

(1933) 09 PAT CK 0017
In the Patna High Court

Muhammad Zakaria and Another	APPELLANT
Vs	
Muhammad Nurul Haque and Others	RESPONDENT

Date of Decision : 22-09-1933

Acts Referred:

Bengal Tenancy Act, 1885 — Section 148A, 171, 171(1)(c)

Citation : AIR 1934 Patna 88

Hon'ble Judges : Kulwant Sahay, J

Bench : Division Bench

Judgement

Kulwant Sahay, J.—This appeal by the plaintiffs arises out of a suit instituted by them for a declaration that they along with the defendants third party were in possession of the entire holding of one Kari Tanti as bharnadars u/s 171, Ben. Ten. Act, and that the plaintiffs could not be dispossessed of it and that they were entitled to retain possession and occupation thereof. The plaintiffs further wanted a declaration that an ex parte decree passed on 7th December 1926 in favour of the defendants first party was fraudulent and illegal, and they prayed for a permanent injunction against the defendants first party restraining them from executing the said decree, and they asked that the said ex parte decree may be set aside. Both the Courts below have dismissed the suit.

2. In order to understand the points raised in the case it is necessary to set out the facts shortly. One Kari Tanti had a holding of 3 bighas 17 kathas 12 dhurs in mauza Bhejbdih. The defendants first party and other persons were the proprietors of this village and the Jitwarpur Concern, represented by the defendant second party in the present suit, was the lessee of the village in respect of the shares of some of the co-sharers. In November 1905 Kari Tanti executed a Sudbharna deed in respect of

2 bighas 7 kathas 9 dhurs of his holding, in favour of Tajamul Hussain, the father of the plaintiffs. The defendants first party instituted a suit for rent against Kari Tanti and obtained a decree for rent u/s 148-A, Ben, Ten. Act. In execution of this decree the holding was sold in Execution Case No. 414 of 1915 on 11th

January 1915 and was purchased by the defendants first party themselves, Tajamul Hussain, the subdharanadar, applied for setting aside the sale under Order 21, Rule 90, Civil P.C., and the sale was set aside on 21st December 1915.

3. Fresh execution of the decree was taken out by the defendants first party in Execution Case No. 91 of 1916. Tajamul Hussain thereupon deposited the decretal amount on 10th January 1917, apparently under the provisions of Section 170(3), Ben. Ten. Act, and on 31st January 1917 he was put in possession of the entire holding under the provisions of Section 171(1)(c) of the Act; and the plaintiffs still claim to be in possession as the heirs of Tajamul Hussain. It appears that thereafter the defendant second party representing some of the co-sharer landlords brought a suit for rent (Suit No. 445 of (1917) against Lila Tanti, the grandson and heir of Kari Tanti. A decree for rent was obtained on 6th June 1918 and in execution thereof (in Execution Case No. 686 of 1918) the holding was sold and purchased by the defendant fourth party on 19th July 1919.

4. The plaintiffs allege that they had no knowledge of this suit or decree or the sale and that they have continued in possession in their own right.

There appears to have been a collectorate partition of the estate in which this holding is situate and the defendants party were allotted a separate estate carved out of the parent estate and they were out in possession of this separated estate on 14th January 1918. 2 bighas 7 kathas 3 dhurs, out of the 3 bighas 17 kathas 12 dhurs constituting the first holding of Kari Tanti, was allotted to the newly formed estate of the defendants first party.

5. The defendants first party thereupon in 1925 instituted Suit No. 213 of 1925 for khas possession of the 2 bighas odd of land which had fallen in their putti by the partition on the ground that the original tenant had abandoned the holding. In this suit the present plaintiffs; as well as the present defendants, second and fourth parties, were impleaded as defendants. The suit appears to have been contested by the defendant fourth party who was the purchaser in execution of the decree of the defendant second party, and although "the plaintiffs filed a written statement they did not appear at the hearing and the suit was heard ex parte so far as they were concerned.

6. A decree was made in favour of the defendants first party (the plaintiffs in that suit) on 7th December 1926. This is the decree which the present plaintiffs seek to be declared as not binding upon them and which apparently gave them a cause of action for the declaration that they have sought for, and the present suit for setting aside the decree and for the reliefs as set out already, was instituted on 26th May 1928. The suit has been contested by the defendants first party and it has been dismissed by both the Courts below as stated above.

The findings of the lower Court are that the sudbharna bond of the year 1905 was genuine and for consideration, and possession passed under it to the plaintiffs' father and thereafter to the plaintiffs; that there was no custom of

transfer of occupancy holdings in the village; that the deposit made by Tajmul Hussain on 10th January 1917 was not a valid deposit and he was not legally put in possession u/s 171, Ben. Ten. Act; that there had been an abandonment of the holding by the original tenant and that Kari Tanti's heir, Tila Tanti, had died without leaving any heir and that therefore the holding had reverted to the landlord; that the defendants first party were not required under the law to redeem the plaintiff's bharna; and lastly that there was no fraudulent suppression of summonses in the previous suit No. 213 of 1925 instituted by the defendants-first-party.

7. The first contention of the learned advocate for the appellants is that the learned Subordinate Judge was wrong in holding that the deposit was not a lawful deposit u/s 170, Ben. Ten. Act, and that the plaintiffs or their father were not lawfully entitled to be in possession u/s 171 of the Act. The learned Subordinate Judge appears to be under some misapprehension on this point. He observes that the sale in execution of the decree for rent obtained by the defendants-first-party had been set aside on an application of Tajmul Hussain under Order 21, Rule 90, Civil P.C. and that the deposit was made at a time when there was no proceeding pending relating to the sale of the holding. It appears however from the documents Exs. 4 and 5-A, which were referred to by the Munsif and which are admitted by all the parties, that the deposit was made in execution case No. 91 of 1916, which was a fresh execution taken out by the defendants first-party after the sale had been set aside on the application of Tajmul Hussain under Order 21, Rule 90.

8. The learned Subordinate Judge observes that a deposit in order to be a valid deposit must be made so as to prevent a sale of a tenure or holding which is advertised for sale under Ch. 14, Ben. Ten. Act, and as there was no proceeding pending which made it necessary to make the deposit in order to prevent the sale, the deposit did not come within Section 171, Ben. Ten. Act. In this the learned Subordinate Judge, as I have said, was clearly under a misapprehension. The learned advocate for the appellants wanted to adduce additional evidence to show that the deposit had been made in an execution case in order to prevent the sale.

It was not necessary to consider that application because the evidence on the record was sufficient to show that the deposit had been made in an execution proceeding in order to prevent the sale. It must therefore be held that the deposit was a valid deposit and that the plaintiff's father Tajmul Hussain had been put in possession validly under Clause (c) of Sub-section (1) to Section 171, Ben. Ten. Act. The next point for consideration is what is the effect of the plaintiffs or their father being put in possession u/s 171 of the Act. Section 171 provides that the amount paid by the person having an interest in a tenure or a holding advertised for sale under Ch. 14 of the Act in order to prevent the sale shall be deemed to be a debt bearing interest at 12 per cent per annum and secured by a mortgage of the tenure or holding to him.

9. It further provides that this mortgage shall take priority of every other charge on the tenure or the holding other than a charge for arrears of rent; and lastly it provides that the person making the deposit shall be entitled to possession of the tenure or holding as mortgagee and to retain possession of it as such until the debt with the interest thereon has been discharged. It is clear therefore that so long as the debt has not been discharged the plaintiffs would be entitled to possession of the holding as mortgagee.

10. It is contended however on behalf of the defendants-first-party respondents that this provision applies under certain restrictions and only in cases where the holding is transferable, that it remains in operation so long as the holding does not revert to the landlord on account of death without heir of the tenant, and that the person making the deposit is entitled to remain in possession only as against the tenant and not as against the landlord who is not bound to recognize him as mortgagee of the tenant. In my opinion these contentions are not sound. The validity of the mortgage created by the deposit u/s 171 does not depend upon the question whether the holding is transferable or not. This is a special provision made by the legislature to enable persons having interest in a holding which would be voidable by the sale to make deposits to prevent the sale, and on making such deposit certain legal rights are conferred upon that person.

11. If the sale had not been prevented by the deposit and the holding had been sold the landlord could not refuse to recognise the purchaser inasmuch as the sale was effected at his instance. If the landlord was bound to recognize the purchaser of the holding in execution of his decree for rent he is also similarly bound under the provisions of Section 171 to recognise the person who acquires the legal status of a mortgagee of the holding. He acquires that status in the presence of the landlord in a proceeding initiated by him and to which he is a party. I am therefore of opinion that the validity of the mortgage created by operation of Section 171 and of the possession delivered to the mortgagee under it, does not depend on the transferability or otherwise of the holding, but that it is binding on the landlord even when the holding is not transferable.

12. The fact that the original tenant may abandon the holding or may die without leaving any heir would not, in my opinion, affect the right of the person to be in possession u/s 171. The holding reverts to the landlord in the event of the death of the tenant without any heir under the provisions of Section 26 of the Act. This section provides that the right of occupancy descends in the same manner as other Immovable property; but in any case in which under the law of inheritance to which the rayat is subject, his other property goes to the Crown, his right of occupancy shall be extinguished.

13. In *Garbhu Mahto v. Mt. Khudaijattunnissa* AIR 1925 Pat 597 the meaning of the provision contained in Section 26 was considered and it was held that the section seems to mean that although the other property of an occupancy raiyat dying intestate escheats to the Crown, his occupancy right does not escheat to the Crown but is extinguished. This does not mean that the holding ceases to

exist but only that the occupancy right is terminated, as in the case of transfer of an occupancy right to a person jointly interested in the land as proprietor. Ross, J., then observed that the holding is then a holding without a tenant and must revert to the landlord.

14. The question was then considered what was it that reverted to the landlord, and it was held that the holding reverts to the landlord subject to the mortgage created by the last holder, It was no doubt held that this was the case when the holding was transferable; but their Lordships were there considering a transfer by act of parties and not transfers by operation of law as contemplated by Section 171, Ben. Ten. Act, which, as I have said, does not depend for its validity on the transfer-ability of the holding.

15. The view taken in this case was affirmed by another Division Bench in Prasad Nath Jogi Vs. Ambika Prasad Singh and Others, . It follows, therefore, that although on the death of the last tenant without leaving any heir the holding reverted to the landlord, yet it so reverted to him subject to the mortgage created in favour of the plaintiffs by operation of Section 171, Ben. Ten. Act. The learned Subordinate Judge has referred to the two decisions of this Court just referred to but has failed to appreciate the true bearings thereof. The case of Muktakeshi Dassi v. Pulinbehari Singh (1909) 1 IC 155, referred to by the learned Subordinate Judge, has been expressly differed from by Ross, J., in Garbhu Mahton v. Mt. Khudaijatunnissa AIR 1925 Pat 597 referred to above. I am, therefore, of opinion that the plaintiffs are entitled to remain in possession so long as the debt created by the operation of Section 171 was not discharged. The next point for consideration is the effect of the decision in the suit previously instituted by the defendants-first-party, viz., suit No. 213 of 1925. It is contended that the present suit was barred by the principle of res judicata inasmuch as the defendants-first-party had obtained a decree for delivery of possession in that suit as against the present plaintiffs.

16. The allegation of the defendants-first-party as plaintiff in that suit was that there had been an abandonment of the holding by the original tenant, that the decree obtained by the defendant-second party was not a rent decree and that the purchase of the defendant fourth party who was really a benamidar for the present plaintiffs was not binding upon him. Mention was made of the fact of the deposit by Tajamul Hussain, but the point as regards the legal rights arising out of the deposit was not put in issue and was not considered. In the present suit the plaintiffs allege that they are entitled to remain in possession as mortgagees, first, under the mortgage created by the sudbharna of the year 1905, and secondly, under the mortgage created by operation of law u/s 171, Ben. Ten. Act.

17. It is contended that this defence was open to the present plaintiff's when they were impleaded as defendants in the suit of the defendant first party and they might and ought to have taken this defence in that suit and not having pleaded that defence then the decree in the previous suit would operate as a bar to the trial of the present suit by the doctrine of res judicata. On behalf of the

appellants, it is contended firstly, that the decision on a pure question of law would not operate as *res judicata*, and secondly that having regard to the reliefs sought in the present suit and the facts upon which those reliefs are sought the previous suit cannot be said to operate as *res judicata*. It is also contended that when a right is created by operation of law the decision on the point to the contrary cannot operate as *res judicata* in a subsequent suit, and reference was made to a decision of this Court in *Bageshwari Charan Singh v. Bindeshwari Charan Singh* AIR 1982 Pat 337.

18. That was a quite different case; that case depended on the interpretation of Section 12-A, Chota Nagpur Encumbered Estates Act, which made an alienation by the proprietor without the sanction of the commissioner void. It was held that although in a proper case the decision on a question of law attracts the operation of the doctrine of *res judicata* as effectively as a decision on a question of fact, yet there may be oases in which a decision on a question of law does not operate as *res judicata*, and reference was made to the decision of Rankin, C.J., in *Tarini Charan v. Kedar Nath* AIR 1921 Cal 777 and to other decisions of the Allahabad High Court as well as of this Court. The present case however is not one of the nature considered by Agarwala, J., in the case just cited.

19. I am of opinion that the observations of Rankin, C.J., in *Tarini Charan Bhattacharjee's* case AIR 1921 Cal 777 applied and the previous judgment would operate as *res judicata* in the present case. But the second contention of the plaintiffs-appellants on this point ought, in my opinion, to prevail. The previous suit was instituted by the present defendants first party for possession on the ground that the original tenant had abandoned the holding. It is no doubt true that the present plaintiffs were impleaded as defendants in the case, but they were impleaded simply on the, allegation that they were the real purchasers in the execution of the decree of the defendant-second party and the ostensible purchaser, viz., the defendant fourth party was merely their benamidar.

20. That suit was not instituted against the present plaintiffs in their capacity as mortgagees and it was not necessary for the present plaintiffs to set up the title which they have set up in the present case as a defence in the previous case.

I have so far considered the case of the parties with reference to the deposit made by Tajamul Hussain, the father of the plaintiffs, u/s 171, Ben. Ten. Act. There is, however, the other mortgage, viz., the *sudbharna* of the year 1905. That *sudharna* was in respect of a fraction of the holding, and not of the entire holding and, therefore, the question of its validity did not depend upon there being a custom of the transferability of the holding.

21. Mr. Hasaron Jan, on behalf of the respondents, however, refers to the Full Bench decision of the Calcutta High Court in *Dayamayai v. Ananda Mohan* AIR 1915 Cal 242, which lays down as a proposition of law that where the transfer is of a part only of the holding the landlord, though he has not consented, is ordinarily not entitled to recover possession of the holding unless there has been

an abandonment within the meaning of Section 87, Ben. Ten. Act, or a relinquishment of the holding, or a repudiation of the tenancy. It is true that in this case there is neither an abandonment nor a relinquishment nor a repudiation and the tenancy reverts to the landlord because of the original tenant having died without leaving any heir.

22. But even so, the landlord can only be bound by the mortgage only when the holding is transferable, as was held by Ross, J. in Garbhu Mahto's case AIR 1925 Pat 597. The plaintiffs, therefore, cannot set up their mortgage of 1905 as against the defendants first party.

The result is that it must be held that the plaintiffs are entitled to remain in possession of the holding so long as the debt created by the mortgage u/s 171 is not discharged. Although the question has not been raised, yet it is clear that the plaintiffs can claim the right to remain in possession only so long as their mortgage has not been discharged. The effect of the deposit made u/s 171, Ben. Ten. Act, is to constitute the present plaintiffs as mortgage in possession. Their mortgage debt would be the amount deposited by them and it has to carry interest at 12 per cent per annum.

23. A mortgagee in possession is always liable to account for the rents and profits of the mortgaged properties. The plaintiffs or their predecessor have been in possession from the date of the deposit on 31st January 1917. The amount deposited was Rs. 77-14-6. They must therefore account for the rents and profits for the period during which they have been in possession as mortgagees u/s 171. After taking of such account, if it is found that the original debt has been paid off, then they will have no right to remain in possession; if, on the other hand, it is found that the debt has not yet been satisfied, then they will be entitled to remain in possession so long as it is not satisfied.

24. This seems to be the legal position of the parties, and although the question was not raised in the Courts below, I think the proper order to make in the case is to set aside the decree of the Subordinate Judge and to remit the case to the Court below for a finding whether or not the debt created by the deposit of Rs. 77-14-6 has been paid off and for disposal according to that finding. If the debt has been paid off the suit will be dismissed; if it has not been paid off, the decree will be made in the plaintiffs' favour declaring them entitled to remain in possession so long as the debt is not paid off. Costs of this appeal will abide the result.