

Kamla Prasad Singh and anr. Vs. Manrup Singh and ors.

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Court : Jharkhand

Decided On : Mar-29-2004

Reported in : [2004(2)JCR555b(Jhr)]

Judge : Vishnudeo Narayan, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 80 and 100 - Order 23, Rule 1(3); Chotanagpur Tenancy Act, 1908 - Sections 46, 46(3A), 46(4A)(C), 71A and 73; Chotanagpur Tenancy (Amendment) Act, 1969; [Limitation Act, 1963](#) - Sections 14 - Schedule - Article 113

Appeal No. : AFAD No. 63 of 1989 (R)

Appellant : Kamla Prasad Singh and anr.

Respondent : Manrup Singh and ors.

Advocate for Def. : Manjul Prasad,; Sunil Kumar Sinha and; S.S. Prasad,

Advocate for Pet/Ap. : N.K. Prasad, Sr. Adv. and; V.K. Prasad, Adv.

Disposition : Appeal dismissed

Judgement :

Vishnudeo Narayan, J.

1. This appeal at the instance of the plaintiffs appellant stands directed against the impugned judgment and decree dated 25.01.1989 and 06.02.1989 respectively passed in title appeal No. 21 of 1987 by Shri Uma Shankar Prasad, 3rd Additional District Judge, Palamau whereby and whereunder the judgment and decree dated 30.06.1987 and 13.07.1987 passed in title suit No. 64 of 1983 by Shri Tabarak Hussain, Munsif, Palamau were affirmed and the appeal was dismissed.

2. The appellants had filed the said suit for declaration of their title in respect of the suit land as their raiyati land and confirmation of their possession and in the alternative for recovery of possession detailed in the schedule at the foot of the plaint situate in village Bakaskhap PS, Lesliganj, District Palamau. The suit plot Nos. 17 and 18 having an area of 1.22 acres and 0.2 acres appertain to Khata No. 11.

3. The case of the appellants is that late Prasana Singh, the father of the original plaintiff Badri Narain Singh (since dead) and the father's father of the appellants was the co-sharer landlord having 3 annas 10 pies interest as proprietor along with other co-sharers landlord in village Bakaskhap, PS, Lesliganj, District Palamau and Khata No. 11 having an area of 1.14 acres consisting of the suit land was the raiyati khata recorded in the name of Ram Rup Singh, the ancestors of the respondents in the cadastral Survey Records of Right and few years after the cadastral survey Ram Rup Singh aforesaid had left village Bakaskhap and settled in village Basaura after constructing a house there and he had abandoned the said suit land and late Prasana Singh and other co-sharer landlords treated the suit land as abandoned and came into the possession of the suit land jointly as their bakast land. There was a partition suit filed by aforesaid late Prasana Singh against the co-sharers landlord for partition of their proprietary interest vide partition suit No. 945 of 1922 and in the said partition suit the suit land was exclusively allotted to the share of late Prasana Singh as his bakast land along with other lands and said late Prasana Singh came in exclusive possession of the suit land after getting delivery of possession and he continued to remain in cultivating possession thereon till his death i.e. 1952 and, thereafter, the original plaintiff (since dead) and, after him the appellants are continuing in cultivating possession over the same and after the vesting of the State the appellants are

paying rent to the State. The further case of the appellants is that there had been a partition between original plaintiff Badri Narain Singh and his brother proforma defendant No. 4 Jagdish Singh in the year 1955 and the suit land was exclusively allotted to Badri Narain Singh the father of the appellants and the appellants are in possession thereof. Return was also filed by the original plaintiff under the provisions of the Bihar Land Reforms Act, after the vesting of the State in which the suit land was shown as his bakast land and, thereafter, rent was assessed in respect of the suit plot as per the provisions of the said suit and jamabandi was opened in his name and rent was paid by the appellants in respect thereof. The appellants on return to his village on 07.10.1979 from outside came to know in the village that some Government officials had come to the suit land to hold the respondents to take possession of the suit land and on enquiry it transpired that the respondents had filed a case under Section 71-A of the Chottanagpur Tenancy Act (hereinafter referred to as the said Act) before the Deputy Commissioner, Palamau for restoration of their possession over the suit land on the ground that the appellants were in possession over the suit land recorded in the name of the paternal grandfather of the respondents and the said case was allowed ex parte vide order dated 15.09.1971 without any notice to these appellants. It is alleged that the suit land having been abandoned by the recorded tenant the landlord resumed possession over the same and the suit became the bakast land of the landlords in cultivating possession of the late Prasana Singh which was subsequently allotted to his share as bakast land by virtue of the partition of the proprietary interest as per partition suit of 1922 and thus the provisions of Section 71-A of the said Act has no application and the Deputy Commissioner, Palamau has no jurisdiction to make an order for restoration of the possession in favour of the respondents. Having a cloud cast on their title the appellants filed title suit No. 69 of 1979 but it was withdrawn with a permission to file a fresh suit after giving notice under Section 80 of the Code of Civil Procedure to Deputy Commissioner, Palamau and, thereafter, the suit at hand was filed.

4. The case of the respondents, inter alia, is that their ancestor Ram Rup Singh was the recorded tenant of Khata No. 11 of village Bakaskhap and it is not a fact that he had ever left village Bakaskhap abandoning the suit land soon after the cadastral survey. It is alleged that so long he was alive he lived in his village

Bakaskhap and after his death his descendants are living therein. It is alleged that village Basaura is at a distance of only 200 yards from his residential house in village Bakaskhap and Tima Singh the son's son of the recorded tenant aforesaid took settlement of some land in village Basaura and he constructed a house thereon about 35 years prior to this suit after the death of his son believed to have been caused by ghost in the ancestral house situate in village Bakaskhap and he started residing with his family members in the said newly constructed house. It is alleged that so long Ram Rup Singh was alive he remained in cultivating possession of the suit land and after his death his descendants are in cultivating possession of the suit land and there is a distance of only 100 yards between the residential portion of both the villages and the suit land is at a very little distance from the house of the respondents and there is no difficulty for them in cultivating the suit land. The further case of the respondents is that Tima Singh, the father of the respondents fell in need of money about two and half years prior to 1970 and he approached Badri Narain Singh, the father of the appellants, to provide him a loan of Rs. 25/- only and said Badri Narain Singh and Proforma defendant No. 4 agreed to advance the said loan to him if he gives temporary possession of the suit land to them till the loan amount is paid and Tima Singh took the loan of Rs. 25/- and handed over the possession over the suit land to Badri Narain Singh aforesaid and, thereafter, Tima Singh refunded the loan amount to him but he refused to re-deliver possession to Tima Singh over the suit land which compelled him to file a case under Section 71-A of the said Act and the possession was restored to him by the order of the Deputy Commissioner in the said proceeding.

5. Written statement has also been filed on behalf of Deputy Commissioner, Palamau in which it has been stated inter alia supporting the case of the respondents that the appellants or their ancestor had not come in possession over the suit land and the respondents were illegally dispossessed from the suit land for which restoration petition was filed and after observing all the legal formalities and noticing the appellant the said restoration petition was allowed and the respondents were put in possession over the suit land on 27.09.1979 and therefore, no step has been taken by the appellants to set aside the restoration order.

6. In view of the pleadings of the parties the learned Trial Court has framed the following issues for adjudication in this case :--

(i) Is the suit as framed maintainable?

(ii) Have the plaintiffs got any valid cause of action for the suit?

(iii) Have the plaintiffs got right, title and interest over the suit land?

(iv) Is the suit barred by law of limitation?

(v) Is the suit bad for defect of parties?

(vi) Is the suit barred under the provisions of Order XXIV, Rule 4 and Section 11 of the CPC?

(vii) Was there any abandonment of the suit land by Ram Rup and did the landlord come in possession thereof?

(viii) Was the suit land in the takhta of Prasana Singh as bakast and did he take delivery of possession of the same?

(ix) Is the plaintiff entitled to a decree as claimed and if so to what other relief or reliefs is he entitled?

7. While deciding issue Nos. (iii), (vii) and (viii) the learned Trial Court has held that the appellants have miserably failed to prove the case of abandonment of the suit land by the recorded tenant and in the decree of the partition suit No. 945 of 1922 Khata No. 11 has been shown as raiyati khata allotted to the share of late Prasana Singh and it further shows Rs. 3/- as the rent of the said khata and return (Ext. 3) is a fraudulent document having interpolation therein in respect of the suit land showing them as bakast land. It has further been held that no document of effecting delivery of possession in consequence of the said partition suit of year 1922 has been brought on the record showing that said Prasana Singh had got delivery of possession over the suit land. The learned Court below has further held that the appellants have no right title and interest over the suit land. It has also been held that the suit land stands recorded in the name of Ram Rup Singh in the

Survey Records of Right and the entries in the khatiyā as the occupation of particular person raises a presumption as to the continuity of possession of that person and the presumption is not neutralized by payment of rent by someone else. It has also been held that miscellaneous case No. 80 of 1970-71 under Section 71-A of the said Act was initiated at the instance of Tima Singh the father of the respondents when his possession was not restored in spite of payment of the loan amount and in spite of service of notice the appellants did not contest the said proceeding and the possession over the suit land was rightly restored to the respondents. The learned Trial Court has also held that the suit of the appellant is barred under Article 113 of the Limitation Act and also under Order XXIII, Rule 4 of the Code of Civil Procedure and also for the non-joinder of the necessary parties. In view of the findings aforesaid the learned Trial Court dismissed the suit of the appellants.

8. Aggrieved by the judgment and decree of the Trial Court the appellants preferred title appeal No. 21 of 1987. The lower appellate Court on re-appraisal and re-appreciation of the evidence oral and documentary on the record affirmed the judgment and decree of the Trial Court and dismissed the appeal.

9. The appellants preferred this appeal before this Court and while admitting the appeal for hearing this Court vide order dated 17.10.1990 had formulated the following substantial question of law :--

(a) whether in view of the fact that the Deputy Commissioner did not contest the suit he would be deemed to have waived the notice under Section 80 of the Code of Civil Procedure?

(b) whether in view of the contention raised by the appellant to the effect that the order passed in land restoration case was a nullity, a suit for declaration of title could have been filed within a period of 12 years from the date of passing of the order in the land restoration case?

10. Assailing the impugned judgment it has been submitted by the learned counsel for the appellants that the learned Deputy Commissioner has committed a manifest error of record in the land restoration case aforesaid restoring the

possession of the respondents over the suit land considering Lesliganj as a part of the schedule area and Section 71-A of the said Act has no application in this case in view of the fact that Lesliganj is not a schedule area in the sub-division of Latehar, now the district of Latehar and both the Courts below have lost sight on this fact whereby illegality stands perpetuated and further and the suit is within 12 years of the order passed in the said restoration case and the question of limitation does not arise at all in this case and thus the concurrent finding of both the Courts below in respect thereof is perverse and a manifest illegality has been committed by both the Courts below in recording the finding to that effect. It has also been submitted that the said restoration proceeding is a collusive one and neither of the Courts below has undergone to the question of fraud in their respective judgment. Elucidating further it has been contended that Order XXIII, Rule 1 (4) is not a bar so far the appellants has filed the fresh suit with the permission of the Court after withdrawing the earlier suit i.e. Title suit No. 69 of 1979 and the relevant provision of the Limitation Act, which is applicable in this case is Article 65 and not Article 113 of the Limitation Act. Lastly it has been contended that the Deputy Commissioner, Palamau though filed his written statement in the said suit, has not contested the suit and it would be deemed that the notice under Section 80 of the Code of Civil Procedure stands waived. Thus the impugned judgment is unsustainable. In support of his contention reliance has been placed upon the ratio of the case of Safiuddin v. Lawrence Somra Kerketta and Anr., AIR 1956 Pat 186.

11. In contra, it has been submitted by the learned counsel for the respondents that suit land stands recorded in the cadastral Survey Records of Right in the name of Ram Rup Singh, the ancestors of the respondents and there was no legal evidence on the record to establish the fact that at any point of time said Ram Rup Singh had abandoned the suit land which has ever come in the khas cultivating possession of the landlords at any point of time and both the Courts below have concurrently found the case of abandonment of the suit land conferring any right title and interest on the appellants as well as their possession by virtue of the said abandonment has not at all been established and the approach of the learned appellate Court below cannot be said to be erroneous in affirming the finding of the Trial Court in respect thereof. Relying upon the ratio of the case of Smt. Purni Devi and Ors. v. Shibu Mahton and Ors., AIR 1971 Pat 249, it has been submitted that

the entries in the cadastral Survey Records of Right as to the occupation of particular person in respect of the suit land raises a presumption as to the continuity of possession of that person and the presumption is not neutralized by payment of rent by someone else. It has been contended that while affirming the judgment of the Trial Court the lower appellate Court being the last Court of facts need not deal with the entire evidence on the record and the reasonings adverted by the Trial Court. It has also been contended that abandonment is a question of fact and it stands concluded by both the Courts below as per their finding based on the evidence on the record and now it cannot be re-opened. The restoration proceeding vide miscellaneous case No. 80 of 1970-71 has not doubt commenced on 16.12.1970 on the basis of the petition filed by Tima Sing, the ancestor of the respondent under Section 71-A of the said Act but the competent authority had passed the restoration order under Section 46 read with Sections 68 and 71 of the said Act on 15.09.1971 ex parte after service of notice on the appellants in accordance with law and holding proper enquiry and recording evidence and the possession was restored in favour of the respondents in execution of the said order on 07.10.1979 and the said suit is barred by limitation having been filed after the expiry of the period of limitation and the order of restoration of the competent authority is legal and valid and within its competence. Lastly it has been contended that the appellants filed title suit No. 69 of 1979 without impleading Deputy Commissioner, Palamau who is a necessary party under Section 46 (3-A) of the said Act as a party defendant and finding the flaw therein he withdrew the suit and filed the present suit on 02.12.1983 and there is no specific order of the Court below granting the appellants leave to file the fresh suit and thus the question of exclusion of time as envisaged under Section 14 of the Limitation Act does not at all arise in this case and thus the subsequent suit of the same cause of action and for the same relief after the withdrawal of the earlier suit is not maintainable in accordance with the provision of Order XXIII, Rule 1 (3) of the Code of Civil Procedure and that being so Section 14 of the Limitation Act is not at all attracted in this suit. In support of his contention reliance has been placed upon the ratio of the case of Bakhtawar Singh and Anr. v. Sada Kaur and Anr., AIR 1996 SC 3488. Lastly it has been contended that Deputy Commissioner, Palamau is a necessary party and notice under the statute has to be served upon him of the intended suit

which can not be waived in any view of the matter whether the Deputy Commissioner, Palamau on filing the written statement does contest the suit or not and non-contest by him cannot in any view of the matter tantamount the said statutory notice being waived. Thus there is no illegality in the impugned judgment.

12. The suit land appertains to Khata No. 11 situate in village Bakaskap within Lesliganj Police Station in the district of Palamau recorded in the name of Ram Rup Singh, the ancestor of the respondents in the cadastral Survey Records of Right. Late Prasana Singh is admittedly a co-sharer landlord along with others in respect of Khata No. 11 and the appellants are his descendants. There had been a partition suit inter se the co-sharer landlords including late Prasana Singh aforesaid for partition in respect of their proprietary interest in the year 1922 vide partition suit No. 945 of 1922. Late Prasana Singh as per the case of the appellant had resumed possession of the suit land of being abandoned by Ram Rup Singh prior to 1922 though specific date or year of the alleged abandoned has not been disclosed and late Prasana Singh continued in khas cultivating possession of the suit land after resuming possession thereon and further claims that the suit plot was allotted to his share as Bakast land by virtue of the said partition suit and since then he continued in cultivating possession thereon. In order to construe abandonment within the meaning of Section 73 of the said Act there must co-exist a voluntary abandonment of holding without notice to the landlord, absence of arrangement for payment of rent and cessation of cultivation of the said holding by the tenant. The cultivation of land and payment of rent are the two primary duties of tenant and the dereliction of such duties aggravated by voluntary departure from holding is strong evidence of the severance of the relationship of the landlord and tenant and in such a situation it is always open to the landlord to resume the possession of the said abandoned land. For proper appreciation of the rival contentions advanced by the learned counsel for the parties it is necessary to look into the provisions of Section 73 of the said Act which reads thus :--

'73. Abandonment of land by raiyat.--(1) If a raiyat voluntarily abandons the land held or cultivated by him, without notice to the landlord and ceases either himself or through any other person to cultivate the land and to pay his rent as it falls due, the landlord may, at any time after the expiration of the agricultural year in which

the raiyat so abandons and ceases to cultivate, enter on the holding and let it to another tenant or take into cultivation himself.

(2) Before a landlord enters under this section, he shall send a notice to the Deputy Commissioner in the prescribed manner, stating that he has treated the holding as abandoned and is about to enter on it accordingly and the Deputy Commissioner shall cause a notice of the fact to be published in the prescribed manner and if an objection is preferred to him within one month of the date of publication of the notice shall make a summary inquiry and shall whether the landlord is entitled under Sub-section (1) to enter on the holding. The landlord shall not enter on the holding unless and until such objection has been decided in his favour, or if no objection is preferred, until the expiration of one month from the date of publication of the notice.

(3) When a landlord enters under this section, the raiyat shall be entitled to apply to the Deputy Commissioner for the recovery of possession of the land at any time not later than the expiration of three years in the case of an occupancy-raiyat, or in the case of a non-occupancy-raiyat one year, from the date of the publication of the notice; and thereupon the Deputy Commissioner may, on being satisfied that the raiyat did not voluntarily abandon his holding, restore him to possession in the prescribed manner on such terms (if any) with respect to compensation to person injured and payment of arrears of rent as to the Deputy Commissioner may seem just.'

Form reading of Section 73 of the said Act, it is manifest that the provision aforesaid gives right to the landlord to take possession of abandoned holding without preferring a suit. However, it simply provides for certain steps to be taken by the landlord for his own protection against any subsequent action on the part of the tenant. The object of enactment of this provision has been dealt with in the book. The Chota Nagpur Tenancy Act, 1908 by J Reid' giving reference to the decision in the case of Bhagaban Chandra Missir v. Bisseswari Debya, 3 CWN 46, which reads this :--

'Aboriginal raiyats in Chota Nagpur frequently desert their holdings in periods of stress, and emigrate to the labour districts without making any arrangements for

the cultivation of the lands comprised without their tenancies, or for the payment of rent. They sometimes return in a year or two, and not uncommonly assert that they have not abandoned their tenancies. The object of the section is to safeguard the legitimate interests of the landlord in these cases and per contra to protect the raiyats against fraudulent resumption.

Section 73(1) of the Act mandates that if the land is abandoned by the tenant without notice to the landlord and the tenant ceases to cultivate the said land and to pay rent the landlord may enter on the holding and let it to another tenant or take into cultivating himself. It, therefore, appears that it is not at all necessary to send a notice to the Deputy Commissioner to enable the landlord to obtain khas possession of the holding abandoned by the tenant. It is not the notice which terminates the tenancy, but the voluntary abandonment of the land by the tenant which terminates the tenancy. The said question arose for consideration in the case of Safiuddin (supra) and it was observed that the landlord is not bound to take any proceeding under Section 73 of the said Act and the landlord acquires a good title to the land by virtue of abandonment. It has further been observed which runs thus :--

'The only difference between the landlord who has taken recourse to the requisite proceedings and one who has not done so is that a landlord, who has taken proceedings before the Deputy Commissioner will have an indefeasible right by virtue of abandonment from the date of order recorded by the Deputy Commissioner treating the land as abandoned. The landlord, however, who has not taken recourse to this proceeding cannot claim indefeasible title and he may be defeated by suit being started by the person entitled to the property within twelve years of the commencement of possession of the landlord.'

Section 73 (3) of the said Act provides that when a landlord enters into the abandoned holding and resumed possession over it, the tenant has the right to apply to the Deputy Commissioner for the recovery of possession of the land at any time not later than the expiration of three years in the case of an occupancy raiyat, or in the case of a non-occupancy raiyat one year, and on such application being filed, the Deputy Commissioner may on being satisfied that the raiyat did not

voluntarily abandon his holding, restore him to possession on such terms with respect to compensation to person injured and payment of arrears of rent as to the Deputy Commissioner may seem just. It is, therefore, clear that if the landlord had entered into the land without following the procedure provided under Sub-section (2) of Section 73 of the said Act, the rule of law of limitation will apply for the tenant to get back the possession of the said land. It, therefore, appears that the provision contained in Section 73 of the said Act is self-contained in itself. Here in this case both the Courts below in view of the evidence on the record have concurrently held that the appellant has failed to prove the abandonment of the land in suit by the recorded tenant Ram Rup Singh and their resumption by late Prasana Singh the co-sharer landlord. Even the documents on the record of partition suit No. 945 of 1922 do not incorporate therein the suit land allotted to the share of late Prasana Singh as his bakast land rather the documents depicts a different picture that raiyati khata has been allotted to his share which fetches Rs. 3/- as annual rent and both the Court below concurrently disbelieved the case of abandonment as set up by the appellants as well as their possession over the same. It is relevant to mention here that entries in khatian as to occupation of Ram Rup Singh raises a presumption as to the continuity of his possession over the suit land and the presumption is not neutralized by payment of rent by someone else and I am fortified in my view as per the ratio of the case of Smt. Purni Devi and others (supra). The return (Ext. 3) has rightly been disbelieved by both the Courts below as tainted with fraud. The learned Courts below on the other hand have found the story of dispossession of the respondents from the suit land true and correct as set up by the respondent by virtue of a loan transaction and even on re-payment of the loan amount the land was not restored to the respondents which led to the filing of the land restoration case. In view of the concurrent finding of both the Courts below the matter stands concluded and the appellant has no right, title and interest over the suit land entitling them for declaration of their title in respect thereof as well as recovery of possession over the suit land.

13. The respondent had no doubt filed a case Under Section 71-A of the said Act for restoration of the possession before the Deputy Commissioner. Palamau. There is nothing on the record to show that Lesliganj is a scheduled area Section

71-A was inserted by amendment in the year 1969 in the said Act which authorizes possession to be recovered in three eventualities i.e. firstly where the transfer has taken place in contravention of Section 46, secondly where transfer has taken place in contravention of any other provisions of the Act; and thirdly where transfer has been by any fraudulent method including decree obtained in suit by fraud and collusion. Only members of Scheduled Tribes are competent to maintain an application for restoration under Section 71-A. However, the competent authority has passed the order of restoration of the suit land in favour of the respondents under Section 46 (4-A)(C) of the said Act and not under Section 71-A finding the transfer in question in contravention of Section 46 of the said Act and there is, therefore, no illegality in the finding of both the Courts below in respect thereof and the order passed in the land restoration case cannot be said to be a nullity. The said order was passed on 15.09.1971 and delivery of possession was effected on 07.10.1979, restoring the possession over the suit land in favour of the respondents in execution of the order aforesaid. Here in this case the appellant has filed an earlier title suit No. 69 of 1979 but it was withdrawn for some legal flaw and, thereafter the suit at hand was filed on 02.12.1983 impleading Deputy Commissioner, Palamau as party defendant after serving notice on him under Section 80 of the Code of Civil Procedure. There is no evidence on the record to show that the learned Trial Court while permitting withdrawal of the suit had granted leave to the appellants to file a fresh suit and as such the question of exclusion of time as envisaged under Section 14 of the Limitation Act does not arise at all in this case. Clause 3 of Order XXIII, Rule 1 of the Code contemplates that where the Court is satisfied that a suit must fail by reasons of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of the suit or part of a claim which may on such terms as it thinks fit grant the plaintiff to withdraw such suit or such part of the claim with liberty to institute a fresh suit with respect of subject matter of such suit or such part of the claim. In the present case both the Courts below have concurrently found that the appellants have failed to produce any evidence to show that the permission to withdraw the suit was given on the ground that the suit was bound to fail by reasons of some formal defect or there were sufficient grounds for allowing the appellant to institute a fresh suit in respect of the same

subject matter. Not only this, the appellants had not even produced the application which is said so have been filed for withdrawal of the earlier suit with permission to file a fresh suit on the same case of action to show as to what was the formal defect in the earlier suit by reason of which it was sought to be withdrawn. Therefore, in the facts and circumstances in the case at hand no case for fresh institution of suit on the same cause of action and for the same relief after the withdrawal of the earlier suit was made out by the appellants in accordance with the provision of Clause 3 Order XXIII, Rule 1 of the Code. Furthermore the appellants stands precluded from instituting any fresh suit in respect of such subject matter or such part of his claim in respect of that he has earlier filed this suit which stands withdrawn without any liberty to institute a fresh suit in respect thereof. But the Courts below have committed no error in respect thereof in their findings holding that the subsequent suit of the appellants stands barred under Order XXIII, Rule 1(4) of the Code Civil Procedure. Section 46 (3-A) of the said Act is relevant which runs thus :--

'(3-A) Notwithstanding anything contained in any other law for the time being in force, the Deputy Commissioner shall be a necessary party in all suits of a civil nature relating to any holding or portion thereof in which one of the parties to the suits is a member of the Scheduled Tribes and the other party is not a members of the Scheduled Tribes.'

It, therefore appears that Deputy Commissioner is a necessary party in all suit of a civil nature relating to any holding or portion thereof in which one of the parties to the suit is a member of the Scheduled Tribes and the other party is not a member of the Scheduled Tribes and prior to the institution of the suit a notice has to be served upon the Deputy Commissioner regarding the intended suit under the provisions of the Code of Civil Procedure. It is needless to say that a statutory notice though an essential preliminary for a valid suit does not make it a part of the cause of action for the suit itself. The provisions of Section 46 (3-A) are intended by the legislature to give protection to a member of Scheduled Tribes who had to transfer his raiyati holding after being defrauded by a person who may or may not be a member of the Scheduled Tribes in violation of provisions contained in Section 46 of the said Act. Therefore, when the legislature is extending special

protection to the named category, the Court has to give a liberal construction to the protection mechanism which would work out the protection and enable the sphere of protection to be effective than limit by its scope. The sole legislative intention is to extend protection to a class of citizen who are not in a position to keep their property to themselves in the absence of protection. Hence by the amendment Sub-section (3-A) has been inserted under Section 46 of the said Act whereby Deputy Commissioner has been declared a necessary party in such a suit. The Deputy Commissioner in this case had filed his written statement though he has not contested the suit and, therefore, the imperative need of serving notice under the statute upon the Deputy Commissioner even if he contest the suit or not cannot in any view of the matter tantamount that the said statutory notice stands waived.

14. Now the relevant question is regarding the period of limitation involved in this case. It is pertinent to mention at the very outset that the appellant had filed the suit for a declaration that the suit land is their raiyati land in their possession and if found out of possession for recovery of possession. The appellants have also not sought a relief for a declaration that the order passed in the restoration case is a nullity. The Apex Court in the case of *Ajudh Raj and Ors. v. Moti*, (1991) 3 SCC 136, has observed which runs thus :--

'.....The principle for deciding the question of limitation in a suit filed after an adverse order under a special Act is that if the order impugned in the suit is such that it has to be set aside before any relief can be granted to the plaintiff the provisions of Article 100 will be attracted and if not particular article of a Limitation Act is applicable the suit must be governed by the residuary Article 113, prescribing a period of three years. Therefore, in a suit for title to an immovable property which has been the subject matter of a proceeding under a special Act if an adverse order comes in the way of the success of the plaintiff he must get it cleared before proceeding further. On the other hand if the order has been passed without jurisdiction the same can be ignored as nullity, i.e. non existent in the eye of law and it is not necessary to set it aside, and such a suit will be covered by Article 65.'

I have already stated above that the order passed in the restoration case is within the competence of the Deputy Commissioner exercising jurisdiction under Section 46 of the said Act and the said order is not a nullity and without jurisdiction and in this view of the matter the proper article of the Limitation Act which has its application is Article 113. The order in the restoration case was passed on 15.9.1971 and the suit at hand was filed on 2.12.1983 which means that it has been filed after the lapse of twelve years from the date of order and thus in any view of the matter the suit of the appellant stands barred as per the law of limitation. Therefore, there is no substance in the contentions of the learned counsel for the appellants.

15. There is no merit in the appeal and it fails. The impugned judgment of the learned appellate Court below is hereby affirmed and this appeal is dismissed. No order as to costs in the facts and circumstances of this case.

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