

LETTERS PATENT APPEAL.

Before Guha and Lodge JJ.

GOSTHABIHARI PARAMANIK

v.

AMIYAKUMAR DAS.*

1935

July 22, 23, 30.

Limitation—Dispossession—Transferable occupancy holding—Mortgage by rāiyat—Auction-purchase of holding by landlord—Mortgagee's right to possession, if barred by continued possession of landlord—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3.

A transferable occupancy holding subject to a mortgage to the plaintiff was purchased and taken possession of by a co-sharer landlord in 1924 in execution of a money decree against the *rāiyat*. In 1927 the holding was sold to the plaintiff in execution of the mortgage decree. In a suit against the landlord for possession,

held that there was no dispossession within the meaning of Article 3, Schedule III of the Bengal Tenancy Act and the suit was not barred by limitation.

Mohim Chandra Basak v. Kanailal Saha (1) distinguished.

Kamaldhari Thakur v. Rameshur Singh (2) and *Srish Chandra Bhaduri v. Brojobashi Pramanik* (3) relied on.

LETTERS PATENT APPEAL by the plaintiff.

A transferable occupancy holding was purchased in 1897 by Rajani at a rent sale. He sold it to Jogendra and eventually it was acquired by purchase by one Radhabinode in 1908. The landlords, however, had on the records Rajani as their tenant. On the 17th November, 1921, Radhabinode executed a mortgage of his holding in favour of the plaintiff. In 1922 Jadunath, a co-sharer landlord, obtained a money decree against Rajani and purchased the property in suit in March, 1924, in execution of the decree. He took delivery of possession in June, 1924, and has been in possession since then keeping out

*Letters Patent Appeals, Nos. 3 to 5 of 1935, in Appeals from Appellate Decrees, Nos. 187 to 189 of 1932.

(1) (1928) 33 C. W. N. 1085.

(2) (1913) 17 C. W. N. 817.

(3) (1928) 48 C. L. J. 554.

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Radhabinode. In 1926, the plaintiff sued on his mortgage and purchased the holding in 1927 in execution of his decree. He failed to obtain actual possession and filed the present suit in August, 1929, against Jadunath for possession.

Bijankumar Mukherji and Gopendranath Das for the appellants.

Brajlal Chakrabarti and Kanaidhan Datta for the respondent.

Cur. adv. vult.

The judgment for the Court was as follows:—

The question for consideration in these appeals is whether the suits giving rise to the same were barred by the special law of limitation as prescribed by Article 3, Schedule III of the Bengal Tenancy Act for a suit for recovery of possession of land claimed by the plaintiff as a *râiyat* or an *under-râiyat*,—the period of limitation being two years from the date of dispossession.

The facts of the case on which the rule of limitation had to be applied were these: The plaintiffs were the mortgagee-purchasers at a sale in execution of decrees on mortgages executed by a *râiyat* who, on the finding arrived at by the trial court and not reversed by the District Judge on appeal, had transferable occupancy right in the holding mortgaged to the plaintiffs or their predecessors-in-title. The mortgagees purchased the holding at the sale held in execution of these decrees on mortgage, and took delivery of possession through court on the 20th August, 1927. At the time of their attempting to take actual possession, they were resisted by the defendants; and the title set up by the defendant was that he, as a co-sharer landlord, had purchased the holding at a sale held in execution of a money decree obtained by him against the tenant. The defendant had as such purchaser taken delivery of possession

of the holding on the 25th June, 1924. The trial court and the District Judge in the court of appeal below came to the conclusion, for reasons given by them, that the suits were not barred by limitation, and agreed in passing decrees in favour of the plaintiffs declaring their title and entitling them to get *khâs* possession of the lands in suit. The decision and decrees passed by the courts aforesaid were reversed by our learned brother Mr. Justice Roopendra Coomar Mitter on Second Appeal to this Court, by the defendant in the suits.

It appears that Mr. Justice Mitter has practically based his judgment on a decision of this Court in the case of *Mohim Chandra Basak v. Kanailal Saha* (1), which case, according to the learned Judge, was on all fours with the case before him, and the decision in that case stated by him was an express decision in favour of the defendants appellants before the learned Judge. In our judgment, however, *Mohim Chandra Basak's* case (1) cannot be treated as on all fours with the present case, in view of the position clearly indicated in the judgment on which so much stress was laid, that the plaintiff in that case was the mortgagee of a non-occupancy right. In the case before us, on the finding of the trial court, not reversed, and which according to the trend of the judgment of the District Judge must be taken to have been accepted by him, the plaintiffs were the mortgagees of a transferable occupancy holding. Apart from the position indicated above, we are unable to agree with the view expressed by the learned Judges, which appears to have been accepted by Mr. Justice Mitter in his judgment, that a rule of general application which must be taken to be well settled, that the statute of limitation would not run against a mortgagee purchaser at a sale in execution of a decree against the mortgagor, until the ownership in and beneficial title to the land vested in him for the first time under the decree and sale on his

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mortgage, could be completely ignored in applying Article 3, Schedule III of the Bengal Tenancy Act. We are also unable to agree in the view that what was intended by providing for a shorter period of limitation as mentioned in the above provisions contained in the Bengal Tenancy Act was that the landlord could altogether ignore the rights accruing by a transfer of a tenancy that was transferable by way of mortgage, and defeat the rights of such a mortgagee in view of a special provision as to limitation of suits of a particular nature. The provision as to the special period of limitation must, in our judgment, be construed as other statutes prescribing limitation of suits and actions are construed, strictly against the party seeking to apply the same. We are not prepared to attribute such an intention to the legislature as has been attributed to it by the learned Judges deciding *Mohim Chandra Basak's* case (1) and Mr. Justice Mitter in the case before us, which completely does away with rights arising upon mortgages, the validity of which could not be questioned either by the landlord or the tenant.

The facts of the cases before us lead to the irresistible conclusion that the special provisions as to limitation of suits contained in Article 3, Schedule III of the Bengal Tenancy Act are not applicable to them.

In the first place, the suits were not suits for recovery of possession of land claimed by the plaintiff as *râiyats*, and there was no dispossession of the plaintiffs as was contemplated by Article 3, Schedule III of the Bengal Tenancy Act. It may also be mentioned in this connection that when the defendant took delivery of possession of the lands in suit in the year 1924 it was not the plaintiffs who were dispossessed; the plaintiffs had not at that time even a right in them to be in possession.

In the next place, Article 3, Schedule III of the Bengal Tenancy Act can be held to apply where

(1) (1928) 33 C. W. N. 1085.

there was dispossession by the landlord. There was no possession by the plaintiffs; and there could be no dispossession of the plaintiffs by the landlord. When, as in the cases before us, the plaintiffs had never been in possession, and they never had the right to possess before 1927, the fact that the defendant had been in possession did not and could not amount to dispossession within the meaning of Article 3, Schedule III of the Bengal Tenancy Act: see in this connection *Srish Chandra Bhaduri v. Brojobashi Pramanik* (1).

Furthermore, inspite of some diversity of judicial opinion on the subject, we are inclined to hold, in consonance with decision of this Court, of which the decision in the case of *Kamaldhari Thakur v. Rameshur Singh* (2) may be said to be typical, that dispossession effected by the act of delivery of possession by the court is not dispossession by the landlord within the meaning of Article 3, Schedule III of the Bengal Tenancy Act. We may add that the reasons given by N. R. Chatterjea J., in *Kamaldhari Thakur's* case (2) mentioned above, apply with full force in the case before us,—in the case of one of the co-sharer landlords obtaining possession of lands appertaining to a tenancy as auction-purchaser at a sale in execution of a money decree.

In view of the conclusions arrived at by us, as indicated above, the decision of Mr. Justice Mitter cannot be upheld. The appeals are allowed, the decision and decrees passed by Mr. Justice Mitter on the 17th August, 1934, dismissing the plaintiffs' suits giving rise to these appeals, are set aside, and the decrees of the trial court, passed on the 29th May, 1930, in favour of the plaintiffs-appellants are restored, with costs throughout.

Appeals allowed.

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