

APPELLATE CIVIL.

Before Mukherjea and Roxburgh J.J.

BAJ ROGA KHATUN

v.

PROVINCE OF BENGAL.*

1939

May 18, 19, 24.

Landlord and Tenant—*Limitation, plea where necessary—Certificate proceeding—Representation of certificate-debtors—Bengal Tenancy Act (VIII of 1885), ss. 146A, 184, sub-s. (1); Sch. III—Code of Civil Procedure (Act V of 1908), O. VIII, r. 2—Bengal Public Demands Recovery Act (Ben. III of 1913).*

Section 184, sub-s. (1), of the Bengal Tenancy Act, which exempts the defendant from pleading limitation, in respect of suits, appeals and applications specified in Sch. III annexed to the Bengal Tenancy Act, applies only to cases where the question of limitation is patent and appears on the face of the case itself. In all other cases, the question of limitation cannot be agitated for the first time in appeal unless the defendant has raised the plea of limitation as required by O. VIII, r. 2, of the Code of Civil Procedure, 1908.

Though the provisions of s. 146A of the Bengal Tenancy Act, relating to the representation of the entire body of co-sharer tenants, do not in terms apply to certificate proceedings under the Bengal Public Demands Recovery Act, 1913, yet the general principles of representation apply to such proceedings.

APPEAL FROM APPELLATE DECREE preferred by the plaintiffs, in a suit for possession on the declaration of plaintiffs' title.

The material facts of the case appear from the judgment.

Jitendra Kumar Sen Gupta for the appellant. The question of limitation was for the first time raised in the lower appellate Court. It depends on investigation of facts and, therefore, ought not to have been allowed to be raised at the appellate stage. It ought to have been raised in the written statement under O. VIII, r. 2, of the Code of Civil Procedure. *Kedar Nath Mondal v. Mohesh Chandra Khan* (1).

*Appeal from Appellate Decree, No. 1631 of 1937, against the decree of S. K. Sen, District Judge of Noakhali, dated Aug. 17, 1937, affirming the decree of Bagala Prasanna Basu, Subordinate Judge of Noakhali, dated Mar. 16, 1937.

Section 146A, Bengal Tenancy Act, speaks of suits and decrees for rent and has no application to certificates under the Bengal Public Demands Recovery Act. No doubt, s. 158A of the Bengal Tenancy Act, now repealed by the Bengal Tenancy (Amendment) Act (Ben. VI of 1938), provided that a tenure or holding might pass in execution of a certificate for arrears of rent: but that section, though applicable to the present case, did not provide that s. 146A of the Bengal Tenancy Act applied to certificates for arrears of rent. The doctrine of representation does not apply to certificate proceedings. *Raja Koer v. Ganga Singh* (1); *Ghanshyam Das v. Ragho Singh* (2).

1939
Baj Roga
Khatun
 v.
Province of
Bengal.

The Assistant Government Pleader, Ramaprasad Mukhopadhyaya, for the respondent. It is not necessary that a point of limitation should be specifically pleaded by the defendant. If the Court is satisfied on the facts found that a case is barred by limitation, general or special, then, under s. 184, sub-s. (1), of the Bengal Tenancy Act, it is the duty of the Court to dismiss the case on the ground of limitation. The plaintiffs in this case do not give in the plaint any specific date of dispossession, but the dispossession is admitted. They only say that in a particular month of a year the dispossession took place and if the admitted dispossession was during the latter part of that particular month then the suit would be barred by limitation. Therefore, I submit that the plaintiff-appellants ought to satisfy the Court about the actual date of dispossession. I submit that s. 146A of the Bengal Tenancy Act applies to certificate-proceedings. I rely on s. 158AAA of the Bengal Tenancy Act and s. 20(3) of the Bengal Public Demands Recovery Act and also on the fact that Chap. XIV of the Bengal Tenancy Act also applies to certificates for arrears of rent.

(1) (1909) 13 C. W. N. 750.

(2) (1930) I. L. R. 10 Pat. 234.

1939
Baj Roga
Khatun
 v.
 Province of
 Bengal.

Sen Gupta, in reply. Section 20(3) read with s. 20(1) of the Bengal Public Demands Recovery Act makes it clear that property other than that of certificate-debtor cannot pass.

Cur. adv. vult.

ROXBURGH J. This appeal arises out of a suit by the plaintiffs for declaration of their *râiyati* right in one-third share of the suit-land and for recovery of possession. The suit-land formerly belonged to one Hakim Uddin Patwari, who died in Pous, 1331 B.S., leaving six daughters, one son and a widow. Three of the daughters are plaintiffs and the other three daughters and the son and the widow are *pro forma* defendants Nos. 5 to 9.

The suit was contested by the Secretary of State, defendant No. 1, who had purchased the holding of Hakim Uddin Patwari in a certificate-sale in respect of arrears of rent for 1937-1938 B.S. The plaintiffs claim that as they were not certificate-debtors in those proceedings their interests were not affected by the certificate-sale, and they also claim to have been dispossessed of the holding in the latter part of 1940 B.S. by the Secretary of State. The Secretary of State's case is that the three plaintiffs were represented by *pro forma* defendant No. 6, Selim Miya, son of Hakim Uddin Patwari, and that their interest passed in the sale.

In the trial Court, the plaintiffs claimed that they had separate possession of the suit-land and had themselves paid rent. The trial Court found that in fact they had no separate possession and that the rent had been paid by the son, Selim Miya. The trial Court, therefore, found that the plaintiffs had been represented by Selim Miya and dismissed their suit. In the lower appellate Court the question of representation appears to have been argued on the basis of s. 146A of the Bengal Tenancy Act and that Court also found that the plaintiffs had been represented by Selim Miya within the terms of sub-cl. (ii) of sub-s.

(3) of s. 146A. The lower appellate Court also held that the plaintiffs' claim was barred under a special law of limitation. In this Court, two points are urged, first, that the lower appellate Court should not have allowed the question of limitation to be canvassed before it, and, secondly, that s. 146A of the Bengal Tenancy Act does not apply to certificate-proceedings.

As regards the question of limitation, we think the lower appellate Court was in error. The learned Judge discussed ss. 3 and 29 of the Limitation Act and O. VIII, r. 2 of the Code of Civil Procedure. It is to be noted, however, that the case is really governed by s. 184 of the Bengal Tenancy Act, although this fact in itself appears to make no difference to the decision.

Section 184, sub-s. (1), provides that every suit instituted after the period of limitation provided in schedule III shall be dismissed although limitation has not been pleaded. We are of opinion that this does not overrule the provisions of O. VIII, r. 2, which require that the defendant must raise by his pleading all matters which raise issues of fact not arising out of the plaint, as for instance, limitation.

Section 184 would require a suit to be dismissed if in fact it has been filed after the period of limitation and would apply even in an *ex parte* case if the facts appeared, but it is clearly evident from the judgment of the lower appellate Court itself that, in this case, the facts were not clear and undisputed and indeed it discussed the evidence at some length in order to arrive at a conclusion that the suit must necessarily have been filed, at any rate, a few days after the period of limitation had expired, and it uses for the purpose some of the evidence that appeared in the case. We do not think this was the proper way of treating the matter and we consider this was clearly a case in which the question of limitation should not have been allowed to be raised, as the necessary facts had not been pleaded and so attention had not been drawn to them at the time of the trial.

1939

Baj Roy
Khatun

v.

Province of
Bengal.

Rooburgh J.

1939

*Baj Boga
Khatun
v.
Province of
Bengal.*
Roazburgh J.

Coming next to the question of representation, it is to be noted that the trial Court did not rely on the specific terms of s. 146A of the Bengal Tenancy Act. This section was enacted in the Amendment Act of 1928 and in fact substantially codified the previous law on the subject, at any rate as regards decrees. We think, however, for reasons that will appear hereafter, that it must be conceded that it cannot be held to apply in terms to certificate-proceedings and that if it is desired by the legislature that it should so apply, some specific reference to the Bengal Public Demands Recovery Act, 1913, is necessary in that section.

The decision on the question turns on the interpretation of s. 20 of the Bengal Public Demands Recovery Act, 1913. Sub-section (1) of that section provides :—

Where property is sold in execution of a certificate, there shall vest in the purchaser merely the right, title and interest of the certificate-debtor at the time of the sale, even though the property itself be specified.

We have then the terms of sub-s. (3), which runs as follows :—

Notwithstanding anything contained in sub-s. (1), in areas in which Chap. XIV of the Bengal Tenancy Act, 1885, is in force, where a tenure or holding is sold in execution of a certificate for arrears of rent due in respect thereof, the tenure or holding shall, subject to the provisions of s. 22 of that Act, pass to the purchaser, subject to the interest defined in that Chapter as "protected interests" but with power to annul the interests defined in that chapter as "incumbrances."

Mr. Sen Gupta who argued the case for the appellants appeared to urge that the meaning of the words "where the holding is sold in execution of a "certificate" must be taken to be equivalent to "where "all the tenants of a holding are certificate-debtors, "and hence all of their interests are sold", but we think it must be taken as meaning "where the "interests of all the tenants of a holding are bound "by the sale and sold in execution of a certificate." The real intention of sub-cl. (3) is evidently to make

clear that, just as in a sale in execution of a rent-decree more than the interests of the tenants themselves shall pass, namely, the right to annul incumbrances under Chap. XIV of the Bengal Tenancy Act, so also in the case of a certificate-sale a similar right shall pass. In support of his contention, Mr. Sen Gupta referred to the case of *Raja Koer v. Ganga Singh* (1), which has been relied on in *Ghanshyam Das v. Ragho Singh* (2), but the former case was decided before the Act of 1913, and on the ground that a certificate-sale did not contemplate enforcement of a security. The provisions of s. 20(3) now clearly provide for such enforcement, and it is in cases of such a kind that the question of representation becomes of importance, for the interests of third parties are vitally affected, and the decision as to such an interest may turn on a question whether some obscure heir or co-sharer tenant who has not interested himself in his share has been named as a certificate-debtor in a certificate or was a party to the decree for arrears of rent. We must suppose that when the legislature gave this extended effect to sales in execution of certain certificates for rent it intended to make it as effective as in the case of a sale in execution of a decree for rent, and legislated on the assumption that the principle of representation then recognised in respect of rent-decrees without statutory provision would also apply in the case of sales in execution of certificates.

Mr. Ramaprasad Mookerjee, appearing for the Secretary of State, pointed out that the phrase "where a tenure or holding is sold in execution of a certificate for arrears of rent due in respect thereof", which appears in s. 20(3) of the Public Demands Recovery Act, appears also in s. 159 of the Bengal Tenancy Act (with the substitution of 'decree' for 'certificate') and that it was inserted in other sections of Chap. XIV of that Act, for example, in ss. 158B, 167(4), 171, 172, by ss. 61 *et seq* of the Public Demands Recovery Act itself. He urges that the phrase should

1939

*Baj Roga
Khatun*
v.
*Province of
Bengal.*

Rozburgh J.

(1) (1909) 13 C. W. N. 740

(2) (1930) I. L. R. 10 Pat. 234.

1938

*Baj Boga**Khatun*

v.

Province of
*Bengal.**Rowburgh J.*

be given the same interpretation throughout. Section 61 of that Act inserted s. 158B into the Bengal Tenancy Act in order to make it clear in what circumstances so far as affected the landlords the holding should pass or not, and a distinction was made in that the holding passed in the case of a decree if it was obtained either by a sole landlord or by the entire body of landlords or by one or more co-sharer landlords who had made all remaining co-sharer's party-defendants to the suit, whereas in the case of a certificate the holding would only pass if the certificate was signed on the requisition of, or in favour of, a sole landlord or of the entire body of landlords. Thus, in the case of certificate-procedure, there was no provision for bringing in co-sharer landlords who were not themselves applying for a certificate, and s. 20(4) of the Public Demands Recovery Act itself points this out. These provisions were amended in 1928, but the same distinction between decree and a certificate was maintained and so far as a certificate was concerned the terms of s. 158AAA were to the same effect as those of section 158B which was repealed. So far as a decree was concerned, some special provision was made so that a co-sharer landlord in certain circumstances might have the advantage of a rent sale in respect of his separate share of the rent. (Chapter XIII A including s. 158AAA has since been repealed by the amendment of 1938).

It will be seen then that the formula "Where a tenure or holding is sold in execution of a decree certificate for arrears due in respect thereof" in s. 159 and other sections in Chap. XIV of the Bengal Tenancy Act has a different meaning according as whether a decree or a certificate is referred to, in the sense that the tenure or holding is "sold" within the meaning of those sections only according as whether the procedure of s. 148A or the terms of s. 158AAA, respectively, are complied with. Similarly, then it

appears that the formula may have a different meaning according as a decree or certificate is referred to in so far as the interests of the tenants are affected. In other words, when the amendment to Bengal Tenancy Act was made by the insertion of s. 146A, by which in the case of sales by execution of decrees it was provided that in certain circumstances the interests of certain persons not actually parties to the suit might be affected, it does not follow that this applied also to certificate-sales in so far as any change was made from the law as it stood at the time when the Bengal Public Demands Recovery Act itself was passed in 1913.

To this extent, therefore, the contention of Mr. Sen Gupta must prevail and we hold that s. 146A does not apply in terms to certificate-sales, but, on the other hand, both Courts have found as a fact that the heirs of Hakim Uddin Patwari possess this holding jointly and that the rent was paid by the son. It would seem that, as was indeed found by the trial Court, apart from the explicit terms of s. 146A the plaintiff daughters were represented and, therefore, their interests were bound by the sale.

The result is that, although the appellants' contention on the point of limitation succeeds, they fail on the question of representation, and this appeal must be dismissed. There will be no order as to costs.

MUKHERJEA J. I agree.

Appeal dismissed.

N. C. C.

1939

*Baj Roga
Khatoon
v.
Province of
Bengal.*

Roxburgh J.