

(1912) 04 CAL CK 0075
In the Calcutta High Court

Nilambar Sahu

APPELLANT

Vs

Suttyo Priya Ghoshal

RESPONDENT

Date of Decision : 18-04-1912

Acts Referred:

Citation : 14 Ind. Cas. 568

Hon'ble Judges : Sharfuddin, J; Brett, J

Bench : Division Bench

Judgement

1. The present appeal is against an order in certain execution proceedings taken by the respondent for realization of a decree for rent which he obtained against his tenant. It appears that the respondent is a co-sharer landlord and he brought a suit (No. 621 of 1906) to recover his share of the rent from 1909 to 1312 making the other co-sharer landlord a party defendant. On the same day, the other co-sharer landlord brought a suit (No. 752 of 1906) to recover his share of the rent making his co-sharer, namely, the present respondent, a defendant in that suit. The claim of the present respondent was decreed on the 21st July 1906 and that of his co-sharer was decreed on the 17th August 1906. The other co-sharer landlord, however, took out execution of his decree first, put up the tenure to sale and, on the 15th March 1909, it was purchased by the present appellant for Rs. 1,200. The sale was confirmed on the 7th May 1909 and possession was given in August 1909. The decree under which the tenure was sold was for recovery of Rs. 665 due as rent. After all these proceedings, the present respondent took out execution of the decree which he had obtained and an objection was then put in by the present appellant, the auction-purchaser, that the same property could not be sold again, as the right of the tenant in the property had been lost and that the only remedy open to the present respondent was by proceeding against the surplus sale-proceeds obtained in execution of the other co-sharer's decree.

2. The Court of first instance allowed the objection but the lower Appellate Court has disallowed it and has directed that execution should proceed of the decree

obtained by the present respondent by sale over again of the tenure.

3. The auction-purchaser has appealed to this Court and the question which we have to determine is whether, when two co-sharers landlords have obtained separate decrees for rent for the same period and when the tenure had been sold in satisfaction of the decree obtained by one of them, the other co-sharer landlord can come forward and claim to execute his decree by sale of the same property after it has passed into the hands of the auction-purchaser. The lower Appellate Court has been influenced by the fact that rent is a first charge on the tenure. But in the present instance, the charges of both the co sharers were equal in priority and strength; and the learned Pleader, who appears on behalf of the respondent, has not been able to indicate to us any provision of the law which provides that, in such a case either of the decrees shall have priority over the other. The only principle which it seems possible to apply in a case like the present, where two persons have decrees equal in priority, is that the first who takes out execution is the first who is entitled to satisfy his decree by sale of the property and that the other person, who delays to take out his execution, loses his light to proceed against the property itself. The learned Pleader for the respondent has argued that as the charge under the respondent's decree was a first charge on the tenure and, as such, bound the tenure, therefore, when the property was sold in satisfaction of the other decree, it must be taken to have been sold subject to the charge existing on it by reason of the decree obtained by the respondent. We are unable to find any authority for this contention and, in our opinion, the only possible view to take in a case like the present is that, where each of two persons has an equal charge on a property, the person who is the first in time to apply for execution of his decree is entitled to satisfy his decree by sale of the property and the person who comes later and applies for execution after the tenure has been sold is not entitled to sell the tenure again as the tenure has then ceased to be a tenure of the tenant, and has passed into the possession of the auction-purchaser. All that he is entitled to is, to recover the sum due to him which from being a first charge on the tenure itself has, on the sale of the tenure, passed as a first charge on the surplus sale-proceeds. In these circumstances, we are of opinion that the view taken by lower Appellate Court is wrong and that the appeal must be decreed and the application of the respondent, so far as it seeks to execute his decree by re-sale of the tenure, must be disallowed and it must be left to him to execute his decree otherwise against the property of his debtor. The appellant is entitled to recover his costs from the respondent in this Court and in both the lower Courts. We assess the hearing fee in this Court at two gold mohurs.