

(1947) 03 CAL CK 0001
In the Calcutta High Court

Chittagong Urban Co-operative Bank Ltd.	APPELLANT
Vs	
Ahmedar Rahaman Mistri and Others	RESPONDENT

Date of Decision : 10-03-1947

Acts Referred:

Transfer of Property Act, 1882 — Section 41, 43

Citation : AIR 1947 Cal 398

Hon'ble Judges : Sharpe, J

Bench : Division Bench

Judgement

Sharpe, J.—The plaintiff is the appellant and the appeal arises out of a suit for declaration of title and recovery of possession of certain property which belonged originally to Osi Mean and Asamuzzama under the landlord Nazumud-din Ahmed. According to the plaintiff Bank the: interest of Osi Mean and Asamuzzama was purchased by the father of defendants 3, 4, 9 and 10 along with defendants 5-8, and thereafter Rama Charan, father of defendants 3 and 4 got-the raiyati in his exclusive share by amicable partition with his cosharers. On 22nd August 1928, Rama Charan and his cosharers mortgaged the disputed property and other property to the plaintiff. Thereafter the plaintiff sued the mortgagors and obtained a decree. They purchased the disputed property in execution of their mortgage decree on 8th February 1933.

2. In 1935, the plaintiff sued the under-raiyats, defendants 1 and 2, for rent. Those defendants alleged that defendant 12 was their landlord, he having purchased the property in 1937 from defendant 11, son of Kamam who had purchased it on 7th March 1927 in execution of a decree for rent obtained by the landlord Nazumuddin Ahmed against the original tenants, Osi Meah and Asamuzzama. The rent suit was dismissed in the Court of Appeal and hence the plaintiff brought the suit out of which this appeal arises for a declaration of their title and recovery of possession.

3. The suit was contested by defendants 1, 2, 3, 4 and 12. The material defences set up were those already indicated as the contentions of the defendants in the

rent suit. It was alleged inter alia that Rama Charan had no interest in the disputed property at the time of mortgage, the interest of the recorded tenants from whom he is said to have purchased having been extinguished by the rent sale. A number of issues were framed, the most material being issue 3, whether the plaintiff Bank had acquired its alleged right, title and interest in the lands in suit. In deciding this issue, the learned Munsif held that irrespective of the questions whether the disputed property, which was included in C.S. Khatian Nos. 36/30, 73/72 and 49/32 was transferable or not, and whether the decree in the rent suit by which Ramani, father of defendant 11 had purchased it was a rent decree or not, the plaintiff could not succeed since there was nothing to show whether the plaintiff had purchased the shares of any persons who had not been made parties to the rent suit or when Rama Charan's purchase took place. He rejected also the contention of the plaintiff that Ramani, the purchaser at the rent sale, was a benamidar of Rama Charan, and dismissed the suit.

4. In appeal, the learned District Judge held that despite the production of two documents in 1928 which were apparently produced in the Court of Appeal for the purpose of rectifying the lacuna in the evidence as to the date of Rama Charan's purchase and title acquired thereby, the plaintiff-appellant had not been able to prove that the exclusion of Rama Charan from the rent decree had converted it into a mere money decree. He held that the evidence justified the inference that although in possession of the property as purchaser, Rama Charan had not been recorded in the landlord's books and that if the purchase was in 1918, it was not impossible that he had not been recognised; if he had not been recognised then the exclusion of Rama Charan would not invalidate the decree as a rent decree and the entire holding passed by the sale. He held therefore that at the time when Rama Charan purported to mortgage his interest in the disputed property to the plaintiff, he had no interest and by the subsequent purchase in the mortgage execution sale, the plaintiff acquired no title. The question whether Ramani, the purchaser in the rent sale was a benamidar of Rama Charan he held to be immaterial and consequently dismissed the appeal.

5. Two main points were stressed by Mr. Sen for the appellants, in support of his contention that the order of the learned District Judge dismissing the appeal was erroneous. The first is that for the purpose of deciding whether the decree in the rent suit was a rent decree by which the holding in its entirety passed to the purchaser Ramani, and not merely the right,, title and interest of the tenants Osi and Asamuzzama who alone were made parties, he should have decided whether the holding was transferable, in other words whether the interest of Rama Charan in the property which had been acquired prior to the rent suit and decree was affected thereby. The second contention is that the learned District Judge should have decided whether Ramani was a benamidar for Rama Charan, so that it might be seen whether the plaintiff was entitled to the benefit of Section 43, T.P. Act, if it should be held that Rama Charan. had no interest in the holding at the time of the mortgage.

6. At the time of argument, Mr. Sen conceded frankly that he did not dispute the correctness of the decision of the trial Court since the plaintiff had failed in that Court to prove that Rama Charan had acquired any interest in the property at the time of the mortgage. He contended however that the learned District Judge had accepted in evidence two documents, marked Exs. 18 and 19 by which the lacuna in the evidence was remedied and that the appellate Court accepted the contention that Rama Charan and his cosharers had purchased the property in 1918. This contention was however disputed by Mr. Hussain on behalf of the respondents, and there seems to me cogent grounds for so doing. In the earlier part of his judgment, the learned District Judge observed that the appellant Bank asked for permission to withdraw the appeal but that a petition for that purpose had been rejected as it showed no adequate cause for granting the prayer, the burden being that the Bank had discovered new documents. In the order-sheet of the case under date 21-6-1938, it is noted "appellant puts in a petition and prayer for accepting some documents filed with the petition. Admit." It also appears from the list of exhibits that two documents were filed and admitted in evidence on 21-6-1938 with objection. One of those documents was a kabala purporting to be executed by one Ahmadar Rahaman in favour of Durga Kinkar Bhattacharjya and the other a lease purporting to be executed by one Nazametali and Baksha Meah in favour of Durga Kinkar Bhattacharjya. Since there was objection to the admission of these documents, they could not have been admitted without formal proof. Moreover, there was no compliance with the mandatory provisions of Clause (2) of Rule 27, Order 41, Civil P.C. In a later portion of his judgment, the learned District Judge observes casually that "despite the introduction in this Court of two documents of 1918, the appellant Bank is still unable to prove what it is essential for them to prove, namely that when the rent suit was brought, excluding Rama Charan, his exclusion converted the decree into a mere money decree." On these facts, I find it difficult to hold that the documents, Exs. 18 and 19 were at all admitted in evidence, or that they could be legally considered for the purpose of deciding the appeal. It is clear moreover that the learned District Judge did not really consider them in coming to his decision, since he dismissed the appeal on entirely different grounds. He did not apply his mind to the question decided by the learned Munsif against the appellant and in my opinion, quite apart from other questions in the appeal, the appellants cannot succeed unless that question is adverted to and decided in their favour, after a formal and proper decision whether they should be at all allowed to produce additional evidence at the appellate stage.

7. So far as the other two questions are concerned, it seems to me that the judgment of the learned District Judge cannot be supported. Mr. Hussain has contended that the question whether the holding was transferable or not was immaterial, and that, in any event, the question must be answered in the negative so far as the property of Khatians 36/30 and 73/70 is concerned, since there was no evidence that it was transferable. And even if the whole or part was transferable, he contends that the landlord was not bound to make the purchaser

a party, and that the omission to do so would not convert the decree in the rent suit into a money decree. In support of his contentions he has referred to the decisions, *Soshi Bhusan Guha v. Gogan Chunder* ('95) 22 Cal. 364 , *Gagan Sheikh v. Abejan Khatun* (11) 14 C.L.J. 180 and *Profulla Kumar Sen v. Salimullah Bahadur* 6 AIR 1919 Cal. 62. The decisions in the earlier cases proceed on the view that the recorded tenants may represent the entire tenancy, and that a decree for rent obtained against the registered tenants binds an unregistered transferee who can show no sufficient cause for not registering his name. The decision in *Profulla Kumar Sen v. Salimullah Bahadur* 6 AIR 1919 Cal. 62 , in which it was held that where a landlord obtained a decree for arrears of rent against all the recorded tenants except one who never got his name registered in the landlord's sherista the entire tenure and not merely the interest of the recorded tenants passed by the sale in execution of such a decree has been modified by the decision of Rankin C.J. and Page J. in *Tarak Govinda Chowdhury and Others Vs. Indu Jyoti Majumdar* , in which it was laid down that it is not enough for the landlord to implead the recorded tenants if, in fact, the interest of any of them passed to a third person unless there are circumstances to show that the tenants impleaded represented the whole estate. This later decision has been approved by Henderson and Cunliffe JJ. in *Ramesh Chandra Guha Vs. Dinanath Mestari and Others* , . It was contended by Mr. Hussain that these later decisions can have no application to the present case because the rent sale in question was held before the introduction of Section 146A into the Bengal Tenancy Act, that being the section whereby the doctrine of representation was enacted. This criticism might be made in regard to the decision in *Ramesh Chandra Guha Vs. Dinanath Mestari and Others* , , though even in that decision no reference has been made to the provisions of Section 146A, but the decision in *Tarak Govinda Chowdhury and Others Vs. Indu Jyoti Majumdar* , was pronounced on 23-7-1928, before the enactment of Section 146A by Bengal Act 4 [IV] of 1928 which was published in the Calcutta Gazette of 21-2-1929. The position following these decisions is therefore that for the purpose of deciding whether in a rent execution Bale the entire holding or merely the interest of the recorded or registered tenants passed by the sale, it will be necessary to determine whether the tenants impleaded represented the entire estate. If therefore the holding which forms the subject-matter of the present proceedings was a transferable holding it will be necessary to decide whether the interest of the transferee was also purchased by Ramani in the sale held in execution of the rent decree, apart from the question whether the landlord refused recognition of the transferee, the consideration on which the decision of the learned District Judge proceeded, notwithstanding the fact that his conclusion on the question of recognition, viz. that "if his purchase was in 1918 it is not impossible it was not recognised" is far from definite and precise.

8. As regards the second contention of Mr. Sen, it has been argued by Mr. Hussain that in view of the finding of the District Judge that Rama Charan had an interest in the property which was sold in the next execution sale the application

of Section 43, T.P. Act, will not arise, and the question whether Ramani was a benamidar of Rama Charan is immaterial. I have already indicated that the learned District Judge did not apply his mind to the question whether Rama Charan had acquired an interest by purchase from the original tenants and unless that question is properly decided and also the further question whether that interest was extinguished by the rent execution sale it cannot be said that the question of benami is unnecessary for decision.

9. I may note that it was contended by Mr. Hussain that his client, defendant 12, was a bona fide purchaser and so entitled to the protection provided by Section 41, T.P. Act. This contention was not apparently advanced at any earlier stage of the proceedings, and it has been argued therefore on behalf of the appellants that it should not be agitated now. The question of bona fide purchase will require a finding of fact, and should have been advanced at an earlier stage, but as it is a mixed question of fact and law, and as in any case the appeal will have to be reheard, I do not think the respondents should be debarred altogether from raising it now, but the question must be decided on the evidence on record.

10. In view of the previous conclusions, this appeal must be allowed and the judgment and decree of the learned District Judge are set aside. The appeal will be remanded to the lower appellate Court for rehearing on all the points involved, including a decision whether the appellants should be permitted to adduce the additional evidence which they sought to adduce at the time of the previous hearing of the appeal in that Court. There will be no order for costs of this Court and future costs will follow the result of the decision of the appeal after remand.