

(1903) 03 CAL CK 0019
In the Calcutta High Court

Case No : Appeal from Order No. 286 of 1902 and Application No. 2622 of 1902

Mohim Chandra Bhattacharjee

APPELLANT

Vs

Ram Lochan Dey

RESPONDENT

Date of Decision : 27-03-1903

Acts Referred:

Citation : (1903) 03 CAL CK 0019

Final Decision : Allowed

Judgement

1. The Appellant before us, so far as this appeal is concerned, purchased a mokurari holding in execution of a mortgage decree, not being a decree for arrears of rent, and it seems that the sale was confirmed without previous payment of the landlord's fee in the manner required by sec. 13 of the Bengal Tenancy Act. The purchaser obtained a certificate, and he then applied under sec. 318, C. P. C., to be put into possession of the property purchased by him. Upon this, the judgment-debtor whose mokurari had been sold objected on the ground that the certificate was not a valid certificate because the sale had been confirmed without payment of the landlord's fee. An objection seems to have been raised both in the Court of first instance and in the Court of Appeal that the Court had no jurisdiction to consider this objection on the part of the judgment-debtor, and both Courts have, however, held that it was a matter within sec. 244, C. P. C. Both Courts have also found that, inasmuch as the landlord's fee had not been paid, the auction-purchaser had not a title to obtain possession of the land because the certificate granted to him was not a valid certificate.

2. On the hearing of this second appeal, an objection has been raised by the judgment-debtor Respondent that this matter does not come within sec. 244, C. P. C., although it was only on this ground that the lower Courts assumed jurisdiction to consider it. It is contended that unless this case comes within sec. 244, there is no right of second appeal. The learned pleader for the Respondent contends that the auction-purchaser is not a party to the suit or to the proceedings taken in execution of decree, and that for this reason the auction-

purchaser cannot appeal as against an order under sec. 244. It seems to us that this is a matter which, so far as the right of the auction-purchaser, comes within the terms of the judgment of their Lordships of the Privy Council in the case of *Prosanno Kumar Sanyal v. Kalidas Sanyal* I. L. R. 19 Cal. 683 : s. c. L. R. 19 I. A. 166 (1892). The learned pleader, however, contends that the facts on which that case proceeded are not the same as the facts of the present case. That may be so. But we understand their Lordships' opinion to be that, as a rule, auction-purchasers must be regarded as within sec. 244, C. P. C., in all matters of dispute in which they are concerned. The last passage in the judgment in that case points to an expression of such opinion. On these grounds, therefore, in our opinion, a second appeal lies to this Court in this case.

3. On the merits, we think that the appeal must be allowed. The lower Courts seem to have thought that an objection of this description can be properly made by the judgment-debtor. The payment of the landlord's fee before confirmation of sale, in our opinion, does not affect the position of the judgment-debtor, but affects the right of the landlord to object to a transfer of a tenant's right without payment of the fee, the object of such payment being to issue notice to the landlord in a case of this description of the transfer of the tenant's right. The case of *Babar Ali v. Krishnamanini Dassi* I. L. R. 26 Cal. 603 (1899) has, however, been relied upon as an authority for holding that the title of an auction-purchaser who has not, under sec. 13 of the Bengal Tenancy Act, paid the landlord's fee is not a valid title. That, however, was a suit brought by the landlord himself and he objected to the attempt made by the Defendant in that case to avoid liability for the payment of rent on the ground that, by a sale in execution of decree, his title had been conveyed to a third party. The finding of the Court was that as between themselves there may have been such a transfer, but it was not a valid transfer so far as affected the landlord because there was no notice to him and consequently there was no change in the name of the tenant in his sherista by means of payment of the landlord's fee. We think, therefore, that that case is distinguishable from the present case in which the objection is raised not by the landlord but by the tenant whose tenure has been sold under a valid sale. The fault was more than the fault of the Court which should not have given the certificate until the landlord's fee had been paid. The learned pleader for the Respondent, however, contends that this is opposed to the principle on which Courts have proceeded to consider the validity of sales of occupancy rights without the consent of the landlord. It will be sufficient for us to consider such a point when it arises. We would, however, refer to sec. 73 of the Bengal Tenancy Act, which relates to proceedings in a suit brought by a landlord who has received no notice of the transfer in the manner prescribed, and we think that, in such a case, various considerations will arise in regard to the party by whom such an objection is raised. In our opinion, therefore, it was not competent to the judgment-debtor to raise an objection to the delivery of possession under sec. 318, C. P. C. Such an objection, moreover, we would observe, could not be entertained under the present law as contained in Bengal

Act I Of 1903, and we may further observe that their Lordships of the Privy Council, in the case of Malkarjun v. Narhari 5 C. W. N. 10 : s. c. L. R. 27 I. A. 216 ; I. L. R. 25 Bom. 337 (1900) have pointed out the confusion which would be introduced into the administration of justice if the title of the purchaser at an execution sale was to be rightly set aside.

4. On the merits too, the objection taken by the judgment-debtor is manifestly frivolous. He objects to the giving up of his tenure which has been properly sold because the auction-purchaser has not completed his title by payment of the landlord's fee and on this ground it has been held that the auction-purchasers cannot be put into possession. The sale however stands. But if such an objection be valid, the result would be that, if the landlord's fee be paid as it has since been paid, the Court will grant a fresh certificate and the judgment-debtor will be compelled to vacate his land which he can have no possible right to retain after the sale. We think, therefore, that the orders of both the Courts below must be set aside and the appeal allowed with costs throughout. It is unnecessary after this judgment to pass any separate order on the application for a rule.