
(1948) 08 PAT CK 0009
In the Patna High Court

Laldhari Kuer and Others

APPELLANT

Vs

Uma Shanker Prasad and Others

RESPONDENT

Date of Decision : 26-08-1948

Acts Referred:

Bihar Tenancy Act, 1885 — Section 161, 167, 65

Citation : AIR 1949 Patna 500

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

Bench : Full Bench

Judgement

Sinha, J.—This is a plaintiffs' second appeal from the concurrent decisions of the Courts below dismissing their suit for a declaration that the execution sale held on 27th July 1939, in favour of the landlord defendant-first party, did not affect the plaintiffs' interest as usufructuary mortgagees in respect of a portion of the holding.

2. The facts in this case are not in dispute, and lie within a very narrow compass. The defendants second and third parties were the raiyats in respect of an occupancy holding under the defendant-first party as their landlord. The defendant-second party executed a usufructuary mortgage bond on 19th May 1924, in respect of a portion of the holding, namely, 1 bigha 3 dhurs odd, which is the disputed land in this case. In 1936, the defendant-first party landlord brought a suit for arrears of rent against the raiyats, defendants second and third parties, and obtained an ex parte decree. In execution of that decree, he put the holding to sale, and purchased it himself on 27th July 1939. Thereafter he took delivery of possession. The plaintiffs objected to the sale and made an application under Order 21, Rule 90, Civil P.C., for setting aside the sale. But, subsequently, they withdrew that application. Eventually, they brought the suit which has led up to this second appeal. They sued, in substance, for a declaration that the landlord's auction purchase of 27th July 1939, in execution of the decree for rent did not affect their interest as mortgagees in possession.

3. The defendant-first party only contested the suit on the ground, chiefly, that

the decree for rent was not a money decree, as alleged by the plaintiffs, but a rent decree properly so called, and as such his purchase in execution of that decree passed the holding itself free from all encumbrances created by the raiyats, and that, he being the landlord, it was not incumbent upon him to have the encumbrance annulled, even though it may be found by the Court that the encumbrance was a real one. The defendant had, as a matter of fact, contended that the usufructuary mortgage bond sued upon by the plaintiffs was not a real but a sham transaction.

4. Both the Courts below have held that the decree, in execution of which the contesting defendant purchased the property, was a rent decree, and that the holding itself passed at the auction sale in favour of the landlord. They also held that the mortgage bond in favour of the plaintiffs was a genuine transaction and for consideration. On the question of law, the Courts below further held that, the contesting defendant being the landlord of the holding, it was not necessary for him to take recourse to proceedings u/s 167, Bihar Tenancy Act, in order to get rid of the encumbrance which was the basis of the plaintiff's suit. In that view of the matter, both the Courts below have agreed in holding that the plaintiffs' suit should be dismissed. Hence this second appeal.

5. So far as this Court is concerned, it has been the *cursus curiae* of this Court that a landlord in the position of the defendant-first party in this case was not obliged to take proceedings u/s 167, Bihar Tenancy Act in order to get rid of an encumbrance on the holding purchased by him in execution of a rent decree: see in this connection the decisions of this Court in the cases of *Surat Lal Chowdhery Vs. Lala Murlidhar and Others*, , followed in the case of *Badlu Pathak and Others Vs. Sibrum Singh and Others*, and *Sourendra Mohan Singh and Others Vs. Kunjbihari Lal Mander and Others*, In the latter case, their Lordships further held that, by reason of having obtained a usufructuary mortgage from the raiyat, the mortgagee cannot assume the position of a subsequent mortgagee in relation to the landlord purchasing the holding in execution of a decree for arrears of rent enforced as a first charge on the holding, and that, there fore, the encumbrancer could not redeem the landlord. They relied upon the previous decisions of this Court referred to above as also the cases of *Chowdhry Mahadeo Prasad v. Shaikh Azmat* A.I.R.1920 Pat. 652, *A.B. Cheoditti v. Quadress* A.I.R 1916 Pat. 385, *Bishun Prasad Singh and Others Vs. Narsingh Das*, and *Hargobind Das and Others Vs. Ramchandra Jha and Others*, . All these decisions of this Court are baaed on the ground that, u/s 65, Bihar Tenancy Act, the landlord has a first charge on the holding, and by enforcing that charge he purchases the holding free from all encumbrances. They further held in that case that in case of a non transferable occupancy holding, though such a transaction may be binding as between the mortgagor and the mortgagee, it would not be binding on the landlord, if he happened to purchase the holding in execution of a rent decree.

6. This line of decisions was not followed by a Division Bench of the Calcutta High Court in the case of *Bidhuranjan Sarkar Vs. Soleman Pramanik and Others*, . In

that case their Lordships held that a mortgage of a non-transferable occupancy holding, either of the whole or of a portion, is an encumbrance within the meaning of Section 161, Bengal Tenancy Act, and that such an encumbrance is not ipso facto annulled by virtue of the rent sale and purchase by the landlord himself. They further held that it made no difference whether the purchaser happened to be the landlord himself or a third party. But we are bound by the long series of decisions of this Court, and, at this stage, it is not necessary to refer the question to a larger Bench. The Courts below have relied upon a Division Bench ruling of this Court in the case of Sri Sri Ram Chanderji v. Hem Chandra Singh AIR 1939 Pat. 200, in which their Lordships reiterated the position that occupancy holdings must be presumed to be non-transferable, in the absence of proof to the contrary. They also held that the landlord purchaser at a rent sale of a non-transferable occupancy holding is entitled to disregard the usufructuary mortgage of a portion of the holding, if the mortgage was not made with the landlord's consent. They further held that sections 26B and 26N do not apply to mortgages, and therefore, those provisions could not be prayed in aid of the mortgagee. It should be noted that this decision of the Division Bench was given on 10th November 1938, the date on which the Bihar Tenancy (Amendment) Act (xi [11] of 1938) came into force. In the case before their Lordships, the holding had been purchased by the landlords in 1930, and delivery of possession taken in 1932. Hence, even the amending Act of 1934 did not apply to the facts and circumstances of that case. Hence that decision of their Lordships of the Division Bench of this Court is no authority for the decision of the present case.

7. In this case, as already indicated, the sale in favour of the landlord had taken place on 27th July 1939, that is to say, after the coming into effect of the Bihar Tenancy (Amendment) Act (XI [ill 1938]). It has been provided by the amended Section 26A as follows:

(1) Every occupancy holding or a portion thereof, together with the right of occupancy therein, shall be capable of being transferred and bequeathed in the same manner and to the same extent as other immovable property, and all transfers made by sale, exchange or gift and all bequests shall, subject to the provisions of Sub-section (2), be binding on the landlord.

Apparently, the latter part of Section 26A(1) quoted above does not apply to the facts of the present case, as a usufructuary mortgage is not covered by the latter part of the section, and, hence, a usufructuary mortgage of a portion of the holding or the entire holding is not binding on the landlord.

8. But it still remains to consider the effect of the first part of this sub section namely, that an occupancy holding is capable of being transferred in the same manner and to the same extent as other immovable property. These words are substantially the same as those of Section 11 in respect of permanent tenures and Section 18 in respect of holdings at fixed rents or rates of rent, read with 8. 11. Under the provisions of those sections, namely, Sections 11 and 18, Bihar

Tenancy Act, in relation to permanent tenures and sarahmoiyan holdings, a permanent tenure-holder or a raiyat at fixed rates could transfer his tenure or holding, as the case may be, and such transactions, though not entirely binding on the landlord in the sense that he would be compelled to sue a mere mortgagee, could not, at the same time, be completely ignored by the land lord on the ground that the tenure or the holding was non-transferable. Section 26A, Bihar Tenancy Act, which came into effect on 10th November 1938 must apply to the facts of the present case. Applying the provisions of that section, it must be held that occupancy holdings are now transferable, either in whole or in part, and though the landlord may not be bound to recognise a transfer which is not by way of sale, exchange or gift or the like, he cannot ignore such a transaction on the ground that the holding, so far as he is concerned, is not transferable. Hence, the amendment made by the legislature incorporated in the new Section 26A has changed the substantive law as regards occupancy holdings. It is no more open to the landlord to contend that occupancy holdings are non-transferable, in the absence of proof of custom to the contrary, as he could have done before the enactment aforesaid. Hence though a mortgagee of a portion or the whole of an occupancy holding may not be entitled to claim that he should be impleaded in the suit for arrears of rent to be instituted by the landlord, because the landlord is not bound by such a transfer, the landlord, in the event of his purchasing the holding in execution of a rent decree, must take notice of the encumbrance, and, if so advised, exercise his option of annulling it in accordance with the provisions of Section 167, Bihar Tenancy Act. That is the legal position, as I understand it, after the enactment of Section 26A, Bihar Tenancy Act.

9. As the Courts below have not given effect to the provisions of Section 26A, and as there is no case of this Court deciding the question one way or the other, this matter was directed to be placed before a Division Bench, when it came before me sitting singly. I have considered the bearing of the new provisions of Section 26A, and, in my opinion, the decision mostly relied upon by the Courts below, namely, the case of Sree Sree Ramchanderji and Others Vs. Hem Chandra Singh and Others, is no more good law, in view of the amendment of Section 26, Bihar Tenancy Act. I do not mean to hold that that decision was not rightly given. In view of the enactment of Section 26A, that decision must be taken to have been, to the extent provided for by Section 26A, overruled. As the respondents in this case were not represented, we have taken care to look into the relevant decisions bearing on the provisions of the Bihar Tenancy Act, and, in my opinion, the right view of the law as it now stands is that the auction purchaser, whether he is the landlord himself or a third party, must take notice of the provisions of Section 167, Bihar tenancy Act, and unless the encumbrance was annulled in pursuance of the provisions of that section, the encumbrance is as much binding on the landlord as on any other purchaser of the holding in execution of a rent decree. It follows from what I have said that the encumbrance created in favour of the plaintiffs by the old tenants still subsists, and the suit should have been decreed. The decision of the Courts below to the contrary is erroneous in law.

10. The plaintiffs had prayed for confirmation of their possession on the ground that they were still in possession. But the trial Court found that they were not in possession, and that the landlord had taken delivery of possession through Courts. As the plaintiffs' interest as mortgagees in possession has not been affected by the sale in favour of the landlord defendant-first-party, it follows that the plaintiffs are entitled to recovery of possession.

11. In the result, the appeal is allowed and the judgments and decrees passed by the Courts below set aside. There will be no order as to costs in this Court: but the plaintiff-appellants are entitled to their costs in the two Courts below.

Ramaswami J

I agree.