

(1927) 05 CAL CK 0046
In the Calcutta High Court

Ambika Charan Roy Barman and Another	APPELLANT
Vs	
Har Kishore Chakravarti and Others	RESPONDENT

Date of Decision : 02-05-1927

Acts Referred:

Bengal Tenancy Act, 1885 — Section 167

Citation : AIR 1927 Cal 825 : 103 Ind. Cas. 707

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

Bench : Full Bench

Judgement

Mitter, J.—This is an appeal from a decree of the Subordinate Judge of Tipperah, dated the 28th August 1924, which affirmed a decree of the Munsif of Nabinagore, dated the 3rd July 1923.

2. The suit to which this second appeal relates was brought by the plaintiff for recovery of Rs. 361-8-0 due on the mortgage bond which was executed by Kshiroda Sundari Devi (who is now represented by defendants 1 and 2) on the 21st Aghrayan 1316 B.S. Defendants 3 to 5 were made parties to the suit as subsequent purchasers of the equity of redemption in execution of a decree for money; defendants 6 and 7 were "impleaded as they were purchasers of the taluk in question at a sale at the instance of the landlord in execution of a decree for rent; plaintiff asked for the usual mortgage decree for sale and made an alternative prayer that in the event of the sale in favour of defendants 6 and 7 being held to be a sale in execution of a rent decree he may be allowed to get the decretal amount from the surplus sale-proceeds; several defences were taken by defendants 6 and 7 of which it is only necessary to mention two. The first plea is that as defendants 6 and 7 are purchasers of the taluk in a rent sale free from all incumbrances plaintiffs can get their claim satisfied out of their surplus sale-proceeds. The second plea is that it is not open to the plaintiff to raise the contention that the decree in execution of which the taluk in question was sold is not a rent decree. The Court of first instance held that the decree was not a rent-decree and that the plaintiff was not estopped from showing that the

decree was not a rent-decree. The Munsif accordingly passed a preliminary mortgage decree for sale of the mortgaged property on contest against defendants 3 to 7 and ex parte against defendants and 2. An appeal was carried to the Subordinate Judge by defendants 6 and 7 and the decision of the Munsif was affirmed. A second appeal has been preferred to this Court by defendants 6 and 7 and it has been contended before us (i) that the Subordinate Judge has erred in holding that the decree was not a rent decree and (ii) that the lower appellate Court has committed an error of law in coming to the conclusion that plaintiff is not estopped from showing that the decree was a rent decree and that the sale was not a rent sale.

3. In order to examine the soundness or otherwise of the two contentions raised by the learned vakil for the appellants it is necessary to state the following facts which have been found in this case. The Maharaja of Tipperah is the proprietor of an estate under which there is a taluk known as taluk Indra Narain Bhattacharjee. In this taluk the plaintiff Kshiroda Sundari the predecessor-in-interest of defendants 1 and 2 and the Maharaja himself are co-sharers. Kshiroda Sundari died leaving behind her a son. Haribole Chakravarti and two daughters Labanya and Mono Mohini; the Maharaja brought a rent suit for the entire rent against Haribole and the plaintiff but did not make Kshiroda Sundari's daughter Mono Mohini a party to the rent suit; the Maharaja obtained a decree for the entire rent less his 8 annas share which was payable to himself and proceeded to execute the decree as a decree for rent under Chap. 14, Bengal Tenancy Act; during the execution proceedings Haribole died and his father defendant 1 was substituted in his place as his heir and legal representative and execution proceeded against the plaintiff and defendant 1 and the entire tenure including the Maharaja's share in it which carried a rental of Rs. 15 was sold and was purchased by defendants 6 and 7, now appellants, with power to annul all incumbrances. The purchasers, i.e., defendants 6 and 7 served notice u/s 167, Bengal Tenancy Act, on the plaintiff for annulling the incumbrances. In these proceedings the plaintiff who was one of the judgment-debtors did not object to the execution proceedings on the ground that the procedure under Chap. 14, Bengal Tenancy Act, could not be availed of by the Maharaja as the decree was not a rent-decree and the property was accordingly sold free from incumbrances.

4. On these facts it is clear that the decree could not be regarded as a rent-decree as Kshiroda Sundari's interest in the taluk in question was her stridhan property and under the Hindu law devolved after her death on her son Haribole and her two daughters Labanya and Mono Mohini. At the date of the rent suit Labanya was dead but Mono Mohini was alive and she was a necessary party to the rent suit. Mr. Brojo Lal Chakravarti has argued that she was fully represented by her brother Haribole who was himself an infant at the time both the Courts have overruled the argument based on this doctrine of representation rightly. Although the taluk was a tenure and no notice was given of the succession of Mono Mohini to the tenure to the Maharaja u/s 15, Bengal Tenancy Act, the decree in the rent suit against one of the two heirs of Kshiroda cannot be

regarded as a rent decree. If any authority is needed for this proposition we may refer to the case of Faizannessa v. Gaganeswari AIR 1921 Cal. 434. The: first ground of appeal, therefore, fails. The second ground of appeal which relates to estoppel is one of considerable difficulty. It is argued for the appellant that the plaintiff not having taken exception to the execution proceedings under Chap. 14, Bengal Tenancy Act, on the ground that the decree was not a rent decree is now precluded from doing so. It is said that he could not raise this plea as against the Maharaja by reason of the proceedings between him and the Maharaja, and consequently he cannot take this plea as against the purchaser at a sale at the instance of Maharaja. And in support of this contention reliance has been placed upon an unreported decision of this Court in the case of Profulla Nath Tagore v. Satya Bhusan Das : Review Rules Nos. 21-F and 22-F of 1923 in appeal from original decree No. 64 of 1920 to which my learned brother was a party. I think this decision supports the contention of the appellant. In that case Mr. Justice Chatterjee and my learned brother made the following pertinent observations:

As stated above, the plaint in the rent suit was framed, and the decree was passed on the footing that there was only one tenure. It purported, therefore, to be a decree under the Bengal Tenancy Act and when the decree-holder adopted the procedure under Chap. 14, and got the processes of attachment and sale proclamation issued simultaneously, and the sale proclamation published u/s 163 of the Act (i.e., with power to annul all incumbrances), there could be no doubt tint ha meant to sell the defaulting tenures with power to annul all incumbrances." So far as persons holding incumbrances who were strangers to the decree and sale were concerned they would not be affected by the fact that the judgment-debtor hid not taken any exception to the procedure adopted under Chap. 14, though the judgment-debtor's interest in the tenure parsed at the sale, but if the judgment-debtors themselves claim to have incumbrances under the tenure (i.e., under-tenures) it becomes material to consider what the effect is of their not taking any objection to the sale being held under Chap. 14, on the ground that the decree was really in respect of six different tenures. It is argued on behalf of the respondent that the landlord or a third party purchasing the defaulting tenure at the sale might not have taken steps to annual the undertenures held by the judgment-debtors, and that, therefore, the judgment debtors might wait until notices u/s 167 were served for annulment of the incumbrances. But we do not see how the judgment-debtors with the full knowledge of the fact that the decree purported to be one in respect of single tenure and that the procedure adopted for bringing it to sale was that under the special provisions of Chap. 14 would be justified in not objecting to the sale with power to annul incumbrance, and in waiting till the notices of annulment of incumbrances were served upon them u/s 167. The order for sale under Chap. 14 and the order confirming it having been passed in the presence of the judgment-debtors, were binding upon them, not only in respect of their superior interest (i.e. the taluki interest), but also in respect of the power to annul the under-tenures. There could be no doubt that the zamindar proceeded to sell the

tenure of the judgment-debtors with power to annul incumbrances. It was incumbent, therefore, upon the judgment-debtors to raise the objection that the sale could not be held with power to annul incumbrances. Not having done so and having allowed the sale to take place with power to annul all incumbrances and the sale to be confirmed without objection, they (or the plaintiff claiming through them) cannot now raise the objection that the sale could not be held with power to annul incumbrances in so far as the under-tenures which were held by the judgment-debtors themselves were concerned.

5. We think, therefore, that the decree of the Courts below should be discharged, and in lieu thereof it is ordered and decreed that the plaintiff will realize their claim from the surplus sale-proceeds which represent Kshiroda Sundari's share. The defendants 3, 4 and 5, who are respondents before us, wanted to be discharged from the suit. The appellant has no objection to the same. Defendants 3, 4 and 5 are accordingly dismissed from this suit and the suit will be regarded as between the plaintiff on the one hand and defendants 1 and 2 and 6 and 7 on the other.

6. There will be no order for costs in this appeal. Plaintiff will be entitled to his costs in the Court of first instance.

7. Plaintiff will pay the posts of defendants 3, 4 and 5 in this appeal.

8. The cross-objection is not pressed and is therefore dismissed.

Panton, J.

9. I agree.