
(1901) 02 CAL CK 0006
In the Calcutta High Court

Amritaa Lal Bose

APPELLANT

Vs

Nemai Chand Mukhopadeya and Others

RESPONDENT

Date of Decision : 13-02-1901

Acts Referred:

Bengal Tenancy Act, 1885 — Section 170

Citation : (1901) ILR (Cal) 382

Hon'ble Judges : Rampini, J;Prinsep, J;Francis W. Maclean, J;Banerjee, J;Ameer Ali, J

Bench : Full Bench

Judgement

Francis W. Maclean, E.C.I.E., C.J.—The question submitted for our consideration is, whether Section 170 of the Bengal Tenancy Act bars a claim u/s 278 of the CPC to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases, or whether the operation is confined to claims to the tenure or holding and does not extend to claims based on the ground that the property claimed does not form part of the tenure or holding attached.

2. There are, as has been pointed out in the reference, two conflicting decisions upon the point, the one reported in 4 Cal. W. Notes, 734, and the other in 4 Cal. W. Notes, 732.

3. The question is not free from difficulty and the answer is dependent upon the true construction of Section 170 of the Bengal Tenancy Act, Sub-section 1, which is in these terms: "Sections 278 to 283 (both inclusive) of the CPC shall not apply to a tenure or holding attached in execution of a decree for arrears of rent due thereon." What is meant by the words, "shall not apply to a tenure or holding attached in execution of a decree for arrears of rent due thereon?" The person making a claim or raising an objection u/s 278 is entitled in the first instance to prefer such claim or objection, and the onus then lies upon the other side to show that Section 170 is a bar to the further prosecution of that claim. He must show that the tenure or holding has been attached in execution of a decree for arrears due thereon. But, if he produces the decree under which he is

proceeding in execution, and that decree, upon the face of it, shows that it is a decree for arrears of rent due upon the tenure or holding attached in execution of the decree, it seems to me that he has sufficiently discharged such onus, and that the Court ought not to proceed further with the investigation of the claim u/s 278; otherwise this somewhat extraordinary result would ensue, viz., a long and possibly intricate enquiry u/s 278 not for the purpose of investigating the claim or objection under that section, but with the preliminary object of ascertaining, whether Section 170 was or was not a bar to the proceeding u/s 278. If that were so in the majority of, if not in all cases, Section 170 would become almost a dead letter and I feel much hesitancy in placing such a construction upon Section 170 as would tend to so abortive a result. In other words the claim or objection u/s 278 would in effect be investigated under colour of the preliminary enquiry whether or not the decree was one for arrears due on the tenure or holding attached. This, to my mind, is not what the Legislature intended by Section 170.

4. Upon these grounds I answer the question referred by saying that Section 170 of the Tenancy Act does bar a claim u/s 278 of the Code to a tenure or holding attached in execution of a 386 decree for arrears of rent due thereon in all cases, where it is shown that the decree was one for such arrears, and I answer the alternative question in the negative.

5. The result will be that the rule will be made absolute with costs, including the costs of this reference.

Prinsep, J.

6. I am of the same opinion. I merely wish to add that I believe that this point has arisen in several unreported cases before me in which judgment has been delivered in the way, in which My Lord, the Chief Justice, proposes to answer this reference to the Full Bench. I do not recollect a single instance, in which the correctness of this view of the law has been impugned. This can cause no injustice to a party placed in the position of the Petitioner in this matter, for there are other remedies provided by the law which would equally enable him to maintain his possession or be restored to his possession notwithstanding what may be a fraudulent decree conferring a right to possession of the land.

Banerjee, J.

7. I regret very much that I am unable to agree with my learned colleagues in this case. The question referred to us for decision is, whether Section 170 of the Bengal Tenancy Act bars a claim u/s 278 of the CPC to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases, or whether its operation is confined to claims to the tenure or holding and does not extend to claims based on the ground that the property claimed does not form part of the tenure or holding attached. and the necessity for this reference to a Full Bench arose from the fact of there being a conflict of decisions upon the point between the cases of Joggabundhu Chattopadhyaya v. Deenu Pal 4 C.W.N.

8. The determination of this question depends upon the language of Section 170 of the Bengal Tenancy Act, and this is what Sub-section 1 of that section says: "Sections 278 to 283 (both inclusive) of the CPC shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon." The section thus bars the application of Sections 278 to 283 of the CPC to certain classes of cases, namely, those in which the tenure or holding is attached in execution of a decree for arrears due thereon. Upon a claim u/s 278 of the CPC being preferred, it, therefore, lies upon the party opposing the claim to show that the claim is barred by Section 170. He can show that by showing that, upon the claimant's own case, Section 170 applies to it, and bars the application of Section 278. That will be the case, where the claim is of this nature, namely, that the claimant admits, that the tenure or holding attached is held under the decree-holder, that arrears of rent are due thereon, and that the decree is in respect of such arrears, but contends that the decree ought not to be allowed to be executed by the attachment and sale of the tenure, because it was obtained against a wrong person, but the claimant was the person entitled to the tenure or holding, and that, unless and until the landlord sues him and obtains a decree against him, the tenure or holding cannot be sold. Where that is the nature of the claim, Section 170 will bar the claim upon the claimant's own case. But where the claim is of this nature, namely, that the tenure or holding attached, or rather, I should say, the land said to constitute the tenure or holding attached, was not held by the claimant under the decree-holder, but was held by him under an independent right, and that the decree for arrears is, consequently, not a decree for arrears due in respect of such land, there the decree-holder cannot say that, upon the claimant's own showing, Section 170 is a bar to the claim being entertained. Nor can it be said that the case is one of "a tenure or holding attached in execution of a decree for arrears due thereon" as the decree sought to be enforced would go to show. For that would be so only as between the decree-holder and the judgment-debtor. If the claimant is to be treated as a party to the proceedings, and if the order rejecting the claim on the ground of Section 170 of the Bengal Tenancy Act being a bar to it, is to be made in his presence, he must be allowed to say that the decree itself cannot be decisive of the question. For, if that be so, it would make the decree-holder in many cases, and the decree-holder and judgment-debtor acting in concert in all cases, the arbiter of the question. A decree-holder, with the view of defrauding a party of his land, may, in collusion with a tenant, or an alleged tenant, aver in his plaint, in a suit for arrears of rent, that the arrears are due in respect of a tenure or holding comprising such land, and he may obtain a decree in a suit so brought; and, then, if the view contended for by the other side be correct, the third party, whose property has in this fraudulent manner been included in the tenure, or holding will be deprived of the summary remedy provided by Section 278 of the Code of Civil Procedure, without having any opportunity of showing that the decree was not for arrears really due in respect of the property attached. The

decree, therefore, cannot, in my opinion, be treated as settling the question. The question must be determined in the presence of the claimant, and, if necessary, upon evidence. No doubt, this would be open to the objection that, in determining whether a claimant is barred u/s 170 of the Tenancy Act, a preliminary enquiry will have to be gone into; but such preliminary enquiry may have to be gone into for the purpose of determining whether the preliminary objection ought to prevail, unless it can be shown that upon the very case of the party against whom the objection is taken, the objection should succeed. It may also be said, on the other side, that, if this view be correct, it would lead to the very investigation, which Section 170 is intended to prevent, and that it would, after all, leave little scope for Sub-section 1 of Section 170. But, as I understand the section, I do not think it would lead to any such anomalous results as these. The preliminary enquiry will be directed, not towards determining whether or not the claimant is entitled to the property, but towards determining whether the arrears, in respect of which the decree has been obtained, were due in respect of the property attached. If that is made out, the claim will have to be at once rejected, without any further investigation as to the case put forward by the claimant. Nor will the view I take make Section 170 nugatory. As I have already observed, the object of that section, as I understand it, is to prevent any claim being advanced by a party, who admits that the property attached constitutes a tenure or holding as alleged by the decree-holder, and that the decree is for arrears due thereon, and whose only objection is, that such tenure or holding held under the decree-holder belongs not to the judgment-debtor, but to the claimant. It is to exclude claims in this class of cases that Section 170 was enacted. That will appear also, from a reference to the old law on the subject, Section 63 of Act VIII (B. C.) of 1869. Therefore the view I take is not only in accordance with the words of the section, but is supported also by a reference to the law on the subject, as it stood before.

9. Preference was made to Section 174 of the Bengal Tenancy Act, Sub-section 3, which provides that Section 313 of the CPC shall not apply to any sale of a tenure or holding under the Tenancy Act, as showing that the Legislature intended to make several provisions of the CPC inapplicable to the attachment and sale of a tenure or holding in execution of a decree for arrears of rent. I think that a reference to this provision rather tends to support an inference the other way. For it would not be reasonable to suppose that the Legislature meant to increase the number of inoperative execution sales and thus enhance the risk of auction-purchasers by leaving open the claims of parties against whom fraud might have been committed, without giving them an opportunity of coming u/s 278 of the Code and having their property released from attachment, when it debarred auction-purchasers from having any remedy u/s 313 of the Code.

10. Then it has been said that a claimant, situated as this claimant was, would suffer no injury by the sale of the tenure or holding, as his rights could not possibly pass by such a sale. That is quite true; but that would be no reason, why he should be deprived of the remedy u/s 278, when other claimants, of

whom also the same thing might be said, are allowed the benefit of that remedy.

11. For these reasons, I respectfully dissent from the view taken in the case of *Makbul Ahmed v. Rakhal Das Hazra* 4 C.W.N. 732 and agreeing with the decision in the case of *Joggabundhu Chattopadhyaya v. Deenu Pal* 4 C.W.N. 734. I would answer the first branch of the questions referred to the Full Bench in the negative, and the second branch of it in the affirmative.

Ameer Ali, J.

12. I am also of opinion, and for the reasons given by the learned Chief Justice, that Section 170 of the Bengal Tenancy Act bars a claim u/s 278 of the CPC to a tenure or holding attached in execution of a decree for arrears due thereon. I only wish to add one other ground in support of the view already expressed. When a landlord obtains a decree against his tenant for arrears of rent due upon his alleged tenure or holding, the decree is unquestionably binding upon the parties and on the tenure or holding; supposing, that in the course of the execution of that decree, a third party comes forward and alleges that either in whole or in part he is entitled to that tenure or holding, as the case may be, his claim amounts to this, that the property attached in execution of the decree is not liable to such attachment, which brings the matter clearly u/s 278 of the Code of Civil Procedure. Now, if we refer to the provisions of Section 170 of the Bengal Tenancy Act, we find that without any exception Sections 278 to 283 (both inclusive) of the CPC are declared not to be applicable to a tenure or holding attached in execution of a decree for arrears due thereon. I said without exception, because whether the claim be adverse to the tenure or holding, or whether it be for the tenure or holding, all claims to the property attached on the ground that it was not liable to such attachment, which can only be put forward u/s 278 of the Code, are excluded from the purview of the Court by Section 170. To hold otherwise would, in my opinion, give rise to the very difficulties which, it must be taken, the Legislature, intended to avoid, and would launch the holder of a decree for arrears of rent upon a complicated enquiry, the result of which may, after all, be wholly infructuous. The tenant against whom a decree for arrears of rent has been obtained may put forward a number of people to claim either in whole or in part the tenure or holding, and thus prevent the landlord from reaping the fruits of his decree. As regards Section 63 of Act VIII (B. C.) of 1869, to which reference was made by the learned vakil for the opposite party, I may observe that that section seems to strengthen the view I have expressed. The Legislature presumably had that section before it, and still deliberately proceeded to enact Sub-section 1 of Section 170 of the present Tenancy Act, barring in all cases claims u/s 278 the Civil Procedure Code.

Rampini, J.

13. I concur in the view of the majority of the Judges constituting this Bench. I am of opinion that Section 170 of the Bengal Tenancy Act bars a claim under sec. 278 of the CPC to a tenure or holding attached in execution of a decree for

arrears due thereon in all cases, and that its operation is not confined to claims to the tenure or holding, but does extend to claims based on the ground that the property attached does not form part of the tenure or holding attached.

14. The determination of this question would seem to me to depend upon the construction of the provisions of Section 278 of the Code of Civil Procedure, read in conjunction with those of Section 170 of the Bengal Tenancy Act. Section 278 of the CPC prescribes, how a claim preferred to or an objection made to the attachment of any property attached in execution of a decree is to be investigated, and Section 170 of the Bengal Tenancy Act provides that the provisions of Section 278, amongst others, of the CPC shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon. The two sections when thus read together would seem to me to imply that, when a tenure or holding is attached in execution of a decree for arrears of rent due thereon, no third party is to be at liberty to prefer any claim of any kind or to intervene in any way in the proceedings in execution of a decree for arrears of rent.

15. The same conclusion, I think, follows, when the question is considered from another point of view, namely, as to whether a third party, who seeks to prefer a claim u/s 278 of the Code to a tenure or holding, is in any way affected by the proceedings taken in execution of a decree for arrears of rent. It seems to me that he is not. He is no party to the decree for arrears of rent; he is not affected by it; he cannot be affected in any way by any proceedings taken by the landlord, the decree-holder, as against the tenant, the judgment-debtor. The rent-decree and the proceedings taken in execution cannot make any question arising between the parties to that decree and a third party, the claimant, *res judicata*.

16. Then, it is to be remembered that it is not of the essence of a tenure or holding in this country that it should consist of any particular area of land situated within definite boundaries. A tenure or holding may have definite boundaries, or it may not, or it may have no boundaries at all. At any rate the essence of a tenure or holding in this country is, that it is the subject of a contract, express or implied, between the parties concerned, viz., the landlord and the tenant, and when a tenure or holding is sold in execution of a decree for arrears of rent, what passes at the sale is the subject matter of the contract between the contracting parties, which is hypothecated for the rent under the provisions of Section 65 of the Bengal Tenancy Act, and the right of the tenant in such subject matter, and nothing more.

17. Then, I would point out that the purchaser of a tenure or holding at a sale held in execution of a decree for arrears of rent is not necessarily entitled to possession of the tenure or holding, which he has purchased. If he attempts to take possession, the person in actual possession of that tenure or holding has his remedy. He can first of all raise an objection u/s 331, C. C. P., which is a portion of the Code not excluded by Section 170 of the Tenancy Act, and, if his objection is overruled, he still has a further remedy in a regular suit.

18. Then, I would point to the provisions of 8. 63 of the former law, Act, VIII (B. C.) of 1869, which are founded on those of Section 106 of Act X of 1859. According to these provisions a claimant, who wished to raise an objection to the attachment of any under-tenure was by the old law obliged, before he could be heard, to pay the decretal amount into Court. If the view of the learned pleader, who appears for the opposite party in this case be correct, then such claimant would be entitled to come in and to have his claim heard without first depositing the decretal amount. It is generally understood that one of the objects of the Bengal Tenancy Act was to give landlords greater facilities for the collection of their rents, in consideration of the greater rights bestowed upon tenants by that Act, and it would seem to me to be an anomaly, if, such being the avowed intention of the Tenancy Act, the effect of one of its clauses were to be to remove the restrictions imposed by the former law on the preferment of claims in execution of decrees for rent and so to place obstructions in the way of, instead of affording facilities for, the collection of arrears of rent by landlords.

19. I would finally advert to the provisions of Section 174 of the Bengal Tenancy Act, Clause 3 of which provides that Section 313 of the CPC shall not apply to any sales under this chapter, that is, Chapter XIV. Now Section 313 of the CPC gives a purchaser the right to apply to a Court to set aside a sale on the ground that the person, against whom the decree was passed had no saleable interest whatever in the property sold. The Tenancy Act, however, provides that the purchaser at a sale in execution of a decree for arrears of rent is not at liberty to apply for the setting aside of a sale on this ground. It seems very strange that a purchaser, whose rights may be affected (because if the judgment-debtor had no saleable interest, the purchaser must lose his money), should have no right to come in and object to the sale on this ground, and yet that a person whose interests are not affected should have the right to come in at a preliminary stage of the execution proceedings, and demand that the proceedings be stayed, until his claim has been enquired into and determined.