
(1937) 11 CAL CK 0012
In the Calcutta High Court

Basiruddin Mahammad

APPELLANT

Vs

Prasanna Deb Raikat and Others

RESPONDENT

Date of Decision : 29-11-1937

Acts Referred:

Bengal Tenancy Act, 1885 — Section 13, 26E(3)

Citation : AIR 1938 Cal 282

Hon'ble Judges : B.K. Mukherjea, J

Bench : Division Bench

Judgement

B.K. Mukherjea, J.—This is an appeal on behalf of the plaintiff and it arises out of a suit commenced by him for declaration of his title to the disputed property and for confirmation of possession in respect of the same. There was also a prayer for a permanent injunction restraining defendant 1 from interfering with the plaintiff's possession.

2. The facts which gave rise to this suit may be shortly stated as follows. The subject-matter of the dispute is a tenure which was held admittedly by the pro forma defendants 2 to 21 under defendant 1, as landlord. On 21st February 1919 the tenure was put up to sale in execution of a rent decree and purchased by one Basiruddin who in his turn sold it to one Garibulla on 16th July 1919. Garibulla, while in possession of this tenure, mortgaged it together with an occupancy holding to the plaintiff by a mortgage deed executed in April 1920. The plaintiff secured a mortgage decree on the basis of this mortgage bond and on 24th June 1931 both the tenure and the occupancy holding were put up to sale and sold in one lot for Rs. 1100 to the plaintiff. The plaintiff deposited the landlord's fees as required u/s 13, Bengal Tenancy Act, in respect of the tenure only, but did not deposit the fees in respect of the occupancy holding. The result was that on 25th August 1931, the executing Court set aside the sale in respect of the occupancy holding purporting to act u/s 26-E, Sub-section 3, Bengal Tenancy Act, and confirmed the sale in respect of the tenure.

3. In 1932 the landlord, defendant 1, brought a rent suit, being Suit No. 135 of

1932, for recovery of rent due in respect of this tenure against pro forma defendants 2 to 21 without making either Basiruddin, Garibulla or the present plaintiff parties defendants. The rent suit was decreed and in execution of the same the tenure was sold and purchased by defendant 1 on 21st June 1933. The landlord purchaser took symbolical possession and as he threaten-ed to dispossess the plaintiff who as he says was in possession as a purchaser in execution of his mortgage decree, the present suit was instituted. The trial Court gave the plaintiff a decree holding that the present decree, in execution of which the landlord purchased the tenure had not the effect of a rent decree.

4. On appeal the lower Appellate Court reversed this decision on a finding that the plaintiff himself cannot be said to have acquired any title by virtue of his purchase at the mortgage sale. His reasoning is this that as the landlord's fees were not paid in respect of the occupancy holding which was sold along with the tenure in one lot, the executing Court had no jurisdiction to confirm the sale even of the tenure in respect of which the landlord's fees were paid. The order of confirmation of the sale, according to the lower Appellate Court was a nullity and as such the plaintiff has not acquired any interest by his purchase which might entitle him to institute a suit. In my opinion this reasoning of the lower Appellate Court is entirely fallacious. The order of confirmation of the sale was not challenged by way of appeal or by any other subsequent proceeding and I am unable to hold that the Court who passed that order lacked the jurisdiction to pass it and as such the order could be treated as a nullity and of no effect by any other Court in any sub-sequent suit or proceeding in which this question was collaterally raised.

5. Mr. Rajendra Nath Bakshi who appears for the respondent has drawn my attention to Section 26-E, Bengal Tenancy Act, and has contended that the Legislature has laid down a mandatory provision making it obligatory on the Court not to confirm a sale unless the landlord's fees are paid in accordance with the provisions of the section. I may say in the first place that there has been no violation of the provision of Section 26-E, Bengal Tenancy Act in this particular case, because as a matter of fact the sale in respect of the occupancy holding has not been confirmed at all. In the second place I think that Sub-section (3) of Section 26-E, Bengal Tenancy Act, has laid down the consequence which will follow if the deposit is not made in accordance with the provision of Sub-section (1) and having regard to the language of Sub-section (3) I am unable to hold that non compliance of Sub-section (1) takes away the jurisdiction of the Court altogether and makes the order a nullity out and out which could be ignored by any other Court in any sub-sequent proceeding. In my opinion in the present case it is not necessary to consider as to what would be the consequence if the sale was confirmed in respect of the occupancy holding as well. But as there was no defect or irregularity so far as the tenure was concerned and the only question was as to how the purchase money should be apportioned and the purchaser himself agreed to take the entire purchase money as against the tenure that was actually sold, I do not think that there is any substance in the

reasoning of the learned Subordinate Judge which has been sought to be supported on behalf of the respondent.

6. The result is that the decision of the lower Appellate Court is set aside and the case is sent back to that Court in order that it might consider the merits of the case and come to a finding as to whether the decree had the effect of a rent decree. The appellant is entitled to the costs of this appeal. Further costs will abide the result. I assess the hearing fee in this Court at one gold mohur.