

(1918) 02 CAL CK 0009
In the Calcutta High Court

Prafulla Nath Tagore and Others

APPELLANT

Vs

Shital Khan and Others

RESPONDENT

Date of Decision : 25-02-1918

Acts Referred:

Citation : AIR 1919 Cal 898 : 47 Ind. Cas. 97

Hon'ble Judges : Smither, J; Charles Chitty, J

Bench : Division Bench

Judgement

1. The plaintiffs-appellants, who may be referred to as the Tagore Estate, claim to have purchased at sales in execution of decrees for rent, under the Bangal Tenancy Act, a Jamma and a Patni Taluq, and to have taken all necessary steps to set aside encumbrances and to have obtained kabuliyats from the cultivating ryots, and on these grounds to be entitled to rent from those ryots.

2. These claims are opposed by what may be referred to as Gobinda Bibu's Estate, and the contentions set up against them are, so far as we are now concerned, (1) that the sale of the Jamma was not a sale for arrears of rent, so as to affect incumbrances, (2) that necessary steps were not taken to set aside incumbrances within the Pattai Taluq, and (3) that for various reasons the kabuliyats are not binding. As to (1).--The decree in execution of which the sale was held was a decree in a suit brought for rent for the Jamma as a tenure covering twelve annas of the Mouza. Originally there was such a tenure, but the lower Appellate Court found that long before the suit it had been divided and separate Taluqs had been created out of it. This finding has been attacked in argument before us on two grounds. The first ground is that it is based partly on a document, Exhibit X, which is not evidence.

3. As to this, all that the judgment says is that this document, which is a judgment dated 24th March 1859 (not 1858), mentions that two of the shares comprised in the 12 annas were settled separately. Other, and much stronger, reasons, based on other materials, were given for the decision. But we also notice that this document was admitted without objection in the trial Court, and

was not objected to in the lower Appellate Court, or in the grounds of appeal in this Court. On the contrary the question raised in the grounds of appeal in this Court is as to how the document should be construed, a question which arises only if the document is evidence. Had objection been taken to the admission of this document in good time, the party producing it might have given other evidence. As the objection was not taken until arguments were heard in this Court, over three years after the appeal was laid here, it should not be allowed.

4. The second ground on which this finding was attacked before US was, that in the absence of a finding that the landlord gave his consent in writing to the division of the original tenure, the finding that it was divided cannot stand. The finding is, that it was divided, and that separate estates were created out of it. A principal reason given for this finding is, that even after these separate Taluqs had all become vested in the same persons, the Dashmina family, the Zemindars, in suing for rents, treated them as separate. Taluqs. It is true that a Zemindar may collect rent separately from the several different co-sharers who hold a Taluq, without consenting to the splitting up of the Taluq into several different. Taluqs. But a Zemindar would hardly bring several separate suits, for rent of several shares of a subordinate Taluq, against the holder of the whole of that Taluq. Having regard to all the facts found and relied upon, we think the finding that separate Taluqs were created is sufficient.

5. To have the benefits of a sale for arrears of rent under the Bengal Tenancy Act, there should have been a separate suit in respect of each of the separate Taluqs.

6. The destruction of valuable incumbrances is a very severe measure, which the law allows only if a certain procedure is strictly followed, and when a party wishes to enforce that severe measure he must show that he has strictly followed the procedure laid down.

7. As to the Pattai Taluq the lower Appellate Court has held that it has not been proved that notice was served on Aditya Chakravarty, who had purchased a share in it. The question is one solely of fact, but the finding has been assailed on the ground that an entry in the order sheet is sufficient *prima facie* proof of service of that notice. The lower Appellate Court has given authority for holding that it is not sufficient proof, see *Radhay Koer v. Ajodhya Das* 7 C.L.J. 262; There is no other evidence, and as pointed out already, there must be strict compliance, and good proof of compliance, with the procedure required by the law, before the severe consequence which the appellants seek to infer can follow.

8. As to the kabuliyats there are rent suits, in some of which the appellants are plaintiffs as Zemindars, while in the others, the Gobinda Babu's Estate is plaintiff, as holder of the incumbrance which the Zemindar claims to have set aside. The suits were tried together, that justice might be done between all concerned. The ryots cannot be ordered, now that all parties are before the Court, to pay rent both to the Zemindar and to the holder of the subordinate

tenures. It may also be noticed that the ryots were in possession before they executed the kabuliyats. They were not admitted to possession by the Zemindar. This appeal is dismissed with costs.

9. This judgment will govern Appeals Nos. 1378 to 1389 of 1915, which are also dismissed with costs.

10. The Rules granted in connection with the suits by the Gobinda Babu's Estate are discharged with costs, in each case one gold mohur.