

(1943) 01 PAT CK 0006

In the Patna High Court

Bhankumar Chand and Another

APPELLANT

Vs

Shree Lachmi Kant Rao Naik Kalia and Others

RESPONDENT

Date of Decision : 27-01-1943

Acts Referred:

Bihar Tenancy Act, 1885 — Section 155
Civil Procedure Code, 1908 (CPC) — Section 65

Citation : AIR 1943 Patna 320

Hon'ble Judges : Shearer, J; Manohar Lall, J

Bench : Full Bench

Judgement

Manohar Lall, J.—This is an appeal by defendants 8 and 9 who are dissatisfied with the decree which has been passed by the learned Subordinate Judge dated 22nd March 1939 by which he has decreed a suit for recovery of rents and cesses against the appellants jointly with their co-defendants in the following circumstances. The principal respondents in this appeal are the maliks of village Sondihra. Their ancestors gave a mukarrari lease of this village to the ancestors of defendants 1 to 7 by a patta and kabuliat bearing date 9th August 1872 at an annual rent reserved of Rs. 1600 to be paid in four equal instalments with liability to pay interest on default of any kist. Although the lease was granted at a time when the Bengal Cess Act had not come into operation, but there is a provision in the lease and kabuliat that Government impositions on the property will be paid by the mukarraridars. The ancestors of defendants 1 to 7 and 1 thereafter defendants 1 to 7 were in possession of the property for a number of years until 1938. But, in the year 1935, certain events happened which are the grounds of the argument about to be considered.

2. On 9th May 1935 defendant 8 in execution of a money decree which he had obtained against defendants 1 to 7 put their mukarrari interest to sale and purchased it himself along with his wife who is defendant 9 in the action. Defendants 1 to 7 applied to the Court to set aside the sale under Order 21, Rule 90, Civil P.C., and the matter was taken to this Court in appeal where the parties entered into a compromise. One of the terms of the compromise was that the

confirmation of the sale should be put off and defendants 1 to 7 should be allowed to pay the decretal dues of defendant 8 by instalments. The first instalment was payable on or before 15th May 1937 and this instalment was duly paid. The next instalment was payable on or before 15th May 1938 but there was a default. It was provided by the compromise that in case there was a single default, the auction purchaser would be entitled to take steps for confirmation of sale and delivery of possession. As there was a default, defendants 8 and 9 took steps for confirmation of sale with the result that the sale was confirmed on 31st August 1938 and thereafter the appellant took delivery of possession on 23rd November in the same year.

3. In the meantime the principal respondents instituted the suit giving rise to this appeal on 23rd April 1938 for recovery of arrears of rent and cess for the years 1343, 1344 in full and for the first kist of 1345 fasli. It may be observed here that 31st August 1938, the date when the sale was confirmed, corresponds to 20th Bhado 1845 fasli. There, fore the entire claim of the plaintiffs relates to a period before the sale was confirmed in favour of the appellants but after the sale had been held in their favour in May 1935. The learned Subordinate Judge held that the plaintiffs are entitled to a decree in respect of rent and cess against all the defendants in the suit that is to say defendants 1 to 7 as well as the appellants because

during the period for which the rent was claimed defendants 1 to 7 were in possession of this tenure with the concurrence of defendants 8 and 9.

4. The learned Subordinate Judge refused to decree the suit for ejectment against the appellants on the ground that notices under; Section 155, Bihar Tenancy Act, were not served upon them. Hence the appeal by defendants 8 and 9 (defendants 1 to 7 have not appealed). The argument put forward on their behalf is that no decree should have been passed against them because the claim in the suit relates to a period when they were admittedly not in possession and when the sale had not been confirmed. The learned advocate for the appellants has no objection if the tenure be put to sale in execution of the decree which has been passed but contends that the appellants are not personally liable for the arrears of rent and cess for the period in suit. The learned advocate for the plaintiffs-respondents, on the other hand, contends that under the provisions of Section 65, Civil P.C., the title of the appellants to the tenure after the sale was confirmed related back to the date of the sale with the result that they must be held liable to pay rent and cess for the period in suit. The question raised by the appellants was not raised in the Court below, but as it is a question of law and no new facts have to be investigated we have allowed the appellants to put forward this contention.

5. In my opinion the contention put forward on behalf of the appellants is sound and must be accepted. The appellants have not incurred any personal liability by any contract to pay rent or cess to the plaintiffs, but the holding to which title has vested in them retrospectively from 1935 is liable to pay the arrears of rent

from that date. The appellants had a right of possession not from the date of sale but from the date of the confirmation of the sale because the appellants could only get into possession after a sale certificate had been issued as provided by Order 21, Rule 94 and not a moment earlier. A similar situation arose in an Income Tax case which went up before their Lordships of the Judicial Committee AIR 1933 101 (Privy Council) .

6. One of the questions for consideration in that case was whether the assessee who had purchased in an auction sale the property of his mortgagor in execution of his mortgage decree--and which sale was confirmed some years after-wards--was liable to pay Income Tax on the amount by which the value of the purchased property exceeded the original loan advanced to the mortgagor together with costs and other incidental expenses. The assessee relied upon the provisions of Section 65, Civil P.C., and contended that he must be deemed in law to have realised his loan and made a profit not in the year when the sale was confirmed but in the year in which the title became vested in him namely the year when the sale was held. But their Lordships of the Judicial Committee in agreement with the view taken by this Court overruled this contention. It is pertinent to quote the following observations from the judgment of their Lordships which was delivered by Lord Macmillan at page 316:

Nor on the date of the sale does the purchaser obtain an indefeasible right, for under Order 21, Rules 89, 90 and 91 the sale may be set aside on various grounds. It is only where no application is made under these rules or where such application is made and disallowed that the Court under Order 21, Rule 92, makes an order confirming the sale, whereupon "the sale shall become absolute." It is then that the process of realisation is completed and any profit or income is realised by the decree-holder. This is so whether the property is purchased by the decree-holder himself or by a third party, for the right of set-off conferred on the purchasing decree-holder must also be dependent on the sale being rendered absolute by confirmation. No doubt Section 65 of the Code provides that "where immovable property is sold in execution of a decree and such sale has become absolute the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute," but this provision does not come into operation unless and until the sale has become absolute. The actual date of realisation is not affected by this retrospective vesting of the property.

7. Applying this reasoning to the present case, it must be held that although by the confirmation of the sale title to the tenure in suit became vested in the appellants on the date of the sale but the actual liability to pay rent was not affected by this retrospective vesting of property save and except that the holding which may be taken to be represented by the appellants from 1935 is liable to sale for arrears of rent due thereon by the operation of Section 65, Bihar Tenancy Act. The appellants, as I have stated above, could not, even if they tried, get into possession of the tenure before the sale was confirmed. In these

circumstances how can personal liability for the arrears of rent attach to them when there is no contract express or implied binding them to pay rent for the tenure to the landlords? Attention may also be drawn to the decision of the Judicial Committee in *Nanku Prasad Singh v. Kamta Prasad Singh* reported in AIR 1923 P.C. 54 (unreported). This was a case in which it was sought to make the purchasers of mortgaged properties personally liable for the mortgage debt. Their Lordships repelling this contention observed as follows:

Their Lordships have considered this case, and they think it is clear that no personal liability was incurred by the purchasers of the equity of redemption, who, their Lordships understand, are defendants 2 to 11, of whom only five are respondents here. Their Lordships, therefore, think that the decree of the High Court was right and that the point made by the appellant fails.

8. The position occupied by the appellant is in no way different from the position which a purchaser of the equity of redemption occupies. The utmost that can be said in favour of the landlords is that they had a charge upon the tenure in hands of the appellants, but that position the appellants have not denied in the argument pressed before us. I now proceed to consider some of the cases on which strong reliance was placed on behalf of the respondents: *Bhyrub Chunder Bundopadhyaya v. Soudamini Dabee* (76) 2 Cal. 141. What was decided in that case was that an auction purchaser in an execution sale of a share of certain property liable to pay Government revenue becomes liable for the amount of Government revenue which accrued due between the date of the sale and the confirmation of the sale and that the original owner or judgment-debtor was not liable for the Government revenue for that intervening period. Sir Richard Garth, C.J. who delivered the leading judgment in concurrence with three other learned Judges observed:

In our opinion the sale having been confirmed, and the purchaser having obtained a certificate, the interest of the judgment-debtor must be held, for the purposes of this suit, to have ceased from the date of the sale and to have thus become vested in the purchaser. That being so, we think that the purchaser, the defendant Soudamini, must be deemed the person liable to pay the amount of Government revenue in question.

9. But in this case the question of personal liability of Soudamini was neither considered nor decided: *Bejoy Chand v. Sashi Bhusan* AIR 1914 Cal. 785. This case has the high authority of Jenkins C.J., and appears to support to some extent the view put forward by the respondents. In this case in execution of a rent decree obtained by the plaintiff, a tenure held by defendant was sold on 15th April 1909 and purchased by one Chakrapani Dutt and the sale was confirmed on 16th June 1909. After the sale the plaintiff applied u/s 169, Bengal Tenancy Act, to take out the surplus sale proceeds for the rent which had accrued due between the date of institution of the suit and the date of confirmation of sale. The surplus fell short by Rs. 191-2-6 and the plaintiff sued to recover from the defendant this sum. The lower Court decided that u/s 169

the surplus sale proceeds and not the judgment-debtor personally were liable to pay the arrears which accrued due between the date of the sale and the date of confirmation thereof. The learned Chief Justice in delivering the judgment observed that in view of the alteration in the law occasioned by Section 65 of the new Civil Procedure Code, as to the date of the vesting of property sold in execution it must be held that the scope of Clause (c) is limited to the rent that may have fallen due to the decree-holder in respect of the tenure or holding, between the dates mentioned and that it must have fallen due from some person and that person must, in his opinion, be the judgment-debtor:

But as a consequence of the alteration occasioned by Section 65, the judgment-debtor is not liable for rent beyond the time when the property is sold and the liability of the proceeds under Clause (c) must be similarly limited, so as to correspond with this.

11. I do not see how this case helps the respondents. All that it decides is that the interest of the original tenant in the holding which was represented by the sale proceeds was liable to be seized by the landlord if further rent had accrued due between the date of this suit and the date of the sale, and thereafter the holding was liable but it was not decided in this case that the subsequent transferee was liable personally for the rent which accrued due after the date of sale. The decision" merely emphasises that the liability of the original tenant to pay rent only remains so long as he holds the land as a tenant, that date being the date of the sale but after the sale has been confirmed. The next case relied on was Maharaj Bahadur Singh Vs. Nari Mollani and Another, . That is a decision of a Single Judge of the Calcutta High: Court. There is an observation at p. 281 that as soon as a document of transfer by a ten-ant is registered

the title to the holding passes from the transferor to-the transferee with retrospective effect from the date of the execution of the conveyance; the question whether the landlord is served with the notice of transfer by the Collector or the Collector sends him the landlord's transfer fee or not is not material. It cannot be said that the transfer is complete as against the landlord only when he receives the notice of transfer and his fees from the Collector.

12. In that case during the pendency of a suit for rent the original tenant transferred the entire holding to defendant 2 by a registered instrument dated 26th May 1934. It was there-fore held that on that date the interested" party No. 1 ceased to be a tenant of the landlord and the interested party No. 2 became his tenant "although both of them remained liable to pay the arrears of rent (if due) claimed by the petitioner." The learned Judge observed that this position was clear from the definition given in Section 3, Tenancy Act, which provides that a person is a tenant as long as he holds the land under another person and he ceases to be a tenant as soon as he sells away all the lands of his occupancy holding. This case again does not clearly decide that the new tenant is personally liable for the rent due from the date of the sale and not from the date when he has right-to enter possession. Further it was not a case of tenure-holder.

13. *Kristo Bulluv Ghosh v. Kristo Lal Singh* (89) 16 Cal. 642. The learned Chief Justice stated the position to be that in a suit by the land. lord to recover rent of the darpatni the defendant stated that he was not liable because at the time when the rent accrued due, he transferred the patni to the purchaser under the provisions of Sections Hand 12 but the landlord pleaded that true he made the transfer but as he did not receive notice of it from the Collector the darpatnidar was still liable for rent. The learned Chief Justice observed that so far as they transfer was concerned it was complete the moment it was registered. He then asked himself, was there any reason or possibility to say that notwithstanding the fact that the transfer was complete, the transferor still remained liable to his landlord and gave this answer:

The liability here is a liability in consequence of the estate, and it is admitted that it is an ordinary rule that the liability ceases when the estate is transferred and the vendor ceased to have any estate in the property but that, in whatever way the transfer may be made, the liability remains on the original tenants, until notice has been given to the landlord. As to that it is enough for us to say that the Act is absolutely silent upon the point, and we do not think that any such condition of things can be inferred from the provisions of the Act. If the Legislature had intended to impose any such limitation upon the right to transfer, we think they would have said so in so many words. They have not done so and we think, we cannot imply it from what they have said.

14. Here again the question as to the personal liability of the transferee from the date of transfer was not considered and decided.

Hemendra Nath Mukherji v. Kumar Nath 12 C.W.N. 478 does not make the position clearer. It merely decides that if defendants 2 to 7 have made a transfer by a valid document then they would not be liable for any subsequent payment to be made under the kabuliat.

15. *Mahomed Abbas Mondul v. Brojo Sundari Debia* (91) 18 Cal. 360. In that case the owner of a patni brought a suit for arrears of rent against three defendant darpatnidars. Their defence was that their tenure had been sold in execution of a decree and had been bought by one Amirunnessa. The Munsif gave a decree against Amirunnessa alone. In appeal this decree was set aside and the suit was decreed against the first three defendants. The Full Bench decides that Section 195(e), Tenancy Act, does not stand in the way of the operation of that Act in the case of darpatni tenures so that the suit was dismissed against the appellants, the original tenants. But there is no decision that Amirunnessa was personally liable. The result is that the appeal of defendants 8 and 9 will be allowed only to this extent that it will be declared that they are not personally liable for the arrears of rent and cess for which the suit giving rise to this appeal has been decreed but only the tenure will be liable for sale in execution. The decree passed by the learned Subordinate Judge against defendants 1 to 7 will stand. They have not appealed and have been correctly made liable in the circum. stances. I would direct each party to bear his own

costs of this appeal.

Shearer, J.

16. I agree. When a tenure of this kind is sold in execution of a decree, and the sale is, in due course, confirmed, the auction purchaser is ordinarily liable to pay the rent, which accrues due, after the date of the sale, and the judgment-debtor is liable to account for the profits up to the date of his dispossession. This relationship, which ordinarily subsists as between the auction, purchaser on the one hand and the judgment-debtor on the other between the date of the sale and the date of the confirmation of the sale is, however, liable to be altered as the result of an agreement between them. In this particular case the auction purchaser and the judgment-debtors entered into such an agreement on 5th February 1937. Under this, the judgment-debtors were to remain in possession of the property subject to their making certain annual payments the earliest on 15th May 1937, and the latest on 15th May 1946. The agreement, further, provided that during this period, it should be open to the judgment-debtors, on certain conditions, to sell the whole or a portion of the property. If the judgment-debtors had exercised this option given to them, would not the person, who purchased the property or a portion of the property from them, have acquired a good title to it? It seems to me that, when the auction purchaser entered into the agreement, which he did, he relinquished the inchoate title which had accrued to him on the date of the sale. That being so, the judgment-debtors, I am disposed to think, continued to be the owners of the property and also the tenants of the plaintiffs, and, as such, the persons directly and immediately responsible for the payment of the rent.

17. In any event, it seems to me clear that it was an implied term of the agreement that the judgment-debtors should continue to pay the rent so long as they were in possession of the tenure, their position, if they were not still the tenants, being analogous to that of mortgagors or trustees.