

(1938) 07 CAL CK 0027
In the Calcutta High Court

Atul Chandra Bhaduri and Others

APPELLANT

Vs

Mohini Mohan Mazumdar Chaudhury and Others

RESPONDENT

Date of Decision : 20-07-1938

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26B

Citation : AIR 1939 Cal 28

Hon'ble Judges : S.K. Ghose, J;Patterson, J

Bench : Full Bench

Judgement

S.K. Ghose, J.—These second appeals arise out of five suits for recovery of arrears of rent for the period 1338 to 1341 Aswin. The tenancies are occupancy holdings. One Sarat Chandra Bhaduri was a co-sharer landlord to the extent of one anna odd share. In execution of a mortgage decree the plaintiff purchased that share on 22nd April 1918 and took delivery of possession thereafter. It has been found that Sarat Bhaduri however continued to be in possession for some time and realized rent up to 1332 B.S. corresponding to 1925 A.D. The pro forma defendants 12 to 14 are the other co-sharer landlords. In 1930 they brought a suit for arrears of rent in respect of their shares in which they impleaded Sarat Bhaduri but not the present plaintiff. They obtained a decree and in execution of that decree they auction-purchased the tenancies. It has been found that with the exception of the Aswin Kist of 1338 B.S. defendants 12 to 14 were in possession in respect of the period in suit. The plaintiff brought the suit impleading defendants 12 to 14 as co-sharer landlords and the original tenants as the principal defendants and they claimed a decree for rent as against the original tenants. The latter however did not appear in this litigation. Defendants 12 to 14 appeared and they alone "Contested the suit. Their contention is that as they had purchased the tenancies in execution of their rent decree, the original tenants are no longer liable but it is they, defendants 12 to 14, who must be recognized as the tenants in possession for the period in suit. The trial Court found in favour of this defence and put the plaintiff upon his election as to whether he should take a decree as against the contesting co-sharer landlords

for the period during which they were in possession of the holding by virtue of their auction purchase. The plaintiff however was not agreeable. Thereupon the trial Court decreed the suits in part against the principal defendants for the period during which they were in possession and dismissed the claim with regard to the rest. Against this decision appeals were taken by the plaintiff to the lower Appellate Court. The learned Judge below held that the auction purchase of the contesting defendants was not in execution of a money decree because they had not impleaded the plaintiff in their rent suit, but had impleaded Sarat Bhaduri whose rights had already been purchased by the plaintiff. Further, the auction purchase was defective since no notice had been served nor had the landlord's fee been paid to the plaintiff u/s 26-B, Ben. Ten. Act. The learned Judge further held that although the aforesaid auction purchase had been confirmed in spite of non-service of the notice and non-payment of the landlord's fee, it did not affect the present plaintiff who was no party to the decree obtained by the contesting defendants and the subsequent proceedings relating to that decree. In that view the learned Judge set aside the order of the first Court and gave the plaintiff decrees as against the original defendants in all the suits.

2. Against this decision the present second appeals have been filed by the contesting defendants 12 to 14. Although there is no decree for rent as against these appellants, it is contended in their behalf that they are entitled to press the appeals because the decrees passed by the learned Judge below contained a decision to the effect that the appellants are not the tenants in respect of these holdings. There is a preliminary objection that the appeals do not lie u/s 153, Ben. Ten. Act. In each of these suits the claim is less than Rs. 50. It would appear however from the facts recited above, that the decree of the lower Court has decided a question relating to title of the land or to some interest in land as between parties having conflicting claims thereon, the question being with regard to the liability to pay rent as between the co-sharer landlord defendants on the one hand, and the principal tenants defendants on the other. The fact that the latter have not appeared in the suit makes no difference in so far as the order purported to decide the question between them. This view is in conformity with that taken by D.N. Mitter J. in *Bipin Chandra Majumdar Vs. Raj Kumar Sinha and Others*, . In that case he followed another decision of his re-reported in *Lakhi Naryan Das v. Jharu Mohan Santra* 31 C.W.N. 140 . To the same effect is the case in *Miajan Jamadar v. Phuljan Khatun* 11 C.W.N. 248 I hold therefore that the decisions are appealable.

3. Coming to the merits of the appeals, the first question is whether the appellants are in the position of having purchased the holdings of the original tenants. They claim to have done so on the footing that the decrees obtained by them were rent decrees. It is contended for the other side that they were not rent decrees because the present plaintiff, who was then in the position of a co-sharer landlord, was not made a party. As to this there is no dispute, but the question is raised u/s 26-E, Ben. Ten. Act. After the auction purchase the appellants did not take steps to serve notice upon the present plaintiff, nor did

they pay the landlord's fee which was payable to him. It is contended on behalf of the appellants that u/s 26-E(1) it was not necessary to serve notice or to pay the landlord's fee in the case of the plaintiff, because that provision applies to decrees "other than a decree or certificate for arrears of rent due in respect of the holding or dues recoverable as such." It is contended for the appellants that they had a decree for arrears of rent. But it seems to me that this provision in Sub-section (1) applies to the case of a decree for arrears of rent due in respect of the entire holding. The reason behind the exception in the case of such a decree appears to be that the decree-holder of such a decree is the landlord himself and there is no necessity to serve notice upon him or to pay the landlord's fee when he himself is the auction-purchaser. But the position is different when the decree is in respect of a share of a holding and the other co-sharer landlord has not been made a party. The Proviso to Sub-section (1) is applicable to cases of co-sharer landlord purchasers and also to some extent confirms this proposition. It seems to me therefore that on the face of it the provisions of Section 26-E were not observed by the appellants with regard to their auction-purchase. But it is contended that since that auction-purchase has been confirmed under Sub-section (4) it cannot be taken to be a nullity and the present plaintiff is bound to accept the position that the appellants have purchased the interest of the original tenants. I think however the learned Judge below took the right view in holding that, although the auction-purchase might be binding as between the appellants and the tenants, it was not binding upon the present plaintiff. No doubt the holding of an occupancy raiyat is transferable u/s 26-B, but this right is under that Section subject to the provisions of the Act. In the present case, as I have found, the provisions of Section 26-E at least had not been followed. Therefore, so far as the present plaintiff is concerned, he is entitled to look upon the original tenants as still his tenants. If they have left the place and the appellants are in possession of the lands, still so far as the present plaintiff is concerned the charge upon the holding remains u/s 65 and the plaintiff is entitled to a decree as against the original tenants and to put the holding to sale in execution of his decree. In that view it seems to me, the decrees as made by the lower Appellate Court are correct. These appeals are accordingly dismissed with costs.

Patterson, J.

4. I agree.