

(1939) 07 PAT CK 0004

In the Patna High Court

Raja Inderjit Pratab Bahadur Sahi

APPELLANT

Vs

Suraj Narain Chaudhury and Another

RESPONDENT

Date of Decision : 26-07-1939

Acts Referred:

Bengal Tenancy Act, 1885 — Section 170, 170(1)
Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1940 Patna 21

Hon'ble Judges : Dhavle, J

Bench : Division Bench

Judgement

Dhavle, J.—This is an appeal by the defendant, the proprietor of the touzi in which lie three occupancy holdings, the subject-matter of the suit. Plaintiffs case was that these holdings Had been purchased by his father in 1913 and that on the landlord putting them up to sale in execution of rent decrees, the plaintiff purchased them in 1914 benami in the name of his servant, the original defendant second party, who, on his death after the institution of the present suit was replaced by his son. In 1925 the landlord (defendant 1) obtained decrees for the rent of the three holdings against defendant second party, and in the execution proceedings the plaintiff obtained permission to deposit the decretal amounts (under Section 170, Bengal Tenancy Act).

2. He deposited the moneys accordingly, and the defendant landlord withdrew them. There were similar decrees and deposits and withdrawals in 1929. In 1931 the defendant landlord again sued defendant second party for arrears of rent, obtained decrees, and took out execution. Plaintiff filed objections tinder Order 21, Rule 58 but these were dismissed in 1934, and plaintiff thereupon brought the suit (out of which this appeal arises) for declarations that he is the raiyat of the three holdings and that these holdings are not liable to be sold in execution of the decrees obtained by the defendant landlord against defendant second party. The suit was contested by the defendant landlord on the grounds that it was not maintainable, that it was barred by Section 47, Civil P.C., and that the defendant had not recognized the plaintiff.

3. The lower Courts have decreed the suit on the ground that the withdrawal of the moneys deposited by the plaintiff in 1926 amounted to the landlord's recognition of the plaintiff as the raiyat of the holdings and that it was therefore not open to the defendant landlord to sue defendant second party so as to bind the plaintiff.

It has been contended on behalf of the landlord appellant that the decrees obtained by him being rent decrees, it was not competent to the plaintiff respondent to apply under Order 21, Rule 58 at all. This contention must plainly be accepted: see *Deonandan Prasad v. Pirthi Narayan* AIR (1933) Pat 32 for, there is no dispute that the appellant is the landlord of the holdings and that the rent for the years in suit had not been paid to him. It is also clear that as Order 21, Rule 58 did not apply, it was not open to the plaintiff to sue under Order 21, Rule 63 as he has done.

4. But assuming for a moment that the plaintiff is not bound by the decrees obtained by defendant landlord against defendant second party, it cannot be pretended that no suit lay at all at the instance of the plaintiff. The effect of the provision in Section 170(1) of our Tenancy Act, which makes Sections 278 to 283, Civil P.C. (now Order 21, Rule 58 to 63) inapplicable to holdings attached in execution of decrees for arrears due thereon, is, as was held by their Lordships of the Judicial Committee in *Jitendranath Ghosh v. Manmohan Ghosh* AIR (1980) PC 193.

that there can be no investigation" in execution proceedings held under Ch. 14, Tenancy Act, of claims by third parties to an interest in the tenure (or holding), but it does not bar a substantive suit such as that for a declaration of the plaintiff's title to the holdings and that the appellant had no right to have them sold in execution of the decrees and for an injunction restraining them from selling.

The suit as framed was capable of, being put into this form by slight amendments of the plaint and the payment of appropriate court-fees: see *Deokali Koer v. Kedar Nath* (1912) 39 Cal 704 though this aspect of the matter has not been pursued, before me because of other consideration's that arise in the case. That Rule 58 and 63 of Order 21 had no application was urged in the lower Appellate Court; but the learned Subordinate Judge, who was apparently not aware of the express decision in *Deonandan Prasad Vs. Pirthi Narayan and Others*, held the suit to be maintainable because in his view it was incumbent on the landlord to sue the real tenant after the decision in the execution proceedings of 1925 that the plaintiff was the real tenant and was entitled to deposit the decretal amounts, and therefore the plaintiff was not represented in the rent suits which led to the present suit.

5. The substantial question before me thus is whether the plaintiff is bound by the rent decrees obtained by the. appellant; It has been contended on behalf of the appellant that he was entitled to sue the benamidar and that decrees

obtained against the benamidar do bind the beneficial owner. The lower Courts have, as against this, upheld the plaintiff's case that the, landlord's withdrawal of the deposits made by the plaintiff in 1926 after obtaining a decision from the executing Court that defendant second party was only a benamidar of his amounted to his recognition as the tenant. That a decree obtained against the benamidar will bind the beneficial owner cannot be and has not been disputed before me: see *Gur Narayan v. Sheolal Singh* AIR (1918) PC 140. But the substance of the plaintiff's claim is that since the decision of 1926 the landlord is not entitled to treat defendant second party as his benamidar. In support of the view that the withdrawal of the deposit u/s 170, Ben. Ten. Act, amounts to a recognition of the tenancy, of the plaintiff the lower Appellate Court has cited two Patna decisions, *Motihari Concern Ltd. v. Lachmi Prasad* AIR (1917) Pat 518 and *Rajendra Narayan Sing Deo and Others Vs. Mahesh Chandra Chatterji*, besides one ruling from Calcutta.

6. The learned advocate for the appellant has drawn my attention to a comparatively recent decision of this Court, *Dina Nath Malla Vs. Dina Nath Gorain and Others*, in which it was held by Macpherson and Scroope JJ., dissenting from the decision in *Rajendra Narayan Sing Deo and Others Vs. Mahesh Chandra Chatterji*, that the withdrawal by the landlord of rents decreed against the tenant and deposited by his transferee does not amount to a recognition by the landlord of the transferee as a tenant. It is true that in this case from 11 Patna the amount deposited had been withdrawn by the landlord under protest, but it is also unquestionable that the present case is itself distinguishable from *Motihari Concern Ltd. v. Lachmi Prasad* AIR (1917) Pat 518 and *Rajendra Narayan Sing Deo and Others Vs. Mahesh Chandra Chatterji*, (which, as I have already said, was dissented from in *Dina Nath Malla Vs. Dina Nath Gorain and Others*, in that in these two cases there is nothing to show that the landlord had objected to the right of the transferee to make the deposit but had been overruled by the executing Court, as happened in the present case. The order of the executing Court in 1926 holding that the plaintiff had an interest voidable on the sale as he was the real purchaser of the land sought to be sold in execution was a summary order, and it was not appealable (*Nalini Behari Roy v. Fulmani Dasi* (1912) 15 CLJ 388) either as a decree or as an order, being passed on the footing not that the applicant was a representative of the judgment-debtor, but that he had an interest of his own which was voidable on the sale and therefore entitled him to make the deposits u/s 170(3), Tenancy Act.

7. The order thus left the landlord no choice but to withdraw the deposit, and was conclusive for the purposes of the execution proceeding. Can it be properly said that withdrawal in such circumstances also meant recognition by the decree-holder of the depositor as the tenant, and this in spite of the fact that the decree-holder had actually challenged the applicant right to make the deposit?

It is as difficult to suppose that the executing Court was intended finally to pronounce in a summary manner on a question which would otherwise be

debatable in a regular suit, subject to appeal, etc. as it is easy to see why the Legislature refrained from letting the proceedings in execution of a rent decree be complicated, even indirectly, by questions relating to title, so much so that it expressly excluded the application of Order 21, Rule 58 to 63.

8. The view that withdrawal amounts to recognition was rested on estoppel in *Thomas Barclay v. Syed Hossein Ali Khan* (1907) 6 CLJ 601, and it was further developed in *Jugal Mohini Dasi v. Srinath Chatterjee* (1910) 12 CLJ 609. This was criticized by Coxe J, in the case from 15 C LJ 3888 to which I have already referred, and in *Suckchand Das Vs. Giridhari Das and Another*, it was observed that the ground on which the principle of estoppel was applied in these and other cases was open to question. In *Re Fazoo Mia Vs. Sultan Ahmed Choudhury*, Rankin C.J. had to deal with the right of the transferee of a non-transferable occupancy holding to make a deposit under Order 21, Rule 89. On the principle of stare decisis he upheld the right, but observed that

if the withdrawal of the deposit made under Rule 89 is to mean that the landlord has recognized the depositor as tenant of this non-transferable occupancy jote, then it does seem anomalous that such a person as the opposite party here should have the right to make the deposit. It clearly cannot be the law that the landlord by the machinery of Rule 89 can be obliged either to go without his rent or to recognize the transferee whom he does not wish to recognize in the case of a non-transferable jote.

9. The learned Chief Justice also said that he doubted extremely whether it is true that a mere acceptance or withdrawal of this deposit would operate to oblige the landlord to recognize this tenant (transferee).

The weight of authority in Calcutta which appeared at one time to be in favour of the view that withdrawal imports recognition thus seems to be shaken, and in our own Court it has been pointed out that the withdrawal is not a withdrawal of rent paid as rent but of money deposited in Court to satisfy a decretal sum due: *Sheo Prasad Lal v. Lala Barhamdeo Lal* AIR (1917) Pat 356, a case which was approved on this point in *Dina Nath Malla Vs. Dina Nath Gorain and Others*, . As I have already said, the appellant did not withdraw the deposits under protest; but he had objected, to the right of the plaintiff-respondent to make the deposits, and the order of the executing Court which was against him was non-appealable and left him to choose between dropping the execution proceedings altogether and withdrawing the deposit.

10. If in such circumstances, he chose to withdraw the deposit, I do not see how it can be properly said that he chose to recognize the depositor as his tenant. As was pointed out by Scroope J. in *Dina Nath Malla Vs. Dina Nath Gorain and Others*, there could be no estoppel, the depositor not having been induced by any action of the landlord to change his position, and the withdrawal merely preserving the status quo ante, whereas if the money is not withdrawn and the holding is sold, the depositor loses his interest in the holding completely.

In my opinion therefore the withdrawal of the deposits by the appellant in 1926 does not, as a matter of law, entitle the plaintiff-respondent to say that he was recognized by the landlord as the tenant of the holding. Further, if the benami character of the interest of defendant second party, in whose name the sale certificates of 1914 stand, be a fact, it cannot, merely because the executing Court allowed the plaintiff in 1926 (and again in 1929) to deposit the decretal amounts and the appellant proceeded to withdraw them, disentitle the appellant to proceed against the certified auction-purchaser or entitle the plaintiff-respondent to claim that he should have been sued instead of his benamidar and that the decrees obtained against the latter do not bind him.

11. The lower Courts have in substance treated the decision of 1926 u/s 170 (3) as res judicata for the purpose of the suits which are now assailed. It was however not treated in that manner for the rent-decrees which were executed in 1929, and I have already given reasons why it cannot be so regarded for the purposes of the still later decree now in question. The benami relation alleged by the plaintiff has in my opinion not been put an end to in such a way as to bind the landlord and compel him to sue not the benamidar but the plaintiff. The rent decrees in question cannot therefore be successfully assailed by the plaintiff. He cannot force himself upon the landlord and is not entitled to a declaration that he is the raiyat of the holdings merely because of the decision of 1926 and the consequent withdrawal of the deposits. The result is that this appeal must be allowed with costs of all Courts and the suit dismissed.