
(1925) 12 CAL CK 0063
In the Calcutta High Court

Shashadhar Chowdhury

APPELLANT

Vs

Bishun Narain Kundu and Others

RESPONDENT

Date of Decision : 08-12-1925

Acts Referred:

Bengal Tenancy Act, 1885 — Section 174(3)

Citation : AIR 1926 Cal 738

Judgement

1. The question arising on this Rule is a proper one to be decided on revision.
2. One Mohendra was a patnidar, and he was sued for rent by three persons who added as pro forma defendants two others as being co-sharer landlords with the plaintiffs. Decree was obtained and this decree was put in execution by the procedure laid down in Chapter XIV of the Bengal Tenancy Act as distinct from the procedure of the Code. At the sale on 12th May 1924 the present applicant became the purchaser for a price of Rs. 1,375. He now says that a relation of his had purchased Mohendra's interest in 1922 at a sale under a mortgage decree and that he has discovered that in the rent suit two other cosharer landlords were not parties, with the result that the decree was not such a decree as is contemplated in Chapter XIV. Accordingly, he says the sale of 1921 passed to him only the right, title and interest of Mohendra and took effect only as a sale under a money decree. As the whole of Mohendra's interest was transferred by the mortgage sale of 1922 the applicant claims under Order 21, Rule 91 to have the sale set aside and his purchase money refunded.
3. This contention has been negated by the Munsif at Katwa and the District Judge of Burdwan on the ground that Section 174, Sub-section 3 of the Bengal Tenancy Act provides that
4. Section 313 of the CPC shall not apply to any sale under this chapter.
5. The Courts below have accordingly refused to enter into the contest between the petitioner and the opposite parties as to whether Mohendra's landlords were five or seven in number, whether his patni was held under an 8 annas share of

the zamindari or under the 16 annas and so forth, and they have dismissed his application. They take the view that whether or not the decree was in strictness a rent decree so as to pass to an auction-purchaser the tenure itself or so as to give a charge to the landlords in terms of Section 65 of the Bengal Tenancy Act, the sale of 12th May 1924 was held under Chapter XIV. Thus notices were issued to cosharer landlords u/s 158B, the proclamation of sale was u/s 163 issued simultaneously with the order of attachment and contained the particulars required by Clause (a) of sub-Section 2. This in their opinion ends the matter as Section 174, Sub-section 3, applies.

6. The learned vakil for the applicant contends that Chapter XIV of the Bengal Tenancy Act has no application except upon the basis of a rent decree and that the absence of this basis has the effect of giving to the auction-purchaser the ordinary rights of an auction-purchaser under the Code, and of rendering inapplicable the special restriction imposed by Section 174, Sub-section 3. He cites as illustrating the principles to be applied *Durga Churn v. Kali Prosanna* [1899] 26 Cal. 727, and *Sadagar v. Krishna Chandra* [1899] 26 Cal. 937. He also cites *Makar Ali Vs. Sarfaddin and Others*, , as showing that Section 313 of the Code of 1882 did not exclude an auction-purchaser from seeking the like remedy by suit and that under the present Code the remedy by suit has been taken away. On behalf of the respondents I am referred to the decision of the Full Bench in *Amrita Lal v. Nema Chand* [1901] 28 Cal. 382 which was a decision u/s 170 of the Bengal Tenancy Act, but in which there are observations upon Section 174(3). It is contended that before applying the general principles on which the applicant relies the Court must decide a prior question, viz., whether at the instance of an auction-purchaser the Court is obliged to go behind the sale and the decree and enquire whether the decree was really in strictness a rent decree.

7. On the exact question as to Section 174(3) there does not appear to be any direct authority. One has to consider primarily the exact form of words used by the Legislature in the sub-section. In my opinion "shall not apply to any sale under this chapter" are words which in their ordinary meaning raise only the question of fact, viz.; was the sale held under the chapter or was it not? The words seem to have the same effect as the phrase in Section [1899] 26 Cal. 727, where the right to bid without obtaining leave is given to the holder of a decree "in execution of which a tenure or holding is sold under this chapter. It is tempting to say that "a sale under this chapter" in Section 174(3) means a sale in all respects rightfully held under the chapter. It might mean that, certainly; but I think a little consideration shows that this is not the true construction and that it does not follow from the principles or the decisions upon which the applicant's vakil relies that his client can at this stage and for this purpose contest the correctness of the procedure adopted in the execution of the decree.

8. The position is this. Agricultural landlords in Bengal are not allowed to evict their tenants for non-payment of rent; but if in substance all the landlords join or are joined, and if they implead all the tenants of a single holding they may obtain

a decree for the arrears of the entire rent. Having done so they may take the steps provided by Chapter XIV to bring the holding itself to sale and to do so in such a manner as to give themselves a first charge upon it for the rent, defeating thereby the rights of persons, e.g., encumbrancers, who were no parties to the rent suit. Whether a decree for rent entitles the decree-holder to adopt these very special proceedings cannot always be finally determined on the mere face of the decree. Facts not appearing by the decree may have to be enquired into. The judgment-debtor has a right to contest the decree-holder's right to proceed under Chapter XIV, but of course he must do so at the proper time. If he does not contest the order for sale at the proper time he is bound by the order unless he can show fraud or non-service of notice or some adequate reason: *Durga v. Kali* [1899] 26 Cal. 727. A third party whose interest are affected, e.g., an incumbrancer, can dispute the decree-holder's right to sell under Chapter XIV. For convenience he is in certain cases prevented from raising his objections in the execution itself (cf. Section 170), but he is never bound by the proceedings except where there has been a strict rent decree and he can assert his rights by suit: of *Durga v. Kali* [1899] 26 Cal. 727. An auction-purchaser is in a different category. He has a right to claim to be relieved against fraud or misrepresentation and there may be other grounds which entitled him to have the sale set aside. But in a Court sale there is no warranty of title by the decree-holder or by the Court. Until he has been declared the purchaser the suit and the execution proceedings are matters with which he is in no way concerned. When he bids he does so upon the terms laid down by this Legislature, whatever they may be, and if he does not like them he need not bid. In the case of a sale which purports to be held under Chapter XIV what is put up for sale and what he purports to bid for, is the holding itself and not the tenant's right and title. The case *Amrita v. Nema* [1901] 28 Cal. 382, already cited, shows that even if the decree is a true rent decree he may take nothing by his purchase and yet cannot set aside the sale. This is clear enough on any view of Section 173(4). If the decree is not a true rent decree under the Bengal Tenancy Act third parties are not bound by the sale, but the judgment-debtor is presumably bound by it, since he has allowed orders for this form of sale to be made against him. Accordingly, if he has any interest in the holding it will pass to the auction-purchaser. But it is another matter altogether to say that if he has no interest the purchaser can set aside the sale. Order 21, Rule 91 applies in principle only to cases where the thing put up for sale is the tenant's interest. This was even clearer on the wording of Section 313 of the old Code. Even in such cases Order 21, Rule 91 does not apply where there is any saleable interest left in the judgment debtor however incommensurate its value may be to the price bid at the auction.

9. No question arises under this rule as regards fraud or mistake or irregularity. The basis of the rule is that what has been sold turns out to have no real existence. Now the prima facie meaning of Section *Makar Ali Vs. Sarfaddin and Others*, is that this principle is to have no application to the man who purports or attempts to buy a holding under Chapter XIV. The facts of the present case may

or may not afford an illustration of a bid being made for a holding in the hope of excluding incumbrancers and with full knowledge that the tenant's interest by itself is nothing. But in sales held under Chapter XIV this is quite possible and quite legitimate, and I have little doubt that it is extremely common. The Legislature may well have thought it highly inconvenient and even absurd to apply Order 21, Rule 91 to sales held under such conditions. I do not therefore consider that it is legitimate to interpret Section 174(3) in any way which restricts its prima facie meaning. Rampini, J., in the Full Bench case *Amrita v. Nemai* [1901] 28 Cal. 382 distinctly held that Section 174 prevented such an application being made on the ground that the judgment-debtor had no interest and that the purchaser would lose his money. This was obiter but I think it was correct. On this view it is in no sense an anomaly that the auction-purchaser in such a case as the present should have no right of suit analogous to the right given to purchasers under the Code by Order 21, Rule 91. I do not see how a change in the Code made in 1908 can assist one in interpreting an Act of 1885. If however the suggestion is that until 1908 a purchaser who had taken nothing by his purchase at a sale held under Chapter XIV could notwithstanding Section 174(3) have brought a suit to set aside the sale either on common law principles or u/s 315 of the old Code, that is a proposition for which I should want very clear authority. The old law however need not be discussed here as in any view the argument is of no avail to the applicant.

10. In my judgment equally strong reasons exist for giving the same meaning to the words in sub-Ss. 1 and 2 of Section 173 as I attribute to their counterpart in Section 174(3). It is difficult to suppose that a purchaser accused of being the benamidar of a judgment-debtor could be heard to say "Never mind. It was not really a rent decree." Or that on the sale of a holding a competing bidder could object to the decree-holder's bid on the ground that he had not obtained leave and that the decree was not a true rent decree. The statute endeavours to vary its language in the different sections of Chapter XIV as it is dealing with different parties and with different stages of the proceedings. It is not perhaps very successful or very clear, and in the light of subsequent experience it could probably be much improved; but as it stands, general principles which apply to the rights of third parties, e.g., incumbrancers cannot be assumed to be applicable to judgment-debtors or to auction-purchasers. The stage at which a judgment-debtor asserts an objection and the stage at which an auction-purchaser comes upon the scene are most material considerations. In cases dealing with the rights of third parties wide language has at times been used by the Court in asserting the principle that their rights cannot be defeated save upon strict compliance with the requirements of the statute. In such a case it has even been said broadly that where only one co-sharer has, sued the tenant "a sale in execution of such a decree is not a sale under the Act:" *Sadagar v. Krishna* [1899] 26 Cal. 937. But the Act itself as well as the plain necessities of the case and other decisions of the Court [cf. *Amrita v. Nemai* [1901] 28 Cal. 382] show that there is no universal and overriding doctrine that in this very

common type of case any person at any time and for any purpose may call upon the Court to decide as to the nature of the decree, and to treat proceedings taken under the Act as proceedings taken under the Code. A mixture of two proceedings may very well be materially different from either, and the application of Order 21, Rule 91 to a sale held under the Bengal Tenancy Act is I think an instance of this.

11. The Rule is discharged with costs: one gold mohur.