REVISIONAL CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

1926.

Dec., 20, 21.

ANANTA CHARAN PADHAN

v.

NIMAL BAHUBALENDRA.*

Orissa Tenancy Act, 1913 (*Bihar and Orissa Act II of* 1913), *section* 227(3)—*application to set aside sale—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Articles* 166 *and* 181.

An application under section 227(3) of the Orissa Tenancy Act, 1913, to set aside a sale held in execution of a decree, is not governed by Article 166 of the Limitation Act, 1908, which applies to an application

" under the Code of Civil Procedure, 1908, to set aside a sale in execution of a decree ",

but by Article 181 which applies to

" applications for which no period of limitation is provided elsewhere in this schedule (I to the Act) or by section 48 of the Code of Civil Procedure, 1908 ".

Chandrama Rai v. *Maharaja of Dumraon*(1), referred to.

An application under section 227(3) of the Orissa Tenancy Code, or under section 173 of the Bengal Tenancy Act, 1885, cannot be considered to be an application under section 47 of the Code of Civil Procedure.

Haripada Haldar v. *Barada Prasad Ray Chowdhury*(2), dissented from.

Petition by the applicants.

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

L. Mahanty, for the petitioners.

B. K. Ray, for the opposite party.

**Circuit Court, Cuttack.* Civil Revision no. 41 of 1926, from an order of Babu Dayanidhi Das, Collector of Puri, dated the 29th April, 1926, confirming an order of J. Das, Esq., Deputy Collector of Puri, dated the 9th February 1926.

(1) (1917) 38 Ind. Cas. 209. (2) (1924) I. L. R. 51 Cal. 1014.

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KULWANT SAHAY, J.

KULWANT SAHAY, J.—The petitioners allege themselves to be the purchasers of a holding in execution of a mortgage decree. The holding was subsequently sold in execution of a rent-decree. The petitioners presented an application before the Deputy Collector purporting to be one under section 227(3) of the Orissa Tenancy Act for setting aside the sale on the ground that the holding had been purchased by the judgment-debtor himself through another person, viz., the purchaser in execution of the rent-decree. The application has been dismissed by the Deputy Collector on the ground that it was barred by limitation under Article 166 of Schedule I to the Indian Limitation Act. The order of the Deputy Collector has been affirmed on appeal by the Collector.

The only question for determination in this case is whether the application is governed by Article 166 or by Article 181 of the Indian Limitation Act. Article 166 provides for applications under the Code of Civil Procedure (1908) to set aside a sale in execution of a decree and the period of limitation is thirty days from the date of sale. It is contended on behalf of the petitioners that the present application was not an application under the Code of Civil Procedure, but it was an application under the special provisions of the Orissa Tenancy Act and, therefore, Article 166 has no application. He contends that the Article applicable is Article 181 which provides for applications for which no period of limitation is provided elsewhere in the Schedule I to the Indian Limitation Act. It is clear that there is no other provision in the Indian Limitation Act for an application like the one now under consideration. It would therefore follow that the Article applicable would be Article 181. In *Chandrama Rai* v. *Maharaja of Dumraon*(1) the question was considered in relation to the provisions of section 173 of the Bengal Tenancy Act which are similar to the provisions of section 227 of the Orissa Tenancy Act, and it was held that the

(1) (1917) 38 Ind. Cas. 209.

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Article applicable to an application under section 173 of the Bengal Tenancy Act was Article 181 and not Article 166. This decision therefore supports the contention of the learned Vakil for the petitioners. The learned Deputy Collector referred to the decision of the Calcutta High Court in *Haripada Haldar* v. *Barada Prasad Ray Chowdhury*(1). The decision in *Chandrama* v. *Maharaja of Dumraon*(2) was distinguished in that case, and one of the reasons given was that this decision proceeded on a construction of the old Article 166 as it stood before the amendment by the Act of 1908. In this the learned Judges were clearly under a misapprehension. The decision in *Chandrama* v. *Maharaja of Dumraon*(2) was on a construction of Article 166 as it stands at present and not as it stood before the present amendment. Another reason given was, that an application under section 173 of the Bengal Tenancy Act would be an application under section 47 of the Code of Civil Procedure. Section 47 of the Code of Civil Procedure, however, contemplates questions arising between the parties to the suit in which the decree was passed or their representatives. In the present case the petitioners were not the parties to the suit, nor were they the representatives of the parties. Therefore, an application under section 173 of the Bengal Tenancy Act or section 227 of the Orissa Tenancy Act cannot be considered to be an application under section 47 of the Code of Civil Procedure. Sections 238 and 239 of the Orissa Tenancy Act provide for special periods of limitation as regards certain suits, appeals and applications specified in Schedule III of the Act. The present application is not an application specified in Schedule III, and therefore the special rule of limitation laid down in the Orissa Tenancy Act has no application. Consequently the Limitation Act will apply and, on a consideration of the nature of the present application, I am of opinion that the proper Article applicable is Article 181 of Schedule I to the

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Indian Limitation Act. The application was, therefore, not barred by limitation.

The order of the Courts below must be set aside and the case remanded for re-trial on merits. The petitioners are entitled to the costs of this application.

MACPHERSON, J.—I agree.

Order set aside.
Case remanded.

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay, JJ.

GREAT INDIAN PENINSULA RAILWAY COMPANY

v.

FIRM GURDAYAL.*

1926-27.

Dec., 2, 3; Jan., 4.

Railway Company—Risk Note B—part of consignment lost by theft—strike of railway servants, whether amounts to wilful neglect.

Under the terms of Risk Note B a railway company is liable for wilful neglect either on their own part or on the part of their servants. A strike of the railway's employees in breach of their contract is evidence of wilful neglect on the part of such employees.

East Indian Railway Company v. *Goberdhan Das*(1), *Great Indian Peninsula Railway Company* v. *Jitan Ram Nirmal Ram*(2), *Pantland Hick v. Raymond and Reid*(3), *and Sims and Company* v. *Midland Railway Company*(4), referred to.

Such evidence, in the absence of proof that the company took adequate precautions to protect their wagons against the risks created by the strike, is sufficient to establish the liability of the company for the loss of goods consigned under Risk Note B, and stolen from the wagons.

*Appeal from Appellate Decree no. 794 of 1924, from a decision of Babu Krishna Sahay, Additional Subordinate Judge of Bhagalpur, dated the 9th April 1924, reversing a decision of Babu Rabindra Nath Ghosh, Munsif, 1st Court, Bhagalpur, dated the 28th May 1923.

(1) (1926) 7 Pat. L. T. 140.
(2) (1923) I. L. R. 2 Pat. 442.
(3) (1893) L. R. Appeal Cases, 22.
(4) (1913) L. R. K. B. 1.