

(1929) 02 PAT CK 0011
In the Patna High Court

Indrasan Pande and Others

APPELLANT

Vs

Kabutra Kuer and Others

RESPONDENT

Date of Decision : 15-02-1929

Acts Referred:

Bengal Tenancy Act, 1885 — Section 65

Bihar and Orissa Public Demands Recovery Act, 1914 — Section 26

Citation : AIR 1929 Patna 237 : 119 Ind. Cas. 556

Hon'ble Judges : Chatterji, J;Adami, J

Bench : Division Bench

Judgement

Chatterji, J.—This appeal arises out of a suit for a declaration that the property in dispute was given to defendant No. 1 in lieu of maintenance and that the sale in execution of a certificate under the Public Demands Recovery Act issued against her is fraudulent and is not binding on the plaintiffs who are the reversionary heirs. The family originally consisted of three brothers Ramsaran Pande, Ramgulam Pande and Ramhit Pande. The plaintiffs are the descendants of Ramsaran, defendant No. 1 is the widow of Ramgulam, while defendants Nos. 2 and 3, who are said to have made the purchase in the name of defendant No. 5 are the descendants of Ramhit. Defendant No. 4 is the landlord at whose instance this certificate was issued. The disputed property consists of 22 bighas 13 cottas 13 dhurs recorded in khata No 11 in the name of defendant No. 1 (Musammat Kabutra Kuer) and one-third of 4 bighas 3 cottas 8 dhurs recorded in khata No. 94 jointly in the names of herself and the other two branches. The total rent payable by each branch is Rs. 56 0-3 This rental is attested in khata No. 11 standing in the name of Musammat Kabutra Kuer with a note mai lagan khata No. 94; while the entry against khata No. 94 is shamil lagan khata No. 11 and the other two khatas of the two other branches.

2. Defendant No. 4 (Maharaja of Hathwa) get a certificate on 13th March, 1923, against defendant No. 1 (Musammat Kabutra Kuer) in respect of arrears of rent for the years 1328 to the 12 annas Mat of 1320 and in execution of it, khata No. 11 appears to have been sold at auction and purchased by defendant No. 5 on

1st December, 1923.

3. The Courts below have held that Ramgulam died in a state of jointness with his brothers Ramsaran and Ramhit and after his death the disputed lands forming one-third share of the entire family property was given to defendant No. 1 on partition in lieu of maintenance. They also found that the certificate of sale was not fraudulent and passed the entire holding to defendant No. 5 and that it was binding on the plaintiffs.

4. In appeal it is urged that the sale passed the right, title and interest of the lady and not the entire holding on the grounds, firstly, that the land had been given in lieu of maintenance and her limited interest could only pass; and secondly, the entire holding was not sold and consequently it passed the right, title and interest of the judgment-debtor. It is, therefore, contended that the plaintiff's right as reversioner is not affected by the sale in question.

5. In support of the first ground reference is made to the cases of Kristo Gobind v. Hem Chunder 16 C. 511 and Bireswar Das Day v. Kamal Kumar Dutt 16 Ind. Cas. 437 : 17 C.W.N. 337. These cases are perfectly distinguishable, because in both, according to the finding, the decrees were in respect of personal debts of the widow. In the Privy Council case of Baijun Doobey v. Brij Bhookun Lall Awusti 1 C. 133 : 24 W.R. 306 : 2 I.A. 275 : 3 Sar. P.C.J. 541 : 3 Suth. P.C.J. 807 (P.C.), there was a decree for the arrears of maintenance and although a particular property was charged with the maintenance neither the decree nor the sale proceedings declared the property itself to be liable for the debt; and it was held by their Lordships of the Privy Council that the purchaser took only the widow's interest and not the absolute estate. The decision would evidently have been otherwise had the maintenance been declared as a charge in the decree. Now, in the present case the sale took place in execution of a certificate for arrears of the entire rent due for a holding at the instance of the 16 annas landlord. The rent in such a case is a charge u/s 65, Bengal Tenancy Act. In the next place the landlord will look to a recorded tenant for his rent and he cannot be required to examine her position and to look behind. All the co-sharers including the plaintiffs have sub-divided the original tenancy amongst themselves and in respect of the one-third share the name of Musammat Kabutra Kuer has been recorded; and so far as the landlord is concerned she represents the entire interest of the tenant therein. I am satisfied that the entire tenancy interest will pass irrespective of the question whether she is a maintenance holder or not. It has been held by the Calcutta High Court in the case of Ashutosh Moohherjee v. Akhoy Kumari Debi 34 Ind. Cas. 581, that the tenure in the hands of the reversionary heirs remains liable in respect of a decree for rent obtained in the time of the widow. In my opinion, there is no substance in the first ground urged by the learned Advocate for the Appellants.

6. In support of the second ground reference is made to Section 26, Bihar and Orissa Public Demands Recovery Act, IV of 1914. Clause 3 of this section provides that the holding shall pass to the purchaser where it is sold in execution

of a certificate for arrears of rent due in respect thereof. Therefore, it follows that if a part of the holding be sold then what will pass is a mere right, title and interest of the judgment-debtor and not the holding itself.

7. This brings us to a consideration of the question whether the entire holding was sold in the present case. The sale certificate of the defendant gives the inventory of properties purchased by him and it shows the survey plots, with their respective areas totaling 22 bighas 13 cottas and odd. The plot and the total area represent Khata No. 11 only. It is clear that Khata No. 94, the plots of which measured a separate area of 4 bighas 3 cottas 8 dhurs is not there. The rental Rs. 56 0 3 is payable not merely for Khata No. 11, but also partly for Khata No. 94 because, as I have already stated the entry against Khata No. 94 is that its rental is shamil (along with) Khata No. 11 standing in the name of Musammat Kabutra Kuer and two other khatas standing in the name of the other two branches. Prima facie, therefore, the entire holding has not been sold.

8. But it is contended by the learned Advocate for the respondent that an undivided share of the land in Khata No. 94 cannot be included as a part of a holding and each tenant's share in this khata is held as an adjunct to the main khata and will pass, even when the main khata is sold.

9. In support of the first part of this contention reference is made to the definition of the word "holding" in the Bengal Tenancy Act and to the case of Hari Charan Bose v. Runjit Singh 25 C. 917 : 1 C.W.N. 521. It has been held in that case (Petheram, C.J., contra) that an undivided share in a parcel or parcels of land is not a holding within the meaning of the Bengal Tenancy Act. This view has also been accepted in this Court in the case of Harnandan Rai v. Kesho Prasad Singh 40 Ind. Cas. 585 : 2 P.L.J. 553 : 1 P.L.W. 798, where the contrary view expressed by Petheram, C.J., was not adopted. The word "parcel" in the definition of the word "holding", implies land within a defined set of boundaries and cannot be taken as meaning an undivided share. But it does not follow from this that Khata No. 11 is a holding by itself. Holding is defined as a parcel or parcels of land held by a tenant and forming the subject of a separate tenancy. In order to constitute a holding it is necessary that a parcel or parcels should form the subject of a separate tenancy. Tenant is defined as a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person. This brings us to the definition of the word "rent" which means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land "held by him. Therefore, it is the rent which gives the index of a particular tenancy. The sum of Rs. 56 and odd is payable in this case not merely for Khata No. 11, but also for a particular share in Khata No. 94. It cannot be maintained that the rent is payable only for Khata No. 11 and consequently this alone cannot form the tenancy by itself. In the case of Harnandan Rai v. Kesho Prasad Singh 40 Ind. Cas. 585 : 2 P.L.J. 553 : 1 P.L.W. 798, referred to above, a case for enhancement of rent was brought by the landlord against the tenant in respect of

a khata recorded exclusively in his name and in respect of two other khatas in which he was a joint holder. This case was decreed and enhancement was allowed in the Court below on the finding that the separate tenancy consisted of a specific area of land (exclusively recorded in the name of the tenant) together with an undivided share in certain areas of land in the other two khatas. But this Court dismissed the suit on the ground that the undivided shares in the two joint khatas were not holdings. If really these were mere adjuncts to the khatas recorded exclusively in the name of the tenants there was no objection to a decree being passed. Therefore, this case cited on behalf of the respondent is rather an authority against him on the second part of his contention. I fail to see how by selling only Khata No. 11 the right, title and interest of the judgment-debtor, in the lands not mentioned in the certificate, would pass. If, however, the paramount description is such that one can make out that the entire tenancy is being sold, the position might have been different, but in this particular case there is no mention of the jama in the sale certificate and it cannot be asserted that the entire tenancy was put up to sale and purchased. Therefore, there exists a prima facie case in support of the appellant's contention.

10. It is, however, urged on behalf of the respondent that such a case was not made out in the plaint or raised in the issues. On the other hand the allegation in the plaint was that the whole of 24 bighas and odd was sold. In reply, it is stated on behalf of the appellant that this was evidently a mistake, as it appears from the respondent's own document (namely, the sale certificate) that 22 bighas and odd was sold and purchased by him. It further appears that this point was raised in the Court of Appeal without any objection by the respondent and considered by that Court, though it came to the conclusion that the entire holding was sold on the ground that the rental is the paramount description and the land is the subordinate description of the holding. The learned District Judge, however, failed to notice that even the rental was not mentioned in the sale certificate. There is jurisdiction in the Court to allow the amendment of a plaint at any stage and even there have been cases where such amendments have been allowed in second appeal. There is a specific case in the plaint that the sale is not binding on the reversionary interest of the plaintiffs; and though generally a ground not taken in the plaint ought not to be allowed to be urged, the matter should be considered when the defendant's own document supports it and when it appears to have been raised in the lower Appellate Court without any objection. We think that, in order to do substantial justice between the parties, we should permit this ground to be advanced. But we should at the same time see that no possible prejudice is done to the other party. It may be, as argued by Mr. Sushil Madhav Mullick on behalf of the respondent, that there is a mistake in the sale certificate or it may be that there are some factors which he might bring into light in order to displace the weight of the point urged. For these reasons we would give an opportunity to the defendant to show that in spite of the apparent state of things as evidenced by the sale certificate the entire holding was put up to sale and purchased by him. We, therefore, remand the case for a finding whether the

entire holding of Musammat Kabutra Kuer was put up to sale in execution of the certificate under the Public Demands Recovery Act for the realization of the rent of Rs. 56 and odd and purchased by defendant No. 5. The parties will be at liberty to adduce documents or any further evidence that may be necessary in order to clear up the point.

11. The learned District Judge will be entitled to remit the case to the trial Court for taking evidence and its finding. The appeal is allowed and the case remanded for the findings of the Appellate Court in the light of the observations made above. The findings should be remitted to this Court within two months from the date of receipt of the record by the Court below. Let the records be sent down at Once.

Adami, J.

12. I agree.