

(1926) 01 CAL CK 0020
In the Calcutta High Court

Rani Hemanta Kumari Debi and Others	APPELLANT
Vs	
Rajendra Kishore Nath Sarkar	RESPONDENT

Date of Decision : 08-01-1926

Acts Referred:

Bengal Tenancy Act, 1885 — Section 174

Citation : AIR 1926 Cal 1236 : 97 Ind. Cas. 306

Hon'ble Judges : Cuming, J;B.B. Ghose, J

Bench : Division Bench

Judgement

Cuming, J.—The facts of the case out of which this appeal arises are these: the decree-holder obtained a decree for rent against the judgment-debtors and in execution of this rent-decree the property was sold on the 26th November, 1923. Then on the 2nd January, 1924, when the Court re-opened after the Christmas holidays two petitions were filed one by the judgment-debtors in which they stated that their property had been sold at an auction sale on the 26th November, 1923, and that they had paid the whole amount of the decree in case to the decree-holder amicably and deposited in Court the sum of Rs. 38-8-0 by means of a chalan as compensation money to the auction-purchaser, and they prayed that the money deposited by the auction-purchaser might be transferred from the account of the auction-purchaser, or in other words it should be paid back to the auction-purchaser. Along with this petition of the judgment-debtors an application was presented by the decree-holder in which she stated that the decree had been satisfied by the judgment-debtors by executing a mortgage? kistbandi bond for Rs. 1,700 and she further prayed that the amount deposited to the credit of the decree-holder, which presumably would be the money paid by the auction-purchaser, ? might be transferred to the account of the auction purchaser and the sale might be set aside and the case finally disposed of.

2. On these applications the learned Munsif set aside the sale. Against this order the auction-purchaser appealed to the District Court. The District Court held that this could not be considered as an application u/s 174 of the Bengal Tenancy Act,

because there was no application to set aside the sale by the judgment debtors and he held that presumably the application was made under Order XXI, Rule 89, C.P.C. He then held that under Order XXI, Rule 92, the sale could not be set aside unless there had been notice of the application on all persons affected, and as this had not been done he set aside the order of the Munsif which set aside the sale.

3. The judgment-debtors and the decree-holder have jointly appealed to this Court against this order. Their contention is that the order of the Munsif was one which fell u/s 174 of the Bengal Tenancy Act and that being so there was no appeal to the District Court, and, therefore, the District Court had no jurisdiction to entertain the appeal.

4. Dr. Sen Gupta who appears for the respondent has contended that no second appeal lies. He would seem to contend that the order was one passed under Order XXI, Rule 89, C.P.C. and hence there is no second appeal to this Court.

5. The first point to be determined is under what section the order of the Munsif was made. Looking at all the facts of the case I have very little difficulty in coming to the conclusion that the order was made u/s 174 of the Bengal Tenancy Act. No doubt, in the judgment-debtors' petition there was no request that the sale should be set aside. This request, however, appears in the petition of the decree-holder which was filed as far as can be seen at the same time. It is very probable that by a mistake the request to set aside the sale was appended to the petition of the decree-holder instead of to the petition of the judgment-debtors. Obviously it was the judgment-debtors who had an interest in setting aside the sale while it was a matter of indifference to the decree-holder whether the sale was or was not set aside. Looking, therefore, at all the facts of the case we have no doubt that it was an application u/s 174 of the Bengal Tenancy Act and that the order of the learned Munsif was passed under that section. I do not, think that it is of any consequence that the money was actually deposited in Court when the decree was satisfied by an arrangement come to between the parties. Section 174 of the Bengal Tenancy Act provides that on the judgment-debtor depositing in Court for payment to the decree-holder the amount recoverable under the decree with costs and for payment to the purchaser a sum equal to five per centum of the purchase-money at any time within 30 days from the date of the sale the Court shall set aside the sale. It seems to me that it would be playing with words to say the petition did not come under the words of Section 174 of the Bengal Tenancy Act, because instead of actually depositing the money in Court for the satisfaction of the decree, the decree was satisfied by an arrangement come to between the parties. If there was no money recoverable under the decree, because that money had been paid by an arrangement between the parties what was still necessary for the judgment-debtors to do was what they did, namely, to deposit in Court a sum equal to five per centum of the purchase money for payment to the auction-purchaser. I am, therefore, of opinion, that the present application did fall u/s 174 of the Bengal Tenancy Act.

That being so there was no appeal to the District Court and the District Court was not competent to entertain the appeal. It is unnecessary for me to decide whether where a District Court entertained an appeal which he had no jurisdiction to entertain an appeal does or does not lie against that order to this Court. Obviously, if there was no appeal then certainly it would be a case in which this Court could and should interfere in revision and a Rule has been granted in the alternative.

6. The order of the Subordinate Judge is, therefore, set aside and the order of the Munsif, dated the 23rd of June, 1924, by which he confirmed sale is also set aside. The order of the Munsif dated the 2nd January, 1924, by which he set aside the sale will be restored.

7. The appellants are entitled to their costs in this Court. Hearing-fee five gold mohurs.

8. This judgment also disposes of the Rule Nisi No. 1121 of 1924.

B.B. Ghose, J.

9. I agree.