

(1909) 06 CAL CK 0074
In the Calcutta High Court

Radhika Nath Sarkar and Another

APPELLANT

Vs

Rakhal Raj Gayen and Others

RESPONDENT

Date of Decision : 28-06-1909

Acts Referred:

Bengal Tenancy Act, 1885 — Section 171

Citation : 3 Ind. Cas. 835

Hon'ble Judges : Lawrence Jenkins, C.J.; Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal on behalf of the plaintiffs, in an action for rent. The plaintiffs and the pro forma defendants were durputnidars of a mehal within which the disputed holding is situated. In 1901 the putnidar brought a suit for rent against the recorded tenants of the durputni, obtained a decree and proceeded to execute it. The predecessor-in interest of the plaintiffs-appellants, who had previously purchased the share of one of the durputnidars, deposited the decretal amount and obtained an order for delivery of possession u/s 171 of the Bengal Tenancy Act. The plaintiffs now bring this suit for rent against the tenant-defendant.

2. The claim is resisted on two grounds : first, that the plaintiffs had no title, because they were not entitled to apply for an order u/s 171 of the Bengal Tenancy Act, and in any event, could not obtain delivery of possession of the property without a proper suit; and secondly, that the defendant had paid the rent claimed to the pro forma defendants, before this suit was brought.

3. The Court of first instance overruled these objections and made a decree in favour of the plaintiffs. On appeal the learned Subordinate Judge has dismissed the suit. He has held that the plaintiffs were not entitled to obtain any order u/s 171 of the Bengal Tenancy Act, and that even if they were entitled to do so, they could not obtain possession except by a regular suit. Against this decision the plaintiffs have appealed to this Court.

4. During the pendency of the appeal in this Court one of the appellants has died. An application by his legal representatives has been presented on this day for leave to prosecute the appeal alongwith the remaining appellants". The learned Vakil for the respondents has objected that the application is out of time under the Limitation Act of 1908 and ought not to be entertained. It has been suggested on the other hand that the matter is governed by the Limitation Act of 1877. It is not necessary for us to deal with this matter, because it cannot be disputed, that treating the application as substantially one to set aside the abatement of the appeal under Order XXII, Rule 9 (2) of the CPC of 1908, we have, under Clause (3) of that very Rule, ample power to enlarge the time; and as the interests of infants are concerned in this appeal, we are of opinion, under the special circumstances, that this is a proper case in which the application ought to be entertained and allowed. The record will accordingly be amended, and the appeal may, therefore, be taken to be properly constituted.

5. As regards the first of the grounds upon which the learned Subordinate Judge based his judgment, we are of opinion that it cannot be supported. Section 171 provides that when any person having in a tenure advertised for sale under Chap. XIV of the Bengal Tenancy Act, an interest which would be voidable upon the sale. pays into Court the amount requisite to prevent the sale, he shall be entitled to possession of the tenure. There can be no question that the predecessor in-interest of the present appellants was a person who had an interest in the tenure; there can be no question. also that the interest was such as would be voidable upon the sale, because the putnidar was entitled in execution of the decree obtained against the recorded tenants of the durputni to sell the entire tenure. We are of opinion, therefore, that Section 171 was applicable to the case, and the order under that section was properly made.

6. As regards the second ground upon which the Subordinate Judge based his judgment, we think it is equally unsustainable. In his opinion the plaintiffs were not entitled to possession unless they brought a regular suit for this purpose. This view is opposed to the decision of this Court in the case of Umatul Fatima v. Nema Charan Banerji 6 C.L.J. 592. We must take it, therefore, that the plaintiffs were properly placed in possession by the Court which was executing the rent decree.

7. The sole question, therefore, which remains is whether the tenant-defendant paid rent to the pro forma defendants without knowledge of the fact that the plaintiffs had been placed in possession of the tenure u/s 171 of the Bengal Tenancy Act. Upon this point there is no finding by the Subordinate Judge.

8. The result, therefore, is that this , appeal must be allowed, the decree of the Subordinate Judge set aside, and the case remitted to him in order that he may determine upon the record as it stands, whether the tenant-defendant at the time when he paid rent to the pro forma defendants had knowledge of the fact that the predecessor-in-title of the plaintiffs had been placed in possession of the tenure u/s 171 of the Bengal Tenancy Act. If he had such knowledge, the

payment was not justifiable, and the suit must be decreed. If on the other hand, he had not such knowledge, and the payment was bonafide, the suit must fail. The burden of proof is upon the tenant to establish that at the time he paid rent, to the pro forma defendant, he had no knowledge that possession had been delivered to the predecessor-in-title of the plaintiffs.

9. Costs will abide the result.

10. This judgment, it is conceded, will govern the other Appeal No. 404.