

(1919) 03 CAL CK 0063
In the Calcutta High Court

Ahamad Biswas and Another

APPELLANT

Vs

Benoy Bhusan Gupta and Others

RESPONDENT

Date of Decision : 28-03-1919

Acts Referred:

Bengal Tenancy Act, 1885 — Section 158B(2)

Citation : 53 Ind. Cas. 515

Hon'ble Judges : Panton, J;Chatterjea, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit rent brought by the plaintiffs against the defendants Nos. 1 to 9, who are the appellants.

2. It appears that a suit for rent of the holding was brought by the defendants Nos. 10 to 13 who were the co-sharers of the plaintiffs in the year 1911, and that suit was framed as a suit u/s 148A. The present plaintiffs had been made parties to that suit. In execution of the decree obtained in that suit, the holding was put up to sale but the notice as required by Section 158B, sub-section 2, was not served on the present plaintiffs, the co-sharer-landlords. The defendants Nos. 10 to 13, decree holders in that suit, purchased the holding at the sale.

3. The plaintiffs brought the present suit for recovery of rent. The tenant defendants pleaded that the, holding had passed by the sale to the defendants Nos. 10 to 13, that they had taken a settlement from the latter and were in possession, that there was, therefore, no relationship of landlord and tenant between them and the plaintiffs and that the suit for rent could not be maintained.

4. The learned District Judge was of opinion that the Court had no jurisdiction to sell without the notice required to be served u/s 158B and that the sale was of no effect. The suit for rent was accordingly decreed against the tenant defendants.

5. The tenants have appealed to this Court and it is contended on their behalf

that the omission to serve the notice did not render the sale void but that it was a mere irregularity in conducting the sale. Reliance was placed upon the decision of the Judicial Committee in *Malkarjun v. Narhari* (1).

6. In that case the sale took place after service of notice u/s 248, Civil Procedure Code, upon a person who was not the legal representative of the judgment-debtors. It was held that the judicial sale was not a nullity and although it might be irregular, the sale held good unless proceedings were taken for setting it aside.

7. The learned Pleader for the respondents relied upon a later case of the Judicial Committee [*Baghunath Das v. Sundar Das Khetri* (2)]. In that case their Lordships observed that a notice u/s 248 of the Code was necessary in order that the Court should obtain jurisdiction to sell the property by way of execution as against the legal representatives of the deceased judgment-debtor. Their Lordships distinguished the case of *Malkarjun v. Narhari* (1) on the ground that in that case a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had, therefore, jurisdiction to sell, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good unless or until it were set aside by appropriate proceedings for the purpose." These decisions have reference to Section 248, Civil Procedure Code.

8. The question which we have to consider in the present case is, what is the effect of an omission to serve a notice u/s 158B, sub-section (2).

9. That sub-section lays down: "When one or more co-sharer landlords, having obtained a decree in a suit framed under sub-section (1) or under subsection 148A, applies, or apply, for the execution of the decree by the sale of the tenure or holding, the Court shall, before proceeding to sell the tenure or holding, give notice of the application for execution to the other co-sharers."

10. The Act makes a special provision for a case where some of the co-sharers obtain a decree for rent u/s 148A and proceed to sell the tenure or holding. Sub-section 2 of Section 158B expressly provides that before proceeding to sell the tenure or holding, the Court shall give notice of the application for execution to the other co-sharers. Having regard to the wording of the section, and to the fact that a special procedure is prescribed by it, we think that the provision is mandatory and not directory. We are of opinion that if a co-sharer landlord wants to have the sale of a tenure or holding, the provision of the sub-section must be complied with before there can be a sale.

11. In the case of *Sarip Hohan v. Tilattama Debi* (4) Fletcher and Newbould, J.J. also held that the provision in Section 158B (2) of the Bengal Tenancy Act as to the giving of notice to the co-sharer landlords before the sale of a holding in execution of a rent decree obtained by one co-sharer is mandatory and not merely directory, and the failure of the Court to serve such notice renders the

sale invalid".

12. It is next contended that even if the sale did not pass the holding by reason of non-compliance with the provisions of that subsection, the right, title and interest of the tenants passed to the defendants Nos. 10 to 13 who purchased the holding at the previous sale and as the tenant defendants had not got that sale set aside, the sale was operative as against them. But the sale was of an entire holding and the plaintiffs did not consent to the sale. The position of defendants Nos. 10 to 13, therefore, was that of an ordinary purchaser under a money decree.

13. It is unnecessary to consider whether the plaintiffs were entitled to khas possession of the land to the extent of their share; because they have chosen to treat the holding as still subsisting and they claim their share of the rent from the tenant defendants. The tenant defendants never abandoned their land; they have continued in possession notwithstanding the sale and we think that, in these circumstances, the relation between the plaintiffs and the tenants did not come to an end, the sale at which the defendants Nos. 10 to 13 purchased the holding being inoperative against the plaintiffs.

14. The result is that the decree of the lower Court is affirmed and this appeal dismissed with costs.