
(1915) 02 CAL CK 0038
In the Calcutta High Court

Badarennessa Chowdhurani

APPELLANT

Vs

Alam Gazi and Others

RESPONDENT

Date of Decision : 26-02-1915

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60

Citation : 29 Ind. Cas. 877

Hon'ble Judges : N. Chatterjea, J;Greaves, J

Bench : Division Bench

Judgement

1. This appeal arises out of an application for execution of a decree obtained by a co-sharer landlord for his share of the rent of an occupancy holding. The judgment-debtor, the raiyat, raised an objection that as the holding was not transferable by custom or local usage, it could not be sold in execution of the decree obtained by the co-sharer landlord.

2. The Courts below have given effect to the objection, and have disallowed the application for execution. The decree-holder has appealed to this Court.

3. Now it has been held in a number of cases that an occupancy holding which is not saleable by custom or usage, cannot be sold in execution of a decree obtained by a co-sharer landlord for his share of the rent, and that in this respect a co-sharer landlord is in the same position as an ordinary execution creditor. See Durga Charan Mandal v. Kali Prasanna Sarkar 26 C. 727 : 3C.W.N. 586; Sadagar Sirkar v. Krishna Chandra Nath 26 C. 937 : 3C.W.N. 742; Jarip v. Ram Kumar De 3 C.W.N. 747. And the recent Full Bench in the case of Dayamoyi v. Ananda Mohan Roy Choudhury 27 Ind. Cas. 61 : 20 C.L.J. 52 : 42 C. 172: 18 C.W.N. 971 (F.B.) 878 have laid down that an involuntary transfer, i.e., a sale in execution of a money-decree of the whole or part of an occupancy holding, apart from custom or local usage, is operative against the raiyat, where the raiyat with knowledge fails or omits to have the sale set aside. It is true the questions whether a raiyat is entitled to have the sale set aside, or has the right to object to the sale before it takes place, were not in terms decided by the Full Bench.

But if the raiyat has no right to object to the sale of an occupancy holding in execution of a money-decree before it takes place or has no right to have the sale (after it takes place) set aside, in other words, where the sale is valid, the sale would be operative against him, and it would be immaterial whether he had knowledge of the sale or omitted or failed to have it set aside. The sale however, though invalid, may be operative against the raiyal if he with knowledge thereof omits or fails to have it set aside. The question, therefore, of the omission or failure to set aside the sale with knowledge thereof becomes material only where the sale is invalid, and the raiyat has a right to object to it. We are accordingly of opinion that the Full bench decision by implication holds that the raiyat is entitled to have a sale of the holding in execution of a money-decree set aside-after it takes place, and that the holding cannot be sold in execution of such a decree where the raiyat objects to the sale before it takes place. This view is in accordance with that taken in the cases cited above, and it is to be observed that the Full bench laid down what had been established by the weight of modern authority.

4. No doubt, u/s 60 of the Civil Procedure Code, all saleable property belonging to the judgment-debtor, or over which he has a disposing power which he may exercise for his own benefit, is liable to sale in execution of a decree. But a non-transferable occupancy holding is not saleable property, and the Full Bench decision does not hold that the raiyat has a disposing power over the holding. All that it holds is that a voluntary transfer is operative against him.

5. It is next contended that the decree-holder being a co-sharer landlord to the extent of a 10-annas share is entitled to sell a 10-annas share of the holding. But apart from other considerations, the principle deducible from the Full Bench decision is applicable to an involuntary transfer of the whole as well as of apart of the holding.

6. There are certain observations in the case of *Dwarkanath Pal v. Tarini Sankar Ray* 34 C. 199 : 11 C.W.N. 513 : 5 C.L.J. 294 to the effect that it is not necessary that the consent of the landlord should be obtained prior to the sale, and that the sale is valid, if the landlord subsequently to the sale recognises the purchaser and receives rent from him. But in that case, the defendants with full knowledge of the execution proceedings and the sale had failed to raise the objection at the time of the sale that the holding was not transferable, and the question was raised after the sale had been confirmed, and after the purchase had been recognised by the landlord.

7. In the case of *Shukuruddin v. Rani, Hemangini Debi* 13 Ind. Cas. 192 : 16 C.W.N. 420. referred to in the judgment of the Court below, it appears that this Court maintained an order passed by the Court below granting the decree holder's application for sale of an occupancy holding to the extent of a 151/4 annas share, the co-sharer landlords to that extent having consented to the sale. In doing so, however, the learned Judges said that "the non-consenting landlords may give their consent after the sale. In any case the decree-holder takes the

risk, and in the present state of the law the purchaser will purchase at his peril. We do not think it necessary to interfere." The decision can no longer be followed having regard to the view taken by the Full Bench.

8. We are accordingly of opinion that the appellant is not entitled to sell the whole or part of the occupancy holding in execution of the decree obtained by him.

9. The appeal is dismissed, but we make no order as to costs.