

(1946) 11 PAT CK 0003

In the Patna High Court

Lachmi Narayan Lal and Others

APPELLANT

Vs

Bhupendra Prasad Shukul and Others

RESPONDENT

Date of Decision : 27-11-1946

Acts Referred:

Bihar Tenancy Act, 1885 — Section 163A, 188

Citation : AIR 1948 Patna 143

Hon'ble Judges : Sinha, J;Meredith, J

Bench : Full Bench

Judgement

Meredith, J.—All these three appeals are connected, and so have been heard together. They relate to various matters in regard to the same tenure. This tenure was created by a lease of 13-11-1906. In November 1938, a rent suit was brought for rent up to the Asin kist of the year 1345, and on 2-7-1940, this suit was decreed for a sum of Rs. 16,000 and odd. Execution was taken out in Execution case No. 3 of 1941 in the Court of the Subordinate Judge, Gaya. On 28-4-1941 sale proclamation was issued, and on 5-7-1941, the property was sold, and the landlords, decree-holders purchased the tenure for Rs. 18,000 and odd. On 4-9-1941, delivery of possession was taken.

2. On 21-12-1943, more than two years later an alleged mortgagee of the tenants judgment-debtors made an application u/s 47, Civil P.C., to have the sale declared void and without jurisdiction. The learned Subordinate Judge said that the contention was that the sale was void for non-compliance with the provisions of Sections 188 and 163A, Bihar Tenancy Act. He obviously meant Sections 158B and 163. The opposite party did not appear, and the learned Subordinate Judge allowed the application and held that the sale was void and without jurisdiction.

3. This order is the subject-matter of Miscellaneous Appeal No. 261, which is, of course, by the decree-holders and which I shall deal with first. It is quite clear that as an application under Order 21, Rule 90 the application could not succeed as it was long out of time. It would be in time, however, if the sale was without jurisdiction and the application could be treated as one u/s 47. Taking first

Section 163, Section 163(2)(b) provides that the sale proclamation, inter-alia, shall state the value of the tenure or the holding or, if the property to be sold is a portion of a holding, the value of such portion as determined by the Court in the manner specified. Section 163(5) provides that before issuing the sale proclamation, the Court executing the decree shall hear the parties and estimate the value of the holding or of that portion of the holding the proceeds of the sale of which it considers will be sufficient to satisfy the decree.

4. It is significant that whereas in Section 163(1) reference is made to a tenure or a holding, and so also in Section 163(2)(b), in Section 163(5) the reference is to a holding only. It seems, therefore, that Section 163(5) has no reference to the case of a tenure with which we are concerned at present. The same has been so held by a Bench of this Court in *Sonu Lal v. Bartram Keightley* AIR 1944 Pat. 101. The Bench held that Sub-section (5) of the section only comes into operation when the property to be sold is a holding, and by valuing it or a part thereof the entire decree will be satisfied by the proceeds of the sale thereof. It is clear that Sub-section (5) is not applicable. The position, therefore, merely is that u/s 163(2)(b) it was incumbent to state the value of the tenure in the sale proclamation. Formally this was done, but it was merely the decree-holder's valuation which was accepted by the Court without hearing the judgment-debtor. In the ruling I have just cited, it has been laid down that a Court is bound u/s 163(2)(b), Bihar Tenancy Act, to value the whole of a tenure before ordering its sale in execution of a decree. Let us assume, without deciding, that what was done did not amount to valuation within the meaning of Section 163(2)(b). The question is what is the legal effect? Will it render the sale without jurisdiction? In my opinion, it will not. The position will be similar to cases of omitting to value the property after hearing the parties u/s 13, Money-Lenders Act. In the latter case we have two rulings of this Court laying down that the sale will not be without jurisdiction, first, *Chandra Sekhar v. Bhagwan Das* AIR 1941 Pat. 440 and second, *Sheo Dayal Narain v. Mt. Moti Kuer* AIR 1942 Pat. 238. The failure to observe the provisions of Section 163(2)(b), if there has been such a failure, does not render the sale a complete nullity.

5. I now come to Section 158B. The first part of Section 158B prescribes the conditions under which the tenure or holding shall pass to the purchaser. In other words, the sale will be a rent sale. The second part lays down the procedure that must be followed by the decree-holder if he wants the sale to be a rent sale. It is in these terms:

When the application mentioned in Section 158AA is made and the decree-holder wants to proceed against the tenure or holding or portion of the tenure or holding in respect of which the decree was obtained, the Court executing the decree shall, before proceeding to sell the tenure or the holding or a part of the holding, give to the parties to the decree notice of the application and of the date on which the sale proclamation shall be drawn up, and may, notwithstanding anything contained in the Code of Civil Procedure, 1908, simultaneously issue

attachment.

6. It has been held by a Bench of this Court in. *Kameshwar Singh v. Bishwanath Jha* AIR 1947 Pat. 33 that Section 158B(2) is a corresponding provision to Order 21, Rule 22, Civil P.C., and the reason why u/s 148(1), Bihar Tenancy Act the notice under Order 21, Rule 22, has been dispensed with in rent executions is because a corresponding mandatory notice has been prescribed u/s 158B(2), and failure to comply with the section would have the same consequence as failure to comply with the provision of Order 21, Rule 22 in cases where that provision is applicable. That is to say, as held by this Court, the sale Would be a nullity.

7. In the present case, no notice was issued u/s 158B(2), and, therefore prima facie it would appear under this ruling that the sale was without jurisdiction. But the circumstances in which this notice was not issued are peculiar. It appears that the decree-holders of their own choice chose to adopt the procedure for the execution of money decrees and so applied for issue of notice under Order 21, Rule 22, and such notice was issued and served as appears from the ordersheet. Then there was an order for attachment, and only after that the Court observed that the order had been passed by mistake as the decree was a rent decree; so the order would be recalled and the sale proclamation and attachment would be issued together, and this was done. It is to be noticed that the mere fact that sale proclamation and attachment were issued together would not in itself make it a rent execution, because even under Order 21, Rule 67, Civil P.C., as amended by this Court, it is possible to issue attachment and sale proclamation simultaneously in money execution.

8. The question is, in these circumstances, what is the effect of the omission to issue the notice u/s 158B(2)? It is, in my opinion, quite clear that having regard to the fact that notice was issued and served under Order 21, Rule 22, the sale could not be a nullity, or without jurisdiction. It would at least take effect as a money sale, that is to say a sale of the right, title and interest of the judgment-debtor, because u/s 158AA, Bihar Tenancy Act, it is quite open to the decree-holder to elect whether he will proceed by way of rent execution against the tenure or holding itself or merely against the property of High judgment-debtor, and here would be nothing illegal in proceeding under the CPC and issuing the notice under Order 21, Rule 22, the Court in each case being the same. The Court will thereby acquire full jurisdiction to sell the property of the judgment-debtor. This being so, it cannot be said in the present case that the failure to issue the notice u/s 158B(2) rendered the sale wholly without jurisdiction.

9. In that view if the sale could be set aside at all it would be only within one month under Order 21, Rule 90, and the application to set aside sale, apart from the fact that it was without merit, was long barred by time. The result is that Miscellaneous Appeal No. 261 succeeds, and I would allow it with costs and set aside the order holding the sale a nullity.

10. I now come to Miscellaneous Appeal No. 390. On 9-6-1944, the judgment-

debtors made & similar application u/s 47. The learned Subordinate Judge rejected their application, because he said the sale had already been set aside on the application of the mortgagee, and. there was nothing further to set aside. Against this order the judgment-debtors have come in appeal. In view of what I have already said it is clear that in any view that application was rightly rejected. It also was long out of time. This appeal, therefore, fails and must be dismissed with costs.

11. Lastly, there is the First Appeal No. 58. At the time when the sale took place a second suit was pending against the tenants for rent which was said to have accrued due before the sale, namely, the period from the January kishit of 1938 to the January kishit of 1941. The previous suit had been brought under the Transfer of Property Act. It was alleged that a notice to quit had been served. Rent was claimed up to the time of the quit notice, and for the subsequent period damages for use and occupation were claimed. The Court held that the suit was one under the Bihar Tenancy Act. The notice to quit was ineffective. Therefore, damages could not be allowed, and as rent had not been claimed in the alternative that suit was dismissed with regard to the period in question which was the four kishits of the year 1938.

12. The defence in the suit then was, first that at the sale referred to the tenure had been purchased subject to the liability for rent due at the time, and, therefore, no suit could subsequently be brought against the tenants for the rent of that period. Secondly, the claim was, in any event, barred for the four kishits of 1938 because under the provisions of Order 2, Rule 2, Civil P.C., rent for that period should have been claimed in the previous suit.

13. Both contentions were rejected by the learned Subordinate Judge, but, in my opinion, he should certainly have accepted the first contention and dismissed the suit on that ground. I have already stated the circumstances in which the sale took place and given my reasons for holding that the sale would take effect as a sale only of the right, title and interest of the judgment-debtors. The property would, therefore, be sold subject to existing encumbrances including the liability for rent. In the sale proclamation reference was made to that liability, but it was in somewhat ambiguous terms. It was stated:

Be it known that the mokarari rent of the said tenure for January kishit of 1345 Fasli up to January kishit of 1348 Fasli is due by the judgment-debtors for the recovery of which a suit being Kent Suit No. 1 of 1941 has already been instituted in the first Court of the Subordinate Judge at Gaya against the judgment-debtors and is pending trial.

14. In the sale certificate it was also notified that the rent for this period was due by the judgment-debtors, and in the bid sheet it is mentioned that the encumbrance was read out. Obviously all this is ambiguous. On one reading it might be a notification that the sale was subject to the liability, on another reading it might be taken as an indication that it was intended by the landlord to

saddle the judgment-debtors with the liability. However that may be, once it is held that the sale was a money sale the landlord's wishes would become irrelevant, since all he could sell would be the right, title and interest of the judgment-debtors. The position has been clearly laid down by a Full Bench of this Court in Kalyani Prasad v. Surendra Nath AIR 1945 Pat. 33 wherein it is held that a landlord, who purchases a tenure in execution of a money decree obtained by him in a suit for recovery of arrears of rent of a tenure takes the property subject to the liability for the arrears of rent accruing due between the date of the suit and the date of the sale, though such liability may not have been notified in the sale proclamation. That is exactly "the position in the present case, and we are bound by the ruling of the Full Bench. It is true that that was a case under the Chota Nagpur Tenancy Act, but there is no significant difference between the two Acts in this regard. The proviso to Section 60, Chota Nagpur Tenancy Act, which does not occur in the Bihar Tenancy Act, is irrelevant, because as pointed out by the Full Bench, that proviso obviously refers to a rent decree and rent sale, and in the present case we are dealing with a money sale. In the course of the judgment the learned Judges referred to an observation of Ghose J. with regard to the Bengal Tenancy Act upon this point in Midnapore Zamindary Co. Ltd. Vs. Haripada Roy and Others, . Ghose J. said:

The tenant was liable for those arrears. The landlord has now placed himself in the position of that tenant by purchasing his right, title and interest. Then can the Landlord still say that he can claim these arrears from the person whose right, title and interest he has purchased?... Moreover so far as the landlord auction-purchaser is concerned, he does not require any notice that arrears of rent are due.

15. That I apprehend, correctly states the position. Moreover, the Full Bench has expressed the opinion that the position with regard to sales in money executions would be the same under the Bihar Tenancy Act. Mr. Prem Lall for the respondents relies upon Kesho Prasad Singh v. Paranjota Koer AIR 1921 Pat. 184 but all that was laid down in that case was that if the landlord obtains two rent decrees against a tenant and first executes one decree by sale of the holding without notifying that the sale is subject to the other decree, and purchases the holding himself, he is not debarred from executing the other decree against the remaining properties of the tenant. That seems to me, with respect, obviously correct, because in a rent sale, without any notification that the sale was subject to any encumbrance, the holding will pass free from encumbrance, and, therefore, the tenant and not the landlord, would be liable for any rent due at the time of the sale. But this ruling quite clearly, is inapplicable to a case like the present one where the sale is not a rent sale.

16. In my opinion, after the sale no suit for rent of the previous period could lie against the former tenants, and the suit should have been dismissed. As the appeal succeeds on this ground, it is unnecessary to express any opinion with regard to the point taken under Order 2, Rule 2. I would, therefore, allow First

Appeal No. 58 with costs, and direct that the suit be dismissed with costs.

Sinha J.

I agree.