

(1925) 03 CAL CK 0060
In the Calcutta High Court

Jabed Ali Talukdar and Others

APPELLANT

Vs

Surendra Nath Bandopadhyia and Others

RESPONDENT

Date of Decision : 19-03-1925

Acts Referred:

Citation : AIR 1926 Cal 351

Hon'ble Judges : Greaves, J;Cumming, J

Bench : Full Bench

Judgement

Greaves, J.—This is an appeal under Clause 15 of the Letters Patent from a decision of Mr. Justice Bipin Behary Ghose, dated the 31st July 1924.... The appeal is by the defendants, Mr. Justice Ghose having reversed the decision of the lower appellate Court which was in favour of the defendants. The suit was brought for rent of a howla, and the facts are as follows: the respondents who are the plaintiffs in the suit claimed one anna and odd share in zamindari. In the zamindari there was a taluq Abdul Kasim and in the taluq there was a howla which was held by the tenant-defendants. As I have already stated the suit was a suit for rent of the plaintiffs' share in howla. The plaintiffs' story was that in the year 1906 they commenced a suit for rent of their share of the taluq, that they obtained a decree in that suit and that in the execution-proceedings they bought one anna odd share of the taluq. The sale was confirmed in the year 1913. Meantime on the 27th September 1909, one Golam Ali Choudhury had purchased a share in the zamindari. The purchase, however, was not registered until 19th August 1910 and before that date, namely, on the 15th April 1910, the Nawab of Dacca who was a cosharer in the zamindari commenced a suit for his share of the rent of the taluq. He made the other cosharers parties and consequently if all the co-sharers were on the record the decree which he had obtained on the 14th August 1910 was rent decree which could be executed as such, The Nawab of Dacca proceeded to execute his decree and in March 1911 the property was sold in execution of the rent-decree, if it was a rent-decree, in presence of the present plaintiffs as the Court have found. This sale was confirmed on the 24th May 1911. Now the position is that if all the cosharers were parties to the

Nawab's suit and had also notice of the execution proceedings the sale of the appealing defendants would be free from any incumbrance in favour of the plaintiffs by virtue of their purchase in 1909.

2. Five points have been raised before us in this appeal. It is stated that Mr. Justice Ghose was wrong in holding that Golam was a proprietor. Mr. Justice Ghose so held, and the result is that if this finding is correct the sale in execution of the Nawab's decree was not a sale free from encumbrance. We think that the decision of Mr. Justice Ghose on this point is correct and that Golam was a proprietor by virtue of his purchase and that the sale in execution was not a sale free from all encumbrances. This also disposes of the second point that if Golam was the proprietor then as he was not registered until 19th August 1910, he was not a necessary party. I agree with Mr. Justice Ghose's conclusion that he was a necessary party as he was the owner from the date of his purchase.

3. Thirdly, it was urged that if Golam was a necessary party he was sufficiently represented by his izaradar who, according to the finding of the Subordinate Judge was the father of Surendra Nath Banerjee and who according to the same finding was on the record in the Nawab's suit both as a cosharer in the zamindari and as an izaradar. We agree with Mr. Justice Ghose that Golam was not sufficiently represented by his izaradar and that the matter is not cured by this.

4. Fourthly, it was urged that in any case it was sufficient that the notice was served on some of the landlords and not on all and reliance was placed on the decision in the case reported as Rajani Kanta Ghose and Others Vs. Sheikh Rahman Gazi and Others, . This seems to us to be a decision which depended upon the facts of the case and cannot be taken as having laid down any principle of law. We do not think that obligation of serving cosharers is sufficiently carried out by serving notices on some of them.

5. Then comes the fifth point which is really the main question before us and which is a question of estoppel. What is urged before us on behalf of the appellants is that assuming that Mr. Justice Ghose was right in finding that the decree obtained by the Nawab was not a rent-decree and that the sale in execution to the present appellants was not a sale free from all encumbrances under the circumstances of the present case by the doctrine of estoppel the plaintiff's are precluded from setting up this contention. Mr. Justice Ghose has negatived this contention and he has held that the mere fact that the plaintiffs were on the record in the Nawab's suit as cosharers did not involve on them any obligation of stating the facts to the purchaser. I agree with him in this conclusion and I do not think that the mere fact that the plaintiffs as cosharers were on the record in the Nawab's suit involved any obligation on them of stating the encumbrance at the time of the sale. But that does not, in my opinion, dispose of the case. If the plaintiffs knew the facts and stood by and allowed the present appellant to purchase on the basis that the Nawab's decree was a rent-decree and that the sale in execution was therefore, a sale free from

encumbrance then we think that they would be debarred from setting up in these proceedings that it was not a rent-decree. Consequently, what really we have to ascertain is, what was the state of the knowledge of Surendra Nath Banerji's father at the time of the execution proceedings in the Nawab's suit. Mr. Justice Ghose has not considered that position. But according to the findings of the learned Subordinate Judge which findings whether correct or not, are binding on us, the father of Surendra Nath Banerji, Hari-prasad Banerji, was on the record in the Nawab's suit not merely as a cosharer zamindar but also as an izaradar of Golam. It follows from this finding that Hariprasad must have known that Golam was a cosharer at the time of the execution proceedings and, therefore, a necessary party to the Nawab's suit and assuming this position which we are bound to assume from the findings of the Subordinate Judge we think that he would be estopped by this fact from now asserting in these proceedings that the sale in execution of the Nawab's decree was not a sale free from encumbrance. It has been urged before us that the ijara was not created until 9th April 1914 and that consequently at the time of the proceedings in the Nawab's suit Hariprasad could not have been on the record as an ijaradar and we were asked to rely on an affidavit which is before us and notice of which was given to the present appellants in the proceedings before Mr. Justice Ghose. But we con-not in second appeal go into the question of facts of this nature and we must accept the finding of fact of the lower appellate Court and on this finding, for the reasons which I have indicated, Hariprasad knew at the time of the execution proceedings in the Nawab's suit that what the appellants were purchasing was not free from encumbrance. By the doctrine of equitable estoppel his standing by and allowing the purchaser to buy thinking he was purchasing free from encumbrance precludes him from now asserting in this proceeding that the decree in the Nawab's suit was not a rent-decree and that, therefore, the sale in execution was not a sale free from encumbrance.

6. This, therefore, disposes of the appeal which must succeed on the fifth ground which was urged before us, namely, the ground of estoppel.

7. There is one thing that we ought to mention, namely, that it was urged before us that there could be no estoppel against the statute. That proposition is perfectly true but has no application to the present case.

8. The appeal accordingly succeeds. The decision of Mr. Justice Ghose is set aside and that of the lower appellate Court is restored.

9. The appellants will be entitled to their costs in this Court and before Mr. Justice Ghose and in the lower Courts.

Cuming, J.

10. I agree.