

(1944) 09 PAT CK 0001
In the Patna High Court

Jadupati Sahay and Others

APPELLANT

Vs

Lal Chand Ram and Others

RESPONDENT

Date of Decision : 07-09-1944

Acts Referred:

Bengal Tenancy Act, 1885 — Section 158B

Citation : AIR 1945 Patna 146

Hon'ble Judges : Fazl Ali, C.J.;Agarwala, J

Bench : Full Bench

Judgement

Fazl Ali, C.J.—This is a Letters Patent appeal from the decision of Sinha J., in a second appeal arising out of a suit which has been decreed in favour of the plaintiffs. The facts of the case as set out in the plaint are somewhat complicated, but for the purpose of this appeal they may be summarised as follows : The plaintiffs are purchasers in execution of their mortgage decree of a number of plots situated in mauza Phulwaria including plots Nos. 2356 to 2360 which had been mortgaged to them by two persons Mosaheb and Jhari Lal who had purchased them from the recorded tenants. On 23rd September 1933 the defendants first party who are the cosharer landlords of the mauza brought a suit for recovery of arrears of rent against Mosaheb and the widow of Jhari Lal and obtained an ex parte decree against them on 13th January 1938. In execution of this decree one of the plots No. 2356 was sold and purchased by defendants third party. The plaintiffs thereupon brought the present suit in which they claimed a number of reliefs including a declaration that the decree in execution of which plot No. 2356 was sold, was not a proper rent decree but a money" decree and that the sale which took place in execution of that decree did not affect the plaintiffs" interest as purchasers of the same plot in execution of their mortgage decree.

2. It appears that a number of grounds were put forward on behalf of the plaintiffs in the first two Courts as well as in the second appeal in support of their contention that the decree in question had the effect of a money decree. The

learned Judge who heard the second appeal has, however, overruled all those grounds except one. In this appeal which has been preferred" on behalf of the defendants first and third party, it is contended that the view of the learned Judge is not correct, that the decree should be held to be a money decree with the result that the sale which took place in execution of that decree merely passed the right, title and interest of the judgment-debtor. In order to decide the point in controversy a reference to the facts upon which it is based is necessary. It is common ground that the defendants first party is a cosharer landlord in mauza Phulwaria tauzi No. 804 and his interest is 14 annas odd. The remaining interest in the mauza formerly belonged to one Juthi Rai until the end of the year 1348 Fasli, but in 1936 Juthi Rai sold his interest to one Sitaram Singh. In the rent suit with which we are concerned the defendants first party claimed 16 s annas rent for 1341 and 1342 but for the years 1343 and 1844 they claimed only rent in proportion to their 14 annas odd interest. In that suit Juthi Rai was not a defendant but Sitaram was a defendant. On these facts the Munsif who tried the suit held that the decree had not the effect of a rent decree but it was a money decree with the result that only the right, title and interest of the judgment-debtor passed by the sale held in execution thereof. The learned Subordinate Judge who had to deal with the appeal from the Munsif's judgment came to the opposite conclusion and held that the decree was a rent decree inasmuch as Sitaram who was the only other landlord besides the defendants first party at the time of the institution of the suit had been impleaded as a pro forma defendant. Sinha J. in second appeal disagreed with this view and held agreeing with the Munsif that the decree was a money decree. His reasons for arriving at this conclusion are clearly set out in the following passage which I quote from his judgment:

The fourth contention raised on behalf of the appellants, in my opinion, is a more substantial one, namely, that the plaintiffs claimed rent for the entire sixteen annas for the years 1341 and 1342 fasli, though the plaintiffs were interested only to the extent of fourteen annas odd as proprietors. If they intended to obtain a "rent decree", they should not have claimed the entire rent, but should have confined their claim to their admitted fourteen annas odd share. Hence if they laid a claim in the plaint to the entire sixteen annas rent for these two years, they incurred the risk of getting only a money decree for several reasons. Firstly if the claim was made also on behalf of the absent proprietor, namely, Juthi Rai, who had ceased to be the proprietor at the date of the suit, any claim on his behalf would be only a money claim, and not a claim for rent. Secondly even if the plaintiffs can be said to have sued for the entire rent as the assignees of Juthi Rai, the claim would not be on a higher footing, as Juthi Rai had ceased to be the proprietor by virtue of his transfer in favour of Sitaram. Hence, in my view, the plaint as laid in Court, which resulted in the decree for rent and the sale thereunder, could not be treated partly as a claim for rent and partly as a claim for money. It could either be the one or the other: it could not be both. The Courts are always circumspect in this matter, that is to say, the Courts have to

scrutinise very carefully any claim based on the contention that the decree was a "rent decree" and not a mere money decree inasmuch as the former has the sweeping effect of wiping out the interest of persons who are not parties to the rent suit or to the execution proceedings...,. Hence the result of including something in the claim which could not be decreed as for rent, but something as a mere money claim, is that the decree so obtained is relegated to the position of a mere money decree: see in this connection the decision of the Judicial Committee of the Privy Council in AIR 1930 193 (Privy Council) . It must therefore be held that the decree obtained in the rent suit in question had the effect only of a money decree, and, consequently, the purchase made by the defendants first party had not the effect of wiping out the mortgage sale in favour of the plaintiff-appellant.

3. Mr. Mukherjee, who has argued this case with his usual ability contends that the mere fact that a person who has ceased to be a landlord was not impleaded in the suit or that the claim of the defendants first party in the rent suit was somewhat in excess of their right will not make the decree in question a money decree. According to him there is a material distinction between matters which are relevant to the merit of the claim in a suit for rent and those which are relevant to the constitution of the suit and if the suit has been properly constituted by impleading all those who were landlords at the date of its institution, it will result in a rent decree even though the actual claim made by the plaintiff be wrong or excessive. In support of this contention Mr. Mukherjee has cited three cases two of which are: 1 pat. L. W. 3422 and 2 Pat. L. J. 194 These cases have been commented on by Sinha J. in these words:

Counsel for the respondents has relied upon the two decisions of this Court in Ram Kishun Jha v. Mahabir Rai A. I. R. 1917 Pat. 640 and Sarup Sahu v. Jagarnath Modi A. I. R. 1917 Pat. 493, both decisions of Chapman and Boe JJ. who have laid it down that a decree for sums due for rent during a period for the latter part of which the plaintiff upon the record comprised the entire body of landlords and for the former part did not comprise the whole body of landlords is a decree for rent within the meaning of Section 158B, Bengal Tenancy Act. They further laid down that all that is required under that section is that at the time of the making of the decree the whole body of landlords must be on the record. If the matter were res Integra so far as our own Court is concerned, I would have been inclined to hold that such a decree would not have the effect of a "rent decree" for the simple reason that as in the present case the claim for the first two years of the rent had not been made by or on behalf of the sixteen annas proprietors, and, certainly, so far as the first two years of the claim are concerned, the decree could not be said to have been obtained by the entire body of landlord. But I am bound to follow the two Division Bench rulings of this Court and in that view of the matter I would overrule the contention raised on behalf of the appellants.

4. With regard to these two cases all that I wish to say at present is that even if

they are supposed to have laid down good law, there is nothing in the reports to show that for the period for which the plaintiff was only a co-sharer landlord he had claimed rent not for his share but for the, entire 16 annas share. The next case which was relied upon by Mr. Mukherjee is Muhammad Nazim Khan v. Ramjiwan Sahu A. I. R. 1934 Pat. 106 which was decided by Wort J. sitting singly. In that case the claim was partly for assigned rent and partly for rent for the period during which the plaintiff was the landlord. One of the contentions put forward in that case was that notwithstanding the fact that the plaintiff was not the landlord of the 16 annas share for part of the period covered by the suit, the decree in that suit was a rent decree and Wort J. after stating that the point was not free from difficulty expressed the view that he was disposed to accept the contention.

5. The view taken in the above case also requires careful examination, but in any event the question which arose there was not identical with the question which arises here. In the present case, the defendants first party were admittedly cosharer landlords up to 1343 and yet they had claimed the 16 annas share of the rent and not merely their share. Upon the materials on the record of this case we must assume that the defendants second party had claimed not merely what was due to them, but what was due to another person who was not before the Court. u/s 65 the rent is a first charge on a tenure or holding, but it seems to me to be plain that this provision can be given effect to only if the rent is claimed by the person to whom it is due and in the manner provided by the Act. It is true that the mere fact that a wrong or excessive claim is made will not necessarily affect the character of the decree; but here the claim was in respect of something which was not due to the claimant but to another person. In my opinion this peculiar feature of the present case is quite sufficient to distinguish it from the three cases on which reliance has been placed by Mr. Mukherjee and I have no doubt that Sinha J. was right in holding that the decree, so far as it related to a part of the claim, was not a rent decree. As was pointed out in Narain Uddin v. Srimanta Ghosh (02) 29 Cal. 219 a decree cannot ordinarily be split up into two parts and therefore if the sale which took place in execution of the decree taken as a whole was bad as regards part of the decree, the whole sale must be held to have been a sale under the ordinary law, that is to say, the CPC and not carrying with it any of the incidents of a sale under the Bengal Tenancy Act. Mr. Mukherjee referred us to certain other cases also for the purpose of deducing the principle enunciated by him, but after reading them carefully we find that they are of no assistance to us in deciding this appeal.

6. It was also contended by Mr. Mukherjee that the point on which Sinha J. has based his decision was a new one and was taken up for the first time before him in second appeal. Mr. Mukherjee further contended that if it had been taken up earlier he would have shown that the plaintiffs had obtained an assignment from Juthi Rai in respect of certain arrears of rent and he wanted leave of the Court to file some additional evidence at this stage. This additional evidence would have been admitted by us if we had been convinced that the point had not been raised

in any of the Courts below but on reference to the three judgments delivered in this case it appears to us that the contention is not well founded. A reference to the plaint will show that the plaintiff had definitely asserted that the defendants first party were not the 16 annas malik and that they were not entitled to realise" the 16 annas rent and that the decree obtained by the defendants first party against the defendants second party was a "nakdi decree." Upon this allegation one of the issues framed in the suit was "Are the plaintiffs bound by the decree in Kent Suit No. 226 of 1937?" The trial Court dealing with this issue observed as follows:

The second objection was that one Juthi Rai alias Jagdip Rai who" ought to have been made a party was not made pro forma defendant in this suit. The plaintiff's witness 1 had said that Juthi Rai was) a malik. There is no denial on the point in the defendant's evidence. The D register filed by the defendants shows that this Juthi Rai was struck off in 1938. Previous to that he was recorded as a landlord. So it was necessary for the defendants to implead this Juthi Rai as a pro forma defendant in the rent suit. Since this Juthi Rai was not made a party the decree obtained would be in effect a money decree.

7. This extract from the judgment of the Munsif is quite sufficient to show that the question as to what was the effect of claiming 16 annas rent for a period for which Juthi Rai was a cosharer landlord without impleading Juthi Rai was prominently before the parties as well as before the Court. I would, therefore, uphold the decision of Sinha J. and dismiss this appeal with costs. The decree should state that the plaintiffs are entitled to a declaration that the decree in Suit No. 226 of 1937 has the effect of a money decree; that the sale of plot No. 2356 in execution of that decree does not affect their right as previous purchasers of that plot in execution of a mortgage decree and that they are entitled to the possession of plot No. 2356 if they have been dispossessed of that plot in execution of the decree in Suit No. 226 of 1937. The other reliefs which were asked for were not pressed for and cannot be granted.

Agarwala, J.

8. I agree.