

(1928) 08 CAL CK 0022
In the Calcutta High Court

Sailaja Sundari Rai

APPELLANT

Vs

Surja Kanta Choudhury and Others

RESPONDENT

Date of Decision : 13-08-1928

Acts Referred:

Citation : AIR 1929 Cal 133 : 117 Ind. Cas. 697

Hon'ble Judges : Mitter, J

Bench : Division Bench

Judgement

Mitter, J.—This rule was obtained by the petitioner who happens to be a mortgagee of a non-transferable occupancy holding for the revision of an order by which the Munsiff declined to allow her to make a deposit of the decretal amount u/s 52, Act 8 of 1869 which prevails in the district from which this case comes. It appears that the opposite party 4 held a mourashi occupancy holding under the opposite parties 1, 2 and 3 for a considerable length of time, that on 7th December 1915 opposite party 4 mortgaged a portion of the holding to the petitioner on executing a mortgage bond and taking a loan of a certain sum which afterwards swelled into Rs. 329. Opposite party ,4 not having paid the money he borrowed, the petitioner instituted a suit on 6th December 1926 in the Court of the Munsiff at Habiganj for enforcing the dues under the mortgage and for realizing the sum of Rs. 329. After the institution of the mortgage suit opposite parties 1 to 3 brought a rent suit against opposite party 4 for arrears of rent. The suit was decreed exparte on 1st February 1927. The decree directed that if the defendant did not pay Rs. 9-1-0 as rent for the year 1322 B.S. within fifteen days of the date of the decree, the defendant in that suit would be liable to be ejected from the suit land. The petitioner states that on coming to know of this fact and of the decree for ejectment she applied on the 9th February 1927 to be allowed to make the deposit and as a matter fact she actually deposited the sum of Rs. 9-1-0 in the Court on 16th February 1927. Her application to make the deposit was considered after several adjournments on the 11th February 1928 and the Munsiff held that she had no locus standi to make the deposit although the application was not contested by the defendant in the rent suit, that

is, opposite party 4. For the revision of that order this Rule was asked for and obtained and it is argued on behalf of the petitioner that the Munsiff had failed to exercise a jurisdiction vested in him by law in not allowing the petitioner to make the deposit u/s 52 and in declining to entertain her application for that purpose. In support of this contention reliance has been placed on a very early decision reported in *Saroda Proshad Boy v. Nobinchandra Dutt* [1864] 1 Mar Rep. 417, where Norman, J. and Kemp, J. dealing with Section 78, Act 10 of 1859, the words of which section are precisely similar to the words of Section 52 of Act 8 of 1869, held that the arrear could be paid not only by the tenant but also by his transferee or by any other party interested in saving a forfeiture of the tenure. Reliance has also been placed on a decision of this Court in the case of *Inder Pershad Singh v. Campbell* [1881] 7 Cal. 474 where it was assumed by Ramesh Chandra Mitter, J. and Maclean, J. that a deposit could be made not only by the tenant but by a transferee from him or by a person who held under the tenant. At p. 478 of the Report the learned Judges said this:

The mere fact that the plaintiff might have paid up the amount of the decree against the Bhatowlia Factory, and thus saved the factory and himself as its tenant from ejectment, is not enough. We are informed it was a decree for rent and for ejectment u/s 52, Beng. Act 8 of 1869 : but it may be that the decree was for a sum which the plaintiff could not reasonably be expected to pay, considering that he would have no security for his payment. The law which allows any one interested in protecting a tenure from sale to pay up a decree, gives him full security in the shape of a right to take possession of the tenure: but this is not the case u/s 52 of the same Act.

2. The next decision on which reliance has been placed is a decision of Teunon, J. and Cuming, J. in the case of *Kali Kishore Das v. Gopal Ram Shaha* 23 C.W.N. 132, and the learned Judges there held that where in execution of a decree for rent the landlord decree-holder proposed to eject the tenant of a non-transferable holding under the provisions of Section 52, Bengal Act 8 of 1869, and to avoid the ejectment a third person claiming to be a transferee from the tenant sought to make the deposit provided for by the section he was entitled to make the deposit. In arriving at that decision the learned Judges referred to the Full Bench case of *Dayamoyi v. Ananda Mohan* . [1915] 42 Cal 172 and the learned Judges held that having regard to the principles laid down in the case from Marshall's Reports to which I have referred and to the principles of the decision in the Full Bench case in *Dayamoyi v. Ananda Mohan* [1915] 42 Cal. 172, the transferee of a portion of a non-transferable occupancy holding was entitled to make the deposit u/s 52. So the view of the law is that u/s 52 it is not the judgment-debtor alone but anyone who happened either to be a transferee from the judgment-debtor or a person who was otherwise interested in protecting the tenure from forfeiture, was entitled to make the deposit.

3. This was the view of the law which obtained in this Court from the year 1864 to the year 1927 when two of my learned brothers (Suhrawardy, J. and Mallik, J.)

took a view contrary to the view taken in the cases to which I have referred. In that case the learned Judges held that there was nothing in Act 8 of 1869 which entitled the purchaser of a non-transferable occupancy holding to make a deposit u/s 52 of the said Act in order to avoid ejectment of the tenant. Apart from authorities it becomes necessary to examine the language of Section 52 which runs as follows:

Any person desiring to eject a raiyat or to cancel a lease on account of non-payment of arrears of rent, may sue for such ejectment or cancelment and for recovery of the arrear in the same action, or may adduce any unexecuted decree for arrears of rent as evidence of the existence of such arrear in a suit for such ejectment or cancelment. In all cases of such suits for the ejectment of a raiyat or the cancelment of a lease, the decree shall specify the amount of the arrear, and if such amount together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, execution shall be stayed.

4. The words "to be paid into Court within fifteen days" do not impose any limitation, as to the person by whom the payment is to be made and it has been argued on behalf of the petitioner that if u/s 62 of Act 8 of 1869 any one interested in the protection of the under-tenure can put in the money for the purpose of preventing the sale there is no reason why any person other than the judgment-debtor who is interested in protecting the holding from forfeiture by the landlord is not entitled to make a deposit. The language of the section itself does not suggest that the money must be paid by the judgment-debtor in the rent suit and by him alone. It has, however, been argued by Mr. Satyendra Kishore Ghose, who appears for the opposite party that the language of Sections 46 and 47, Act 8 of 1869, suggests, that there is also an implied prohibition in Section 52, for any person other than judgment-debtor to make the deposit in just as under Sections 46 and 47, it is said, the judgment-debtor alone could make that payment, so also in Section 52, the payment could only be made by him. I do not think that would be the proper mode of the interpretation of the statute.

5. In order to affect the rights of persons who have got interest in the holding, the statute must expressly say so, as it seems unreasonable as to why any one having an interest in the holding should be prohibited u/s 52 unless the statute either expressly or by the plainest implication suggests a contrary construction. Besides looking to the facts of this particular case, before me it would certainly be a great hardship to the petitioner if for a decree for Rs. 9-1-0 obtained in circumstances I have narrated, the tenant would be evicted from the holding which had been mortgaged to the petitioner for a large sum of Rs. 329 odd. Looking from the common sense point of view the landlord certainly is entitled to get the arrears of rent from his tenant and if a tenant chooses for his benefit to effect a transfer of a portion of his occupancy holding for a large sum, the interest of such a transferee ought not to be allowed to be affected to his prejudice so long as the landlord gets all his dues which is said to be recoverable from the tenant. There is undoubtedly the decision in the case of Baneswar Singh

and Others Vs. Abdul Hassan and Others, , which supports the contention of the opposite party but having regard to the language of the statute and having regard to the fact that the earlier authorities applicable to the case and which are relied on on behalf of the petitioner have stood for more than half a century, I feel myself reluctant to follow the last decision in the case. It is true, as I have said in another case that it cannot be said that the last word has been said on the subject. I think the ends of justice will be met if the petitioner be allowed to make the deposit. The order of the Munsiff is, therefore, set aside and he is directed to receive the deposit which has been made by the petitioner. The Rule is made absolute. There will be no order as to costs.