

(1884) 02 CAL CK 0005
In the Calcutta High Court

Panye Chunder Sircar and Others

APPELLANT

Vs

Hurchunder Chowdhry and Another

RESPONDENT

Date of Decision : 12-02-1884

Acts Referred:

Citation : (1884) ILR (Cal) 496

Hon'ble Judges : McDonell, J;Field, J

Bench : Division Bench

Judgement

Field, J.—In this case the appellant is the purchaser under a private conveyance of a taluq or tenure such as that defined in Section 26 of Bengal Act VIII of 1869, that is, a permanent transferable interest in land intermediate between the zamindar and the cultivator. The zamindar, defendant No. 1, brought a suit for rent against defendant No. 2, who was the tenant of the tenure whose name was registered in the zamindari serishta. He obtained a decree, brought the tenure to sale, and himself became the purchaser. The plaintiff in this suit seeks to assert his right to the tenure, setting up a title based upon a private conveyance from defendant No. 2 alleged to have been executed before the proceedings in the rent suit. No intimation of this transfer was formally given to the landlord; and it has not been shown-I may say attempted to be shown-that he was aware of it.

2. There can be no doubt that the execution sale, under which defendant No. 1 purchased, was not a sale of the tenure itself under the provisions of the rent law, but that it was a sale in execution under the provisions of the CPC (Act X of 1877), and in this respect the present case differs from the Full Bench case of Sham Chand Koondo v. Brojo Nath Pal Chowdhry 21 W.R. 94. It is contended that all that passed by that sale was the right, title and interest of defendant No. 2; that inasmuch as the defendant No. 2 had, before the rent suit, conveyed away his interest to the plaintiff, there was no right, title or interest in him which could pass by the sale; that the title to the tenure is therefore in the plaintiff, who purchased bond fide a transferable tenure and that he must succeed in the present suit.

3. I may first observe that an execution sale under the provisions of Act X of 1877 is something different from an execution sale under the old Code (Act VIII of 1859). What was sold under Act VIII was "the right, title and interest of the judgment-debtor." These words were omitted from the Code of 1877, and what was sold under that Code was the property of the judgment-debtor, that is, the thing itself was sold and not the judgment-debtor's right, title and interest in that thing. The Code of 1877 contains provisions for ascertaining and defining the judgment-debtor's interest in the property about to be sold, and there was one Section 313 in that Code which allowed the purchaser to have the sale set aside, if it were shown that the judgment-debtor had no saleable interest in the property. I do not think it necessary on the present occasion to determine what may be the effect of these provisions as compared with the provisions of the Code of 1859 in connection with the question of what passes to a purchaser at an execution sale. I think that the present case must be dealt with upon its own grounds. The plaintiff, notwithstanding his own laches, had two courses open to him in order to save the tenure from sale. When the landlord obtained a decree for rent, he could have satisfied that decree and thus prevented the sale. He had a second course under the provisions of the Code of 1877. Section 311 of that Code provides: "The decree-holder or any person whose Immovable property has been sold may apply to the Court," &c, and it has been decided see *Bhagabuti Churn Bhattacharjee Chowdry v. Bisheshwar Sen* ILR 8 Cal. 367 : 10 C.L.R. 441 and the cases there quoted] that the words "any person whose Immovable property has been sold" include persons, other than the judgment-debtor. In the present case the plaintiff did make an application u/s 311. That application was rejected on the ground that he had no locus standi. It was open to him to have appealed against the order rejecting his application. There being thus two courses open to the plaintiff to prevent the sale of the tenure which he is alleged to have purchased, he did not avail himself of one of them, and by a wrong decision of an inferior Court, upon the construction of the Code he was prevented from availing himself of the other. He has now brought a regular suit, and the question is, whether he is entitled to treat the proceedings in the rent suit, and the sale in execution as a nullity so far as he is concerned, on the ground that he was not a party to that suit. It appears to me that he is not so entitled. According to the common law, quite apart from any statutory provisions, when a tenant transfers his interest to a third person, in order to discharge himself from future liability for rent, and in order that the transferee may have the advantages of the tenancy, one or both of them must give notice to the landlord. In this country Section 26 of the Rent Law expressly imposes the duty of giving notice upon all transferees of tenures, such as are described in that section, and the tenure, in the present case is one of those tenures. The tenant, the transferor, gave no information of the transfer to his landlord, and the plaintiff, the transferee, gave no intimation of his purchase. This being so, the latter has by his own laches placed himself in the disadvantageous position which he now occupies. In the course of the argument the case was put to us of a decree-holder who attaches and sells in execution of his decree property which belongs

not to his judgment-debtor, but to a third person, and we were asked whether it could be contended that such a sale would convey a good title. I think it could not be so contended, but that is a very different case from the case which we have now before us. When a decree-holder seeks to execute his decree against property, moveable or immoveable, it is his duty to make sure that the property which he brings to sale in execution is the property of his judgment-debtor, and, if he makes any mistake, he does so at his own peril. The circumstances of the present case are, I think, an exception to this general rule. The landlord, the decree-holder, knew that the person whom he sued was his tenant. No doubt that tenant had by law the right to transfer his tenure, but the same law cast upon the transferee the duty of giving the landlord due notice of the transfer, and unless the transferee discharged the duty so cast upon him, the landlord was not, in my opinion bound to look beyond the information contained in his *serishta*, and cannot be affected with knowledge of a fact not communicated to him by the person whose duty it was to communicate it. It will be borne in mind that he had not this knowledge from any other source and no case of fraud has been made out. In this exceptional case, therefore, the duty was, not upon the decree-holder, but upon the person who now comes into Court, and asks for redress. That person has been guilty of neglect in the transaction itself-neglect of a duty expressly imposed on him by the law- whilst the landlord, against whom, he seeks redress, has committed no wrongful act, and has been guilty of no omission of duty. It appears to me, therefore, that the plaintiff is estopped by his own omission from saying in this suit as against the landlord that he had acquired a good title to the tenure. Then, there is another consideration. Section 316 of the Code provides that the sale certificate shall, so far as regards the parties to the suit and persons claiming through or under them, vest the title to the property in the purchaser. In the case now before us, the plaintiff claims under one of the parties to the rent suit, that is, the defendant, and I think that the provisions of this section are therefore applicable to him.

4. I am therefore of opinion that, although the tenure in this case was sold under the provisions of the CPC and not under the special provisions of Bengal Act VIII of 1869, the plaintiff is not entitled to succeed in this suit.

5. We dismiss this appeal, but without costs, no one appearing for the respondent.

McDonell, J.

6. In this case it is found by the Court below that the zamindar was entitled to sell the whole tenure, and the sole question we have to decide is, whether he actually sold it. Both the Courts below have found as a fact that the whole tenure was sold, that the tenure was proceeded against and regarded as liable, and that the sale proclamation and sale certificate show that the tenure was sold. Under these circumstances I do not think that we ought to interfere, although there may have been irregularities in the sale proceedings, and I would therefore dismiss this appeal.