plaintiffs were not in possession from that date; and the suits, having been brought within 5 days before the expiry of 2 years from that date, the question of possession becomes very important. There is no direct evidence of possession

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on these 5 days. But it is contended, on behalf of the plaintiffs respondents, that, as the plaintiffs had paid rent to their landlords up to Pous 1327 B. S., that is, a few months before Chait, 1327, possession of the plaintiffs should be presumed to continue till the end of Chait, 1327 B. S., that is, within the 13th or 14th of April, 1921. Now, the difficulty in the plaintiffs' way is the order of the magistrate retaining the defendants in possession of the lands in dispute. As was observed by their Lordships of the Privy Council in the case of *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (1), the order of the magistrate is in the nature of a police order admissible as evidence of the fact as to who was declared entitled to retain possession; and these orders are admissible against all persons when the fact of possession on the date of the order has to be ascertained. But, as between the parties to the proceedings, one may go further and say that such an order is admissible as evidence as regards possession with reference to section 145 of the Criminal Procedure Code, because, if there had been any dispossession within 2 months of the date of the order, when the proceedings were started, the magistrate would have been bound to make over possession to the person who had been so dispossessed. In this case the proceedings were started on the 12th August, 1920, and it would require very strong evidence to show that, although the order of the magistrate was made retaining the defendants in possession on the 14th April, 1921, the meaning of which was that they were in possession on the date of the order first made, that is, 12th August, 1920, still the plaintiffs were in possession up to April, 1921. There is no evidence to that effect. On the other hand, one of the plaintiffs, Mahimachandra Das gives evidence that "*Go-hât* is being held on our "lands (disputed lands) since the last 4 years." The *go-hât* was being held by the defendants and this plaintiff gave evidence on the 15th May, 1924. Therefore, the dispossession by the defendants will be

(1) (1901) I. L. R. 29 Calc. 187; L. R. 29 I. A. 24.

carried back to some time in 1920 and that would be quite in keeping with the order of the magistrate passed in April, 1921, on the preliminary order made in August, 1920. It is not necessary to deal with the evidence of the rest of the witnesses for the plaintiffs as regards the question of possession, because all of them say that the dispossession of the plaintiffs was on account of the order of the magistrate. That can hardly be right. The rest of the witnesses who gave evidence of possession stated the dates of possession in a very vague way. The only tangible evidence is that one of their under-*râiyats* grew crops in 1326 B. S., and in Srâban, 1327, on account of the building of a hut by the plaintiffs, the criminal proceedings were instituted. In this state of evidence it must be held that the plaintiffs have not succeeded in showing that their dispossession was within two years before the suits. This finding ought to put an end to the plaintiffs' case.

But the learned advocate for the respondents, Mr. Sen, contends that as a matter of fact the defendants are not co-sharer *mâliks*. It is not contended that the special rule of limitation would not apply, if the defendants are co-sharer landlords. This matter has been settled by a long series of cases. It is only necessary to refer to *Annada Sundari Chandalini* v. *Kebulram Changa* (1) and *Nabin Chandra Saha* v. *Sheikh Wajid* (2). The first objection that the appellants' advocate raises is that this question was not open to the respondents to argue, because the Additional District Judge has taken it for granted that the defendant-appellants before him were co-sharer landlords, but they had not dispossessed the plaintiffs in their capacity as co-sharers. This finding, he seemed to contend, concluded the plaintiffs' case. On the other hand, the argument on behalf of the respondents amounted to this, that although the learned Additional District Judge took the fact for granted that the defendants were co-sharer landlords, he did not come to any definite finding on the question, and

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that, having regard to the finding of the Munsif, it is still open to him to argue that the defendants Nos. 1 to 3 were not co-sharer landlords of *mouzâ* Chorekhali. We have allowed the plaintiffs to argue the matter having regard to the ambiguous findings of both the courts below. The first question that must arise in this connection is that the defendants pleaded in paragraph 15 of their written statement that they were co-sharer landlords of Chorekhali and upon that apparently the issue as regards special limitation was raised. There is no evidence on behalf of the plaintiffs directly denying the fact that the defendants Nos. 1 to 3 are the landlords of Chorekhali. As a matter of fact, in the record-of-rights of *mouzâ* Chorekhali, the names of defendants Nos. 1 to 3 appear as co-sharer landlords. But the plaintiffs argue that in the record-of-rights the plaintiffs were recorded as being liable to pay rent only to the *sarkârs* and nothing has been stated with regard to their being liable to pay rent to defendants Nos. 1 to 3. It may be that by some arrangement between the co-sharer landlords, the rent due from the plaintiffs used to be paid only to the *sarkârs*. It is found by the Munsif that defendant No. 4 is a co-sharer *mâlik* of Chorekhali; and he also finds that defendants Nos. 1 to 3 are also recorded as co-sharer landlords of Chorekhali; and when the Munsif says that defendant No. 4 is very likely the *benâmdâr* of defendants Nos. 1 to 3, it seems he meant that defendant No. 4 was the *benâmdâr* of the other defendants both with regard to Chorekhali as well as Bardiahat. Therefore, defendants Nos. 1 to 3 must be considered as the co-sharer landlords with regard to the *mouzâ*, within which the plaintiffs claim to hold as *râiyats* or under-*râiyats*. Further, even if defendant No. 4 was a co-sharer landlord of Chorekhali and he was declared to have been in possession of the lands by the magistrate's order in April, 1921, and the plaintiffs sought to recover possession as against him also, no matter whether he put in appearance or not

or whether he pleaded special limitation or not, the special limitation under the Bengal Tenancy Act would apply to the suits. It has been held repeatedly that where a *râiyat* or an under-*râiyat* sues for recovery of possession and when the dispossession is by the landlord, he must come within 2 years. Here there is no question that the plaintiffs plead that there was dispossession by all the 4 defendants and seek relief against all of them; it does not matter whether all the defendants or any one of them plead limitation or not, special limitation must apply to these cases.

Under the circumstances, the appeals must be allowed. The judgments and decrees of the courts below are set aside and the plaintiffs' suits dismissed. The appellants are entitled to their costs in all the Courts.

S. K. GHOSE J. I agree.

Appeals allowed.

R. K. C.