

ent with the continuance of the holding divested of this right of occupancy which attached to it. The saving clause in the sub-section "that nothing in it shall prejudicially affect the right of any third person," indicates also that the holding would, for some purposes at all events, continue to exist. This view of the construction of the section was taken in an unreported case, appeal from Appellate Decree No. 37, decided by Mr. Justice Norris and Mr. Justice Banerjee on the 30th March 1894; and the same view was also taken in the case of *Sitanath Panda v. Pelaram Tripathi* (1). Although the facts of those cases are not precisely similar to the facts of the present case, the view taken of the provisions of sub-section 2, section 22 of the Bengal Tenancy Act was the same as that which I have expressed. I, therefore, think that the appeal must be dismissed with costs.

TREVELYAN, J.—I entirely agree with Mr. Justice Macpherson.

GHOSE, J.—I am of the same opinion.

HILL, J.—I am also of the same opinion.

GORDON, J.—I also agree.

H. W.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

LALOO SINGH (DEFENDANT) v. PURNA CHANDER BANERJEE AND OTHERS (PLAINTIFFS). *

1896

August 25.

Limitation Act (XV of 1877), schedule II, Article 14—Estates Partition Act (Bengal Act VIII of 1876), sections 116, 150—Right of Suit—Suit for possession.

A suit for possession of lands of which the owners have been dispossessed in pursuance of an order of the Collector under section 116 of the Estates Partition Act (Bengal Act VIII of 1876) will lie, even though no suit is brought to set aside the Collector's order under section 150.

Article 14 of Schedule II of the Limitation Act (XV of 1877) does not bar such a suit.

THIS was one of seven cases tried together by consent of parties. The plaintiffs were proprietors of mouzas Nathudoar and

* Appeal from Appellate Decree No. 1872 of 1894, against the decree of Babu Jaggadurabhab Mozoomdar, Additional Subordinate Judge of Tirhoot, dated the 27th of June 1894, affirming the decree of Moulvie Ali Ahmed, Munsif of Samastipur, dated the 18th of May 1893.

(1) I. L. R., 21 Calc., 869.

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Para Ram Bhaddar, and the defendants were proprietors of mouza Parkotimpur Parmanand. Plaintiffs' case was that during the course of a partition under the Estates Partition Act (VIII of 1876), their lands were included within the defendants' mouza and plaintiffs' ryots were dispossessed from those lands in Baisakh 1286 (April 1879). The present suits were brought in 1890 for declaration of right and for recovery of possession of the lands. The defendants, among other objections, pleaded that the plaintiffs having failed to bring any suit to set aside the order passed by the Collector under section 116 of the Estates Partition Act, within one year as laid down in Article 14, Schedule II of the Limitation Act (XV of 1877), these suits were barred by limitation. The lower Courts decreed the plaintiffs' claims.

The defendants appealed to the High Court.

Babu *Umakali Mukerjee* for the appellants.

Babu *Saroda Charan Mitra* for the respondents.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows :—

The only two points pressed before us in these appeals are :—

1. That the lower Appellate Court was wrong in holding by its judgment of 8th February 1892 that the suits were not barred by Article 14 of the Limitation Act and in remanding them for trial on the merits.

2. That the Courts below have not tried the question whether the plaintiffs' suits are barred by twelve years' adverse possession on the part of the defendants.

On the first point it is to be remarked that the present appellants did not appeal, as they might have done, against the order of remand. It is contended, however, that under the provisions of section 591 of the Code they are entitled to object to that order when appealing against the final decree. Assuming that to be so, we are not prepared to say that the order of the lower Appellate Court was wrong.

The question turns upon certain provisions of the Estates Partition Act (Bengal Act VIII of 1876). It is contended that under section 116 of that Act the lands now in dispute were treated by the Collector as part of the appellants' estate at the

time of partition, and that the plaintiffs cannot recover possession of them until the order of the Collector is set aside.

Section 150 of the Act provides that "any person who is aggrieved by any order of a Revenue Officer passed under section 116, may bring a suit in a Court of competent jurisdiction to modify or set aside such order of the Revenue Officer." But the law nowhere says that if no such suit is brought the order of the revenue officer shall be binding as between the proprietors of the estate under partition and third parties. So far from that being the case, section 117 contemplates the contingency of the proprietors of the estate under partition being "dispossessed by a decree of a Court of competent jurisdiction" of disputed lands which have been treated as part of the estate by the Collector's order under section 116, and makes provision as to what should be done in the event of such a contingency.

It seems clear, therefore, from a consideration of that section alone that a suit for the possession of lands of which the owners have been dispossessed in pursuance of an order of the Collector passed under section 116 will lie, even though no suit is brought to set aside the Collector's order under section 150. In fact, the dispossession might not actually take place till more than a year after the Collector's order; and it seems to us that it would be unreasonable to hold that in such a case the aggrieved party would have no remedy if he had omitted to sue to have the Collector's order set aside. On the contrary, the Act appears to contemplate that the claimant of such lands "may" either sue to set aside the Collector's order, or wait till he is in fact dispossessed and then bring a suit to recover possession. We are of opinion, therefore, that the plaintiffs in these suits were not bound to sue to have the Collector's order set aside, and that the suits are not barred by Art. 14 of the Limitation Act. The first ground of appeal therefore fails.

As regards the second ground we do not find that any claim by 12 years' adverse possession was put forward in the written statements, in which limitation was only pleaded on the ground that the plaintiffs should have sued within one year to set aside the Collector's order of 12th June 1869. The issue framed was no doubt in general terms "whether these suits are barred by

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limitation," but that issue was tried solely with reference to Art. 14 of the Act. It is true that the lower Appellate Court before remand made certain remarks in its judgment regarding the 12 years' limitation, and advantage has been taken of those remarks to urge this point before us in second appeal. But it seems to us on a consideration of those remarks that the lower Appellate Court intended to find as a fact that the plaintiffs had been dispossessed within 12 years, and that the suits were not barred under Art. 144. And it is quite clear that after the remand this point was not pressed or argued in either Court. We think, therefore, that under these circumstances the appellants are not entitled to have the suits remanded again for the trial of this question.

The result is that the appeals fail and must be dismissed with costs.

S. C. C.

Appeals dismissed.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

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 August 13.

BANSI DAS *alias* RAGHU NATH DAS AND ANOTHER (PLAINTIFFS) v. JAGDIP NARAIN CHOWDHRY AND OTHERS (DEFENDANTS).^a

Bengal Tenancy Act (VIII of 1885), section 50—Presumption—Occupancy raiyats—Raiyats holding at fixed rates—Incidents of tenancy—Transferability of tenure—Alienation of part of a tenure—Suit for khas possession and for declaration that alienation was invalid—Form of decree.

In a suit brought in 1893 for declaration that a holding was not transferable and that the alienation of a portion thereof was invalid, and also for *khas* possession of the land on the ground of such alienation, it was found that the rate of rent payable for the holding had never been changed since 1831, and that there was nothing to rebut the presumption raised by section 50 of the Bengal Tenancy Act (VIII of 1885). *Held:—*

(1) That the alienation did not work a forfeiture, and the plaintiffs were not entitled to *khas* possession, but they were entitled to the declaration that the alienation was not binding upon them.

(2) That the presumption created by section 50 does not operate to convert an occupancy raiyat into a raiyat holding at fixed rates, nor does it render the tenancy subject to the incidents of a holding at fixed rates as proscribed by section 18 of the Act.

^a Appeal from Appellate Decree No. 844 of 1895 against the decree of A. Mackie, Esq., District Judge of Zillah Tirhoot, dated the 2nd of February 1895, affirming the decree of Babu Amrita Lal Chatterjee, Subordinate Judge of that District, dated the 31st of August 1894.