

(1945) 03 CAL CK 0019
In the Calcutta High Court
Case No : Appeal No. 289 of 1943

Dhiraj Uday Chand Mahtab Bahadur

APPELLANT

Vs

Mahima Ranjan Roy and others

RESPONDENT

Date of Decision : 29-03-1945

Acts Referred:

Citation : (1945) 03 CAL CK 0019

Final Decision : Allowed

Judgement

B.K. Mukherjea, J.—This appeal is on behalf of the landlord decree-holder and arises out of a proceeding in execution of a rent decree. The appellant as plaintiff instituted a suit against the respondents in the Court of the Subordinate Judge of Birbhum (being R.S. No. 10/28) for recovery of arrears of rent for the years 1331-1334 B. S. due in respect of a putni held by the defendants under the plaintiff, and obtained a decree on 10th December 1929. The decree was put into execution in 1930, but nothing was realised in course of that execution proceeding which was finally disposed of on 2nd May 1932. In the meantime further arrears of rent having accumulated, the landlord started a certificate case under the Public Demands Recovery Act, against the same tenant, and in execution of the certificate the putni was put up to sale and purchased by the landlord on 27th April 1932. The sale was confirmed on 2nd July 1932, and the landlord-purchaser took delivery of khas possession soon after. Thereafter several unsuccessful attempts were made by the landlord decree-holder to execute the decree obtained in R. S. No. 10/28, and finally the present execution case was started on 2nd December 1940 in course of which the decree-holder applied for attachment and sale of certain property belonging to the judgment-debtors other than the tenure in arrears. The judgment-debtors took objection under S. 168A, Ben. Ten. Act, contending, inter alia, that as the defaulting tenure had already been sold, the landlord could not proceed against any other property of the judgment-debtors. The trial Judge gave effect to this contention and dismissed the execution case. On appeal this judgment was affirmed by the District Judge of Birbhum. The landlord decree-holder has now come up on

appeal to this Court. The position taken up by the decree-holder is that as the defaulting tenure was purchased by the landlord in execution of a certificate under the Public Demands Recovery Act and made khas, the tenure had expired by being merged in the superior interest of the proprietor, and consequently the latter was at liberty to proceed against other properties of the judgment-debtor under the proviso to S. 168A (1) (a), Ben. Ten. Act.

2. This contention was overruled by the Court of appeal below on the ground that the proviso would only be attracted if the tenure expired before the first or initial application for execution was made. As in the present case there were previous applications for execution of the decree when the tenure was in existence and could be proceeded against the landlord decree-holder was not entitled to avail himself of the benefit of the proviso. In taking this view the learned District Judge relied upon a decision of a Division Bench of this Court, which is reported in 46 C. W. N. 684 Atul Chandra v. Upendra Narayan ("42) 29 A. I. R. 1942 Cal 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684 and to which one of us was a party. In that case the landlord decree-holder proceeded initially against the tenure in arrears, for realization of his decretal dues, and the tenure was put up to sale and purchased by himself. The sale proceeds being insufficient to wipe off the decree, he started a fresh proceeding in execution of the same decree for recovery of the balance and sought to attach and sell other properties belonging to the judgment-debtor. It was held by this Court that he could not do so, and the proviso was not attracted to a case where the tenure was sold and purchased by the landlord in execution of the same decree, for the recovery of unsatisfied balance of which the subsequent proceeding in execution by attachment and sale of other properties, was started. The words "before an application is made for execution of such a decree" occurring in the proviso were construed to mean and refer to the original or initial application for execution by the landlord, and not to any subsequent one started after he himself purchased the defaulting tenancy in part satisfaction of his decree.

3. It is to be noticed, that in 46 C.W.N. 684 Atul Chandra v. Upendra Narayan ("42) 29 A. I. R. 1942 Cal 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684, the purchase by the landlord in execution of the rent decree was prior to January 1941 when S. 168A, Ben. Ten. Act, came into force, and it was argued on behalf of the respondent that the proviso to S. 168A (1) (a), Ben. Ten. Act, could be invoked only when the tenancy expired after the passing of S. 168A. This contention was not accepted by the Division Court, primarily on the ground that the language of sub-s. (2) of S. 168A, Ben. Ten. Act, gave a retrospective effect to the provision of the section to the extent indicated therein and a case where the landlord after putting up to sale the defaulting tenancy before the passing of the section, proceeded against other properties of the judgment-debtor which were attached but not sold, when the section came into force, would come within the purview of sub-s. (2).

4. Mr. Purusattam Chatterjee appearing for the appellant has contended before

us that there is no reason why the application referred in the proviso to S. 168A (1) (a), Ben. Ten. Act, should be taken to mean only the first or initial application, and he has invited us to reconsider the matter particularly as different views have been expressed on this point in subsequent pronouncements of this Court. This identical question came up for consideration before a Division Bench of this Court consisting of Roxburgh and Blank JJ. in 48 C. W. N. 220 Swarnamunjuri v. Fakir Chandra ('44) 31 A. I. R. 1944 Cal. 203 : 216 I. C. 292 : 48 C. W. N. 220. There also the landlord in execution of a rent decree realised a portion of the decretal dues by sale of the defaulting tenancy prior to January 1941 when S. 168A, Ben. Ten. Act, came into force. He applied in 1941 for execution in respect of the balance of his dues by attachment and sale of the properties of the judgment-debtor who contended that S. 168A which came into operation in the meantime operated as a bar to the proceedings. This contention was given effect to by the Courts below and the execution case was dismissed. It was contended on behalf of the landlord appellant in this Court that as the tenure ceased to exist by merger as a result of his own purchase in the earlier execution proceeding the case came within the proviso to sub-s. (1) (a) of S. 168A, Ben. Ten. Act. Thus the facts were on all fours with those in 46 C. W. N. 684 Atul Chandra v. Upendra Narayan ('42) 29 A. I. R. 1942 Cal 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684. Blank J. who was a party to the judgment in 46 C. W. N. 684 Atul Chandra v. Upendra Narayan ('42) 29 A. I. R. 1942 Cal 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684 was of opinion that the appeal should be dismissed on the authority of that decision. Roxburgh J. agreed in dismissing the appeal but on a different ground. He was of opinion that the word "expire" occurring in the proviso to S. 168A (1) (a), Ben. Ten. Act, refers to expiry after the commencement of the Bengal Tenancy Amendment Act of 1940, whereby S. 168A, was introduced, and consequently the proviso could not be attracted to a case, where the sale took place prior to January 1941. Roxburgh J. further held that the application for execution referred to in the proviso did not mean the first or initial application, but the particular application for execution against other properties of the judgment-debtor which would have been barred under sub-s. (1) (a) of S. 168A, but for the operation of the proviso. Thus according to Roxburgh J, the decision in 46 C. W. N. 684 Atul Chandra v. Upendra Narayan ('42) 29 A. I. R. 1942 Cal 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684 was correct, not because the application for execution in the case was a subsequent application but because the tenancy had expired prior to the introduction of S. 168A, in the Ben. Ten. Act. It may be pointed out here, that the view taken by Roxburgh J. is of no assistance to the appellant in the case before us, as here also the sale under the certificate proceeding took place prior to January 1941.

5. The matter came up for consideration again in 48 C.W.N. 837 Lakshman Chandra Roy Choudhury and Another Vs. Birendra Kumar Singha and Another, which was heard and decided by Mitter and Sharpe JJ. In this case a rent decree was obtained by the landlord in 1932. The decree was executed several times

and certain monies were realised. On 5th June 1940, there was an adjustment of the decree by which the decree-holder agreed to accept a sum of Rs. 3639 in full satisfaction of the decree, and the amount was payable in certain instalments. The judgment-debtor paid the first instalment in proper time, but there was default in the payment of subsequent instalments. On 15th May 1941 the patni was sold under Regn. 8 [VIII] of 1819 for recovery of arrears of rent not included in the decree mentioned above, and it was purchased by the landlord. On 14th June 1942, the decree-holder applied for execution of the balance due under the rent decree of 1932. Objection was raised by the judgment-debtor under S. 168A, Bengal Tenancy Act. The Court below overruled the objection being of opinion that the tenure having expired by merger by reason of the purchase by the landlord at the patni sale the proviso was attracted. The case in 46 C. W. N. 684 Atul Chandra v. Upendra Narayan ('42) 29 A. I. R. 1942 Cal. 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684 was relied upon by the judgment-debtor, but it was held that as the decree was adjusted in 1940 and a new decree passed, the application for execution in 1942 was the first and initial application in connection with the adjusted decree, and consequently came within the principle enunciated in 46 C.W.N. 684 Atul Chandra v. Upendra Narayan ('42) 29 A. I. R. 1942 Cal. 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684. On second appeal to this Court, it was held that the adjusted decree of 1942 could not be regarded as a new decree and the application for execution in 1942, was not the original or the first application. It was held, however, following the opinion of Roxburgh. J. in 48 C. W. N. 220 Swarnamunjuri v. Fakir Chandra ('44) 31 A. I. R. 1944 Cal. 203 : 216 I. C. 292 : 48 C. W. N. 220 that the application referred to in the proviso, meant the particular application for execution against other properties of the judgment-debtor which would have been barred but for the proviso. As in this case the tenancy expired after the passing of the Bengal Tenancy Amendment Act of 1940, the question whether the proviso would apply, when the expiry was prior to the Act was left open. All the three cases mentioned above were considered and discussed by Khundkar and Biswas JJ., in their recent decision in S. M. A. No. 248 of 1943 Amrita Lal Chatterjee v. Manindra Nath Biswas S.M.A. No. 248 of 1943, decided on 16th March 1945. In this case a rent decree was obtained in 1930. A number of execution cases were started between 1931 and 1939, all of which proved infructuous for one reason or another. In 1935, the superior touzi was sold for arrears of revenue and as a result of that the tenure in arrears was extinguished by annulment. In 1942, the landlord proceeded to execute the decree, by attachment and sale of the properties belonging to one set of judgment-debtors and he was met with the objection that under S. 168A (1) (a), such execution was not maintainable. The first Court disallowed the objection but the lower appellate Court gave effect to it. Against the decision the landlord came up in second appeal to this Court. The appeal was allowed and the Court accepted the view of Roxburgh J. that the application for execution mentioned in the proviso under S. 168A (1) (a), referred not to the first application for execution of the decree, but to the particular application for attachment and sale of the properties

of the judgment-debtor other than the tenure in arrears which but for the proviso would be barred under S. 168A (1) (a). The learned Judges held that the decision in 46 C. W. N. 684 Atul Chandra v. Upendra Narayan ("42) 29 A. I. R. 1942 Cal 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684 was correct, and was determined in accordance with the principles underlying S. 168A, Ben. Ten. Act, but it was not necessary for purposes of that decision to go so far as to say that the application for execution contemplated by the proviso must be the first or original application. After quoting a passage in the judgment in 46 C. W. N. 684 Atul Chandra v. Upendra Narayan ("42) 29 A. I. R. 1942 Cal 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684 where the words "before an application is made for execution of such a decree" occurring in the proviso to S. 168A (1) (a) were interpreted to mean the first or initial application the learned Judges observed as follows:

We do not think it necessary to go so far as to adopt the view contained in the words just quoted. The actual decision in 46 C. W. N. 684 Atul Chandra v. Upendra Narayan ("42) 29 A. I. R. 1942 Cal 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684 was that the proviso does not apply when the tenure has been obliterated by reason of the fact that it was previously purchased by the landlord in execution of the very decree for the execution of which the application under consideration is being made. We respectfully agree with this conclusion, and we think that it is in accordance with the principle underlying S. 168 A, the scheme of which is to protect the other properties of a tenant from an execution for arrears of rent which the landlord could very well levy against the tenancy in respect of which the default occurred. It would follow that if such execution has already been levied by the landlord against the tenancy in default, it would be against the spirit of the provisions embodied in S. 168 A to permit the landlord to proceed against the other properties of the judgment-debtor for further satisfaction of the self-same decree for arrears of rent.

6. The learned Judges did not accept the view of Roxburgh J. that the tenancy must expire after the passing of S. 168 A, Ben. Ten. Act, in order that the proviso might be attracted and held that the Legislature intended the provisions of the section to be retrospective at least to the extent indicated in sub-section (2). On a full and careful consideration of the matter, we are inclined to agree with the views taken by Khundkar and Biswas JJ. in the case referred to above. The case in 46 C. W. N. 684 Atul Chandra v. Upendra Narayan ("42) 29 A. I. R. 1942 Cal. 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684 was in our opinion correctly decided, though it was not necessary for the purpose of deciding the case to lay down as a proposition of law that the application for execution contemplated by the proviso referred only to the first or original application. In this respect we are inclined to adopt the views of Roxburgh J. which has been accepted by two Division Benches of this Court, in the two cases mentioned above. We cannot, however, agree with Roxburgh J. that to bring the proviso into operation, the expiry of the tenancy should occur subsequently to coming into force of S. 168 A, Ben. Ten. Act. On this point we adhere to the views expressed

in 46 C. W. N. 684 Atul Chandra v. Upendra Narayan ("42) 29 A. I. R. 1942 Cal 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684, which have been affirmed by Khundkar and Biswas JJ. On the view we are taking, all the cases referred to above can be held to have been correctly decided, and as we are not disputing the correctness of the actual decision in any one of them, it is not necessary for us to refer the matter to a larger bench. It is true that we are differing from Roxburgh J. on the question as to when the tenancy should expire for the purpose of bringing the proviso into operation. But that opinion has already been dissented from by a subsequent Division Bench, and as Blank J. did not agree in that opinion the question of referring that question to a Full Bench does not arise. It may be pointed out here that expiry of a tenancy prior to 1941, will be a comparatively rare event as time passes, and the question whether the tenancy was extinguished before or after the amendment of 1940 would have only an academic value in future.

7. We hold, therefore, in accordance with the decision of Khundkar and Biswas JJ. in S. M. A. No. 248 of 1943 Lakshman Chandra Roy Choudhury and Another Vs. Birendra Kumar Singha and Another,

, that to attract the proviso to S. 168 A (1) (a), Ben. Ten. Act, it is not necessary to show that the tenancy expired before S. 168 A came into force, and the proviso would apply even if the application for execution was not the first or original application. If, however, the landlord had purchased the tenure in execution of the very same decree, for the balance due under which the subsequent execution case was started the proviso would have no application. This was exactly the basis of another decision of a Division Bench of this Court, vide I. L. R. (1944) 1 Cal. 671 Uday Chand v. Kuroram Mukherjee ("45) 32 A. I. R. 1945 Cal. 99 : I. L. R. (1944) 1 Cal. 671. Thus in the circumstances of the present case it must be held that the landlord can avail himself of the proviso to S. 168 A (1) (a), Ben. Ten. Act. The question whether there has been an extinction of the tenancy by merger has not been actually determined by the Courts below. This appeal, therefore, will be allowed. The orders of the Courts below are set aside and the case sent back to the Court of first instance in order that this question may be determined on such evidence as the parties might adduce. If the Court finds that there has been a merger, it will direct the execution to proceed. As the Court of appeal below was perfectly justified in basing its decision upon the authority in 46 C.W.N. 684 Atul Chandra v. Upendra Narayan ("42) 29 A. I. R. 1942 Cal 478 : ILR (1942) 2 Cal. 397 : 202 I. C. 147 : 46 C. W. N. 684, we make no order as to costs in this Court. Further costs will be in the discretion of the Court of first instance.

Ellis, J.

8. I agree.