
(1949) 12 CAL CK 0022

In the Calcutta High Court

Case No : A.F.A.D. No's. 1211 and 1441 of 1944

Nrisingha Prosad Bose and Others

APPELLANT

Vs

Nil Ratan Singha Roy and Others

RESPONDENT

Date of Decision : 06-12-1949

Acts Referred:

Bengal Tenancy Act, 1885 — Section 148A, 167, 65
Transfer of Property Act, 1882 — Section 52

Citation : AIR 1951 Cal 221 : (1951) 1 CALLT 244 : 54 CWN 683

Hon'ble Judges : G.N. Das, J; Das Gupta, J

Bench : Division Bench

Advocate : Paresh Nath Mukherji and Manan Kumar Ghose, for Sukumar Ghose, for the Appellant; Prafulla Kamal Das and Nilmoni Goswami, for the Respondent

Final Decision : Dismissed

Judgement

G.N. Das, J.

1 These appeals are at the instance of the contesting defendants. The facts are not in controversy and may be stated as follows :

2. There was an occupancy holding which was held by Ibrahim Sheikh and Sakina Bibi under the landlords. The interest of Ibrahim Sheikh passed later on to Ramswami Chatia. At that stage a suit for recovery of rent being Rent Suit No. 1654 of 1938 was instituted by defendant 1 against Ramswami Chatia and Sakina Bibi. The suit was framed under the provisions of Section 148-A, Bengal Tenancy Act, the co-sharer landlords being impleaded in the suit. On 3-11-1938 the suit resulted in a decree. On 5-12-1940 defendant 1 started execution of the said decree. The tenancy was brought to sale on 15-2-1941 and was purchased by the decree-holder, defendant 1. The auction-purchaser took delivery of possession through Court. Meanwhile in 1933 Ibrahim Sheikh mortgaged a portion of the occupancy holding in favour of Nilratan, plaintiff in the suit which gave rise to Second Appeal No. 1211 of 1944. In 1934, Ibrahim Shiekh mortgaged another portion of the occupancy holding to Snehalata, plaintiff in the

suit out of which Second Appeal No. 1441 of 1944 arose. The mortgagees instituted suits on their mortgage and recovered decrees and in execution of those decrees the mortgaged property in each case was brought to sale on 14-12-1939 and was purchased by the decree-holders. Notice of the confirmation of sale was served on the landlords on 29-6-1940, that is, before defendant 1 started execution of his decree for rent. The plaintiffs being resisted in taking delivery of possession started proceedings under Order 21, Rule 100, Civil P. C., which were dismissed on 28-11-1941, The plaintiffs started the present suits on 9-2-1942 for declaration of their respective titles and for recovery of possession.

3. The main defence to these suits was that the interest of the plaintiffs had passed by the rent sale which took place on 15-2-1941 and the plaintiffs have, therefore, no title as claimed.

4. The trial Court dismissed the suits. On appeal, the lower appellate Court has reversed the decisions of the trial Court and has decreed the plaintiff's suits. Defendant 1 has, therefore, appealed to this Court.

5. The question which is involved in these appeals is a pure question of law, viz., whether a purchaser of an occupancy holding in execution of a decree for its own arrears of rent in a suit framed under the provisions of Section 148A, Bengal Tenancy Act, acquires the holding even though the transferee of the interest of some of the tenants after the passing of the rent decree are not impleaded in the course of the execution proceedings.

6. Mr. Mukherji who appears for the appellants admits that he has to contend against three Bench decisions of this Court, viz., the cases of Smt. Binapani Devi Chakraborty Vs. Banku Behary Mondal and Others, , Kamalakshya Chowdhury and Others Vs. Joychand Lal Babu and Others [since affirmed on a different point by the Judicial Committee of the Privy Council in AIR 1949 239 (Privy Council) and Menajuddin and Another Vs. Heronuddin Mullick and Others, In all these cases the interest of the tenants or of some of them had passed by an execution sale to another person after the landlord had obtained a decree for rent against the old tenants but in course of the execution proceedings the landlord did not implead the purchaser at the execution sale. This Court held that the sale in execution of the rent decree did not pass the tenancy but merely passed the right, title and interest of the judgment-debtor, the title of the transferees being unaffected by the resultant sale. The decisions referred to above, if they are correctly decided, would conclude the pre-sent appeals.

7. Mr. Mukherji who has argued this case with care and thoroughness, however, submits that the said decisions were not correctly decided and has invited us to refer the matter to a Full Bench. He has drawn our attention to certain aspects of the case which were not considered in the cases above referred to. We shall deal with these aspects of the case and give our views on those matters.

8. It may be pointed out that there is no decision of the Privy Council covering the present cases. The case of AIR 1930 193 (Privy Council) was a case where

the tenant's interest had ceased prior to the institution of the suits for rent. The only other decision of this Court is a decision of Henderson J. in the case of Surendranath v. Protap Chandra 76 C. L. J. 248.

9. Mr. Mukherji submits that prior to the decision in Smt. Binapani Devi Chakraburty Vs. Banku Behary Mondal and Others, referred to above there was no Bench decision of this Court on the point. He submits that the decisions in Kamalakshya Chowdhury and Others Vs. Joychand Lal Babu and Others and Menajuddin and Another Vs. Heronuddin Mullick and Others, which are both decisions of Mukherjee and Sharpe JJ. merely followed Smt. Binapani Devi Chakraburty Vs. Banku Behary Mondal and Others, . He accordingly submits that if the decision in Binapani's case is put out of the way on the ground that it was wrongly decided the other two Bench decisions would not stand in his way. His main submission is that the decision in Binapani's case proceeded on a misinterpretation of the decision of the Privy Council in the case of Arthur Henry Forles v. Bahadur Singh 41 I. A. 91 : (A. I. R. 1914 P. C. 111) Mr. Mukherji contends that the true import of the decision in Forbe's case is that the charge created by Section 65, Bengal Tenancy Act, in favour of the landlord comes into being on the passing of the decree for rent and not at any time prior thereto, that the charge or the holdings that as the charge enures in favour of the landlord it must be conceded that the latter must continue to maintain that status till the charge is worked out by a sale in execution of the decree for rent. He, however, contends that as the charge is against the tenure or the holding and is not directed against the tenant the cessation of the tenant's interest after the passing of the decree for rent does not stand in the way of the landlord executing his decree for rent under chap. 14 of the Bengal Tenancy Act and bringing the tenancy to sale so as to confer on the auction-purchaser a statutory title to the tenure or holding itself. In support of these submissions reliance is placed by Mr. Mukherji upon the following passage in Forbes's case, at p. 101 :

"To acquire the right which the section (section 65) gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interest "vested" in him."

Mr. Mukherji submits that the general words which follow, viz :

"In other words, the right to bring the tenure or holding as the case may be, to sale exists so long as the relationship of landlord and tenant exists"

must be limited to what precedes, and argues that the last sentence also refers to the transfer of the landlord's interest only and not of the tenant's interest.

10. This interpretation is, however, opposed to what their Lordships have stated elsewhere in the judgment. After referring to the general scope of the statute, their Lordships at p. 100 observe :

"The governing idea throughout the multitudinous provisions contained in Chap.

VIII to regulate the respective rights and obligations of landlords and tenants is the subsistence of the relationship that gives rise to those rights and obligations."

This statement is quite general and applies equally to transfer of the interest of the landlord and of the tenant. Their Lordships again make the following observation at p. 101 :

"The right to proceed to sell in one case, in the other to eject, is dependent on the existence of relationship of landlord and tenant at the time when the remedy prescribed by law is sought to be enforced."

In this observation their Lordships consider the remedy by sale to be on a par with the remedy by ejectment. An ejectment can only be decreed in proceedings taken against all the tenants and not merely some of them, similarly to have the effect which their Lordships contemplated in the passages quoted above the proceedings in execution must continue against the entire body of tenants or some of them who represent themselves as well as other persons interested in the tenancy.

11. In my opinion their Lordships when they stressed upon the subsistence of the relationship of landlord and tenant, contemplated the cases of landlords as well as tenants. The subsistence of relationship of landlord and tenants must therefore refer to the transfer of the landlord's interest as also of the tenant's interest in the tenancy. The special Bench decision of this Court in *Krishnapada v. Manada Sundari* 69 Cal. 1202 : (A. I. R. 1932 Cal. 320 S. B.) also lays stress upon the subsistence of the relationship of landlord and tenant up to the date of sale. The interpretation of the decision in *Forbes's case* (41 I. A. 91 : A. I. R. 1914 P. C. 111) which was put by this Court in *Smt. Binapani Devi Chakraburty Vs. Banku Behary Mondal and Others*, cannot be said to be unjustified.

12. In *Smt. Binapani Devi Chakraburty Vs. Banku Behary Mondal and Others*, their Lordships gave two other reasons in support of the view taken by them, namely (1) that the relationship of landlord and tenant is mutual and cessation of the interest of either must have an identical effect and (2) that the landlord can bring the tenure or holding to sale only if the tenure or the holding is represented by the persons proceeded against, Section 65 cannot be supposed to mean that the landlord may proceed against the tenure or the holding irrespective of the question whether the tenure or the holding is duly represented or not. These additional reasons also commend themselves to me.

13. The effect of an execution sale of an occupancy holding either in whole or in part is to divest the judgment-debtor of his interest and to vest the same in the auction-purchaser and after such a sale the landlord is bound to recognise the transferee as his tenant. *Maharaj Bahadur Singh Vs. Nari Mollani and Another*, It has to be observed that it is not correct to say that in *Menajuddin's case* (51 C. W. N. 914 : A. I. R. 1947 Cal. 187) *Mukherji and Sharpe JJ.*, merely followed the decision in *Smt. Binapani Devi Chakraburty Vs. Banku Behary Mondal and Others*, , *Mukherji J.*, considered the effect of the decision in *Forbes's case* (41 I.

A. 91 : A. I. R. 1914 P. C. 111) and gave independent reasons for the conclusion reached by him. The decision of Henderson J. in Surendra Nath Holder's case (76 C. L. J. 248) was a decision of a single Judge and proceeds on considerations as to the service of notice etc. which, in my opinion are either irrelevant or erroneous.

14. Mr. Mukherji further contended that a decree for arrears of rent which creates a charge in favour of the landlords can be enforced against the defendants as also transferees pen-dente lite on the principle of lis pendens.

15. The doctrine of lis pendens is embodied in Section 52, T. P. Act. In order that the doctrine may apply the suit must be one in which a right to immovable property is directly and specifically in question. This is of the essence of the rule. A suit for arrears of rent or a tenure or holding is primarily a suit for recovery of money and although a decree for arrears of rents creates a first charge it cannot be said that this renders the suit itself as one in which a right to immovable property is directly and specifically in question. This view is supported by the decision in the case of Jaynal Abedin and Others Vs. Hyder Ali Khan Pani, and Maharaj Bahadur Singh Vs. Nari Mollani and Another, .

16. Mr. Mukherji distinguishes the above cases on the ground that in those cases the transfer was made while the suit for recovery of rent was pending and a decree had not followed. He contends that the position is changed after the decree is passed and a charge enures in favour of the landlord. In other words, the sub-mission is that the suit assumes a different character after the decree for rent is passed and transfer subsequent thereto must be deemed to have been made at a stage of proceedings when a right to Immovable property was directly and specifically in question. In support of his submission he has referred us to the case of Yasin Khan v. Muhammad Yer Khan 19 ALL. 504 : (1897 A. W. N. 135). Bhart Chandra Dhupi Vs. Hari Krishna Patari, , K. Y. Chettyer Firm v. Jamila Bibi 7 Rang. 734 : (A. I. R. 1930 Rang. 132). These cases have now to be considered. In Yasin's case (19 ALL. 504 : 1897 A. W. N. 135) a decree for dower debt against the heirs of a deceased Muhammadan was held to have priority over a mortgage by the heirs pendente lite and over a sale in execution thereof. The decision was based on the case of Bazayet Hossain v. Dooly Chand 4 Cal. 402 : (5 I. A. 211 P. C.) This latter case arose out of an administration suit and was not properly applicable to the facts which fell to be decided in Yasin's case (19 ALL. 504 : 1897 A. W. N. 135). As a matter of fact the decision in Yasin's case (19 ALL. 504 : 1897 A. W. N. 135) has been dissented from in the case of Bholanath v. Maq-bul-unnessa 26 ALL. 28 : (1903 A. W. N. 184). At page 31 Stanley C. J. made the following observation :

"We have examined the record of the case (Yasin Khan's case: (19 All. 504 : 1897 A. W. N. 135)) and discovered that the decree which was obtained by the heirs of the widow was a simple money decree, unlike the decree obtained in the case of Bazayat Hossain v. Dooly Chand (4 Cal. 402 : 5 I. A. 211) which was in the nature of an ordinary administration decree and was operative to bind the

property of the husband in the hands of the heirs. It appears to me that the learned Judges must have overlooked this fact."

The decision in Yasin Khan's case (19 ALL. 504: 1897 A. W. N. 135) cannot, therefore, be said to be correctly decided and is no authority for the general proposition contended for on behalf of the appellants.

17. In Bepin Krishna's case (51 Cal. 1033 : A. I. R. 1925 Cal. 396) the creditor Bepin had advanced a loan on a pledge of ornaments to the predecessor of Byomkesh Deb. He brought the suit for recovery of the loan and obtained a decree. The pledged articles were brought to sale. The sale proceeds were insufficient to satisfy the decree, Thereafter on application by the decree-holder a preliminary decree for administration of the estate of Byomkesh was passed. The transfers in question took place thereafter and these transfers were held to be hit by the doctrine of *lis pendens*. It may be pointed out that in the suit as originally framed there was an alternative prayer for administration of the estate, The transfers took place after a decree for administration had been made. It cannot, therefore, be said that the action was not one in which the right to immovable property was not directly and specifically in question. In Chettiyar Firm's case (7 Rang. 734: A. I. R. 1930 Rang. 132) there are no doubt certain general observations at p. 742. These observations have to be read in the light of the facts of that case. The suit in that case was one for administration. Such a suit is obviously one in which the right to immovable property is directly and specifically in question. In that case the property which was transferred had been found by the commissioner to belong to the estate of the deceased. In the proclamation of sale, it was specifically mentioned that the property was claimed as a part of the estate of the deceased in the administration action. The decision, therefore, stands on a special fact and cannot be taken as laying down a general rule.

18. In my opinion the transferee of the interest of the judgment-debtor after the passing of a decree for rent of an agricultural or horticultural tenancy is not hit by the doctrine of *lis pendens*.

19. In my opinion therefore it is not possible to say that the decision in Smt. Binapani Devi Chakraborty Vs. Banku Behary Mondal and Others, or in Kamalakshya Choudhury's case, (48 C. W. N. 105) or in Menajuddin and Another Vs. Heronuddin Mullick and Others, proceeded on a wrong basis. It is, therefore, not necessary for us to refer this matter to a Full Bench.

20. Mr. Mukherji lastly contends that the decree for arrears of rent has the effect of a charge decree and if a subsequent transferee of the interest of some of the tenants is not joined in the execution proceedings, the effect of the sale is that the sale vests the tenancy in the purchaser subject to redemption by the prior transferor who was not made a party to the execution proceedings, that the only remedy of the excluded person is to redeem but such an excluded person cannot maintain ejectment against the purchaser. It is, therefore, urged that the

plaintiffs can only redeem the rent decree but cannot recover possession in the facts of the present case. Reliance is placed on the decisions in the cases of Bhagaban Chandra Kundu Vs. Tarak Chandra Basak and Others, and Bhodai Sheikh Vs. Barada Kanta Dutta, . The contention proceeds on an analogy between a mortgage suit and a suit for arrears of rent. The analogy, however, is only true to this extent that on the passing of a decree in either case a decree for charge enures in favour of the landlord. The analogy does not go further than this. This would appear from the fact that in a mortgage suit all persons interested in the equity of redemption or in the mortgage security have to be made parties in view of the provisions contained in Order 34, Rule 1, Civil P. C. The position is entirely different in a suit for arrears of rent. The landlord is entitled to institute his suit for arrears of rent only against his recorded tenants. A mortgagee of the tenancy or an incumbrancer need not be impleaded; the latter cannot bring a suit for redemption or otherwise exercise his right of redemption after the rent sale, the purchaser at the latter sale having the right to annul the mortgage by taking proceedings as provided for in Section 167, Bengal Tenancy Act. Again, if the landlord fails to take the procedure as provided for in Section 167, Bengal Tenancy Act, the mortgage or the incumbrance is binding on the tenancy in the hands of the purchaser at the rent sale. Thus the analogy of a first mortgage and of a subsequent incumbrance cannot avail the purchaser at the rent sale. (See the case of Bidhu Mukhi Dasi v. Bhabasundari Dasi 24 C. W. N. 961 : (A.I.R. 1920 Cal. 870). This contention must, therefore, be overruled.

21. All the contentions raised on behalf of the appellants, therefore, fail and the appeals must be dismissed with costs.

Das Gunta, J.

22. I agree.