

(1927) 11 PAT CK 0002

In the Patna High Court

Sarasvati Charan Prasad Singh and Others

APPELLANT

Vs

Suraj Deo Narain Singh and Others

RESPONDENT

Date of Decision : 21-11-1927

Acts Referred:

Bengal Tenancy Act, 1885 — Section 11, 13, 18

Citation : AIR 1928 Patna 367

Hon'ble Judges : Dawson-Miller, C.J.;Adami, J

Bench : Full Bench

Judgement

Dawson-Miller, C.J.—This is an appeal on behalf of the defendants second party in the suit against a decision of the Subordinate Judge of Muzafferpur in favour of the plaintiffs, dated 16th January 1925, reversing a decision of the Munsif of Hajipur which had dismissed the plaintiffs" suit.

2. It appears that in and before the year 1913 Dasrath Rai and certain other members of his family, who are now represented by the defendants third party, were the tenants of a small holding measuring between three and four bighas of land in mauza Dighi Kalan in the Muzafferpur District. It was held at a rate of rent fixed in perpetuity, commonly described as saramoiyan, and was so recorded in the Record-of-Rights. By Section 18, Ben Ten. Act a raiyat holding at a rent or rate of rent fixed in perpetuity is subject to the same provisions with respect to the transfer of his holding as the holder of a permanent tenure. On 10th June 1913, plaintiffs 1, 2 and 3, in execution of a money decree obtained by them against the defendants third party, put up for sale a fractional portion of the holding describing it in the sale proclamation as an occupancy holding and themselves purchased it.

3. On 13th September in the same year plaintiff 1, in execution of a similar decree obtained by him, put up for sale a further portion of the holding similarly described and himself purchased it. The portions so purchased at these two sales amounted together to approximately one bigha. At three later sales which took place on 13th November 1915, 23rd January 1917 and 24th January 1917, the

plaintiffs or some one or more of them purchased the remainder of the holding. The first sale was in execution of a money decree and the other two were by a kobala executed by the defendants third party.

4. On 27th September 1915, that is after the date of the first two sales above mentioned and before the remaining three, the landlords of the village, in whose sherista the names of the third party defendants were still registered as tenants, sued those defendants for arrears of rent, obtained a decree and put up the holding for sale on 7th June 1919. At that sale Jamna Prasad, deceased, the father of the defendants second party, who now represent him, was the purchaser and he subsequently obtained delivery of possession by dispossessing the plaintiffs. The sale proclamation in that execution properly described the property as a saramoiyan interest.

5. The plaintiffs now sue to recover possession, together with mesne profits, from the defendants second party. The landlords and the original tenants have also been impleaded as first and third parties respectively. The suit was contested by the defendants second party only. One of the main questions at the trial was whether, as the plaintiffs in their plaint alleged, the holding was held at a fixed rate of rent or whether it was merely an occupancy holding. In the former case, under the provisions of Section 11, Ben. Ten. Act, the holding would be transferable without the consent of the landlord, and it would, ordinarily, be incumbent upon the landlord to sue all the actual tenants in whom the property vested in order to enable him to obtain a decree having the force of a rent decree. In the latter case, unless there was a custom of transferability in the village, which was not the case here, the holding would be non-transferable and the landlord could properly sue the registered tenants unless he had recognized the transfer, which was not the case.

6. The Munsif of Hajipur, before whom the case came for trial, held that the presumption attaching to the entry in the survey khatian describing the holding as saramoiyam was rebutted by the evidence and that it was in fact an ordinary occupancy holding, and, as there was no custom of transferability, the plaintiffs by their purchase acquired no right to possession against the landlords or those who purchased in execution of the rent decree obtained by the landlords.

7. The Subordinate Judge on appeal differed from the Munsif on this point and found that the holding was one held at a fixed rate of rent and was freely transferable. He further held that the two purchases by the plaintiffs in execution of money decrees against the defendants third party in 1913 vested in them the portions so purchased and, therefore the decree obtained by the landlords in the rent suit brought in 1915 against the defendants third party, without impleading their transferees the plaintiffs, did not create a charge upon the property as those defendants did not when the suit was instituted, represent the entire tenancy, and the decree must be regarded as a money-decree only. From this it followed that the holding which had entirely passed out of the hands of the defendants third party by the 24th January 1917 could not be attached and sold

in execution of the so called rent decree, the execution proceedings having been instituted after that date.

8. It was contended, however, on, behalf of the defendants second party, that, as no notice of the transfer to the plaintiffs was given the landlords, as prescribed by Section 13, Ben. Ten. Act, the landlords. were not bound to recognize the transferees as tenants and might still sue the registered tenants. The learned Subordinate Judge considered that this point was concluded by the decision of the Judicial Committee in *Surapati Roy v. Ram Narayan Mukerji* AIR 1923 P.C. 88 which decided that u/s 12, Ben. Ten. Act, a transfer of a permanent tenure is complete as soon as the instrument of transfer is registered, as therein prescribed and the transferrers are not thereafter liable for rent to the landlord. He accordingly reversed the decision of the Munsif and passed a decree in favour of the plaintiffs for possession and mesne profits.

9. From that decision the defendants second party have appealed to this Court. In ray opinion the decision in *Surapati Roy v. Ram Narayan Mukerji* AIR 1923 P.C. 88 is not conclusive of this case nor are the facts at all similar. There the patnidar as landlord sued 15 defendants as darpatnidars for rent, alleging that they were all jointly interested in the under-tenure and jointly and severally liable for the whole rent. Some of the defendants denied liability on the ground that before suit they had transferred their interest to their cosharers, the remaining defendants, by a deed of relinquishment properly registered as prescribed in Section 12, Ben. Ten. Act, and that from the date of registration they ceased to have any interest in this property and were not liable for the subsequent rent. The contention which had found favour in the High Court at Calcutta, whose judgment was then under appeal, was that there was no consideration for transfer which was therefore inoperative. Their Lordships of the Judicial Committee appear to have agreed with the Subordinate Judge, whose judgment they quote, that the question of consideration was a matter between the transferrers and transferees and did not concern the plaintiffs and held that a transfer of a permanent tenure by a registered document was complete u/s 12, Ben. Ten. Act, as soon as the document was registered following the earlier decisions of the Calcutta High Court in *Kristo Bulluy Ghose v. Kristo Lal Singh* [1889] 16 Cal. 642 and *Hemendra Nath Mukharji v. Kumar Nath Roy* 12 C.W.N. 478. In the last-cited case it was held that a relinquishment in favour of cosharer tenure holders was complete and the liability of the transferrers ceased on registration u/s 12, notwithstanding that the landlord's fee required by the section had not been paid to him.

10. It seems clear that non-payment of the landlord's fee would not invalidate the transfer in view of Section 1, Bengal Act 1, 1903 (the Bengal Tenancy Validation and Amending Act) and the Court relied on that section. In the former case the objection taken by the landlords was that the transferrer remained liable because the notice required by Section 12 to be served on the landlords had been served on one only of them although registration had been effected

and the transferee's name had in fact been duly registered in the landlord's sherista in place of the previous tenants. Again it was held that the property passed on registration and that thenceforward the transferrer was not liable for rent.

11. It will be observed that in those cases there is nothing to indicate that the transferees omitted to do anything that was required to be done by them before registration under the section and it does not appear that it was through any fault of theirs that the fee was not transmitted to the landlord in the one case or that the notice was not served on each of the landlords in the other. I do not question the correctness of the decisions in those cases, but the question for decision which there arose was not whether the suit against the tenants was properly constituted, but whether some of the defendants who had transferred their interest by a document properly registered under the Act remained liable for the rent accruing due after the registration.

12. In the present case no question of registration arises, for Section 12 has no application to the case of a sale in execution of a decree. In this case the relevant section, assuming that the plaintiffs acquired an interest in a holding at fixed rates, is Section 13 which applies to a sale of a permanent tenure in execution of a decree other than a rent decree and provides that

the Court shall before confirming the sale u/s 312 (now Order 21, Rule 22), Civil P.C., require the purchaser to pay, in addition to the landlord's fee and the cost of transmission prescribed in the earlier section, such further fee for service or notice on the landlord as may be prescribed.

13. u/s 17 the earlier provisions relating to transfer of a permanent tenure apply equally, subject to Section 88, to a transfer of a share in a permanent tenure. Now the provisions of Section 13 which require certain things to be done before the sale can be confirmed, including the deposit of a fee for service of notice upon the landlord of the sale, were not complied with and, therefore, the landlords had no information whereby the plaintiffs purchased a portion of the holding in 1913. The landlords accordingly sued the registered tenants for the rent, and it is not contended that the rent was not due or that the plaintiffs, had they been joined as defendants in that suit, could have successfully resisted the claim. Had the execution Court in 1913 been informed before confirmation of the sale that the property purchased was a portion of a holding at fixed rates it would have required the plaintiffs to conform with the provisions of Section 13, and it may be presumed that in due course the landlords would have been informed through the Collector of the transaction as provided in Sub-section (2) of Section 13. It is unnecessary to determine whether, if the plaintiffs had done all that was required by them and still the landlord had not received notice, they could then have contended that the rent suit was not properly constituted; but in the present case they did nothing by way of informing the Court before confirmation of the sale that the property was a holding at fixed rates. The reason they assign for their omission is that the property which they put up for

sale and purchased in execution of their decrees in 1913 was not described in the sale proclamation as a portion of a holding at fixed rates but a portion of an occupancy holding and therefore Section 13 had no application. The plaintiffs, however, were themselves the decree-holders and they are responsible for the description in the sale proclamation of the property they attached and sold in execution of their money decrees. Their case now is that the property was in fact a tenancy at fixed rates although not so described by them when they purchased it. They know best why they falsely described the property as an occupancy holding; and it was through their own omission that the landlords were not informed of the transaction. In such circumstances I think there would be good ground for holding that they are estopped from contending that the rent suit against their transferrers, the original tenants, was not properly constituted; but there is another aspect of the case which, in my opinion, is fatal to the plaintiffs' claim.

14. They never in fact purchased a share in a saramoiyan interest in 1913 in execution of their decrees. What they purported to purchase at those sales was a share in an ordinary occupancy holding and the saramoiyan right was not transferred to them.

15. It follows therefore that the third party defendants were not divested of that right at that time and legally remained tenants holding at a fixed rate of rent, and the rent suit against them was properly constituted and the sale in execution of the rent decree passed the interest to the appellants and forms a first charge upon the property. It may be urged that this is a somewhat technical point, but those who rely upon technicalities--and the plaintiffs' claim is clearly unsupportable on the merits--cannot complain if they are resisted by their own weapons. In my opinion the appeal should be allowed with costs here and in the Courts below against the plaintiffs-respondents. The decree of the Subordinate Judge will be set aside and that of the Munsif restored.

Adami, J.

16. I agree.