

(1943) 04 CAL CK 0006
In the Calcutta High Court

Smt. Binapani Devi Chakraborty	Vs	APPELLANT
Banku Behary Mondal and Others		RESPONDENT

Date of Decision : 16-04-1943

Acts Referred:

Bengal Tenancy Act, 1885 — Section 106

Citation : AIR 1943 Cal 475

Judgement

1. These are two appeals in two suits u/s 106, Ben. Ten. Act, which were heard together in the Courts below and disposed of by the same judgment. In one of the suits the plaintiff was Banku Behari Mondal who claimed that the disputed holding, which was dag 13 in Khatian 91 of Mouza Iswaripur, should be recorded in his name, while the other was by Sukeshi Bose, one of the putnidars of the mouza who supported his case. The contesting defendant in each case was defendant 1, Binapani Debi, the appellant before us, who had the entry in the record of rights made in her favour. Both the Assistant Settlement Officer and the Special Judge decreed the suits, if not on precisely the same grounds, and hence the appeals by Binapani. The material facts are now more or less admitted. The land in dispute was originally held by one Gobardhan Mondal as a raiyat under the patnidars at an annual rental of Rupees 16-4-3. In the year 1931 the putnidars obtained a rent decree against him, and in execution thereof purported to purchase the holding themselves on 11th September 1934. They then let the land in barga for some time to one Nanilal Mondal who was there from before as a bargadar under Gobardhan. The putnidars thereafter granted a raiyati settlement to Banku Behari Mondal the plaintiff in one of these suits, first under an amalnama dated 27th October 1937 and then on taking from him a kabuliyat dated 4th November 1937. It is by virtue of this settlement that the plaintiffs claim that Banku's name should have been entered in the settlement record as tenant of the dag in question, and on this basis they challenge the entry which, as already stated, was made in the name of Binapani. The record of rights was finally published on 22nd January 1938.

2. Binapani resists the claim on the ground that before the putnidars brought the

holding to sale under their rent decree, she had purchased it in execution of a mortgage decree which she had recovered against the original tenant in respect of the property. The date of the mortgage does not appear from the proceedings, but the final decree for sale was made on nth November 1932 and the sale followed on 18th April 1933 and was confirmed on 17th June 1933. Binapani thereafter obtained delivery of possession through Court on 17th December 1933. Apparently, however, Nanilal Mondal continued in actual occupation of the land, and Binapani claimed possession through him. She actually took from him a barga kabuliat in Ashar, 1348 B.S. (June-July 1937), but the Assistant Settlement Officer has found in effect that the kabuliyat was taken under coercion, and this finding has not been reversed in appeal. The Assistant Settlement Officer seems to think all the same that Binapani was in possession during the settlement operations, and the fact remains that she got her name recorded in the settlement khatian. It appears that on her purchase Binapani duly deposited the landlords' transfer fee u/s 26E, Ben. Ten. Act, and the fee was duly accepted by the putnidars, so that the putnidars must be taken to have had notice of her interest. The putnidars, however, did not make her a party to their execution proceeding which was subsequent to her purchase and it is the effect of this circumstances that we are mainly concerned to consider in these appeals.

3. The Assistant Settlement Officer was inclined to accept the contention that Binapani not having been joined as a party to the rent execution case, her interest could not be affected by the sale, but he decided against her on the ground that she on her part knew about the sale, and knew also that the landlords thereafter settled the holding with another party, and yet with such knowledge she took no steps to set aside the sale. On appeal, the learned Special Judge affirmed the decision, but took a different view. On the question of possession, he definitely found that Binapani was never in possession after her purchase, not even during the settlement operations, but the main ground on which he rested his judgment was that as the putnidar's decree against Gobardhan was a rent decree proper, the holding itself passed by the execution sale, and that Binapani's interest must consequently have passed with it, even though her purchase was prior to the execution proceeding and she was no party to it. The learned Judge was of opinion that to make the sale a rent sale under chap. 14, Ben. Ten, Act, it was sufficient for the land-lords to proceed in execution only against the judgment-debtor named in the decree. The Assistant Settlement Officer found as a fact that the putnidars did not recognise Binapani as a tenant, but it has not been contended before us either that the mortgage by Gobardhan to Binapani was inoperative against the landlords, or that the sale to Binapani under her mortgage decree was ineffective to pass title. We must take it, therefore, that Binapani did acquire a valid interest by her purchase. The only question accordingly is whether the Special Judge was still right in the view he took as to the effect of the landlords' sale under the rent decree, without making Binapani a party to the execution proceeding.

4. The learned Judge says that there is no authority for the contrary view, but on the other hand, he has not been able to cite any in support of the view he has expressed. In the argument before us we have not been referred to any reported case directly in point one way or the other, but the learned advocate for the appellant has relied strongly on the principle underlying the decisions in *A.H. Forbes v. Maharaj Bahadur Singh* ("14) 1 AIR 1914 P.C 111 and *Alauddin Ahmad Vs. Aziz Ahmad and Others*, . The principle is stated to be that under the Bengal Tenancy Act the right to bring a tenure or holding to sale in execution of a rent decree is dependent on the existence of the relationship of landlord and tenant at the time. Applying this principle, it is argued that as at the date of the execution in the present case Gobardhan had lost his interest as tenant, and as Binapani who had acquired the tenant's interest was not made a party to the execution case, there was no relationship of landlord and tenant between the parties, and that consequently the holding could not pass at the sale. We think there is a good deal of force in this contention, and it must prevail. In *A.H. Forbes v. Maharaj Bahadur Singh* ("14) 1 AIR 1914 P.C. 111 the question was whether a person who had parted with his interest as landlord before institution of the suit for rent, could bring the tenure to sale in execution of his decree, and the Judicial Committee answered the question in the negative. The right to proceed to sale is conferred by Section 65, Ben. Ten. Act, and their Lordships distinctly laid down that:

To acquire the right which the section gives, not only the person obtaining the decree must be the landlord at the time, but the person seeking to execute it by sale of the tenure must have the landlord's interest "vested" in him.

5. In other words, their Lordships went on to say, the right to bring the tenure or holding, as the case may be, to sale, exists so long as the relationship of landlord and tenant exists. In *Alauddin Ahmad Vs. Aziz Ahmad and Others*, the landlord ceased to be landlord after obtaining his decree, but before putting it in execution, and a Special Bench of this Court held that the same principle would apply and the decree could not be enforced by sale of the holding. It is quite true that in both these cases the question was considered with reference to the status of the person who obtained the decree or was seeking to execute it, but the ratio decidendi was the subsistence of the relationship of landlord and tenant between the decree-holder on the one hand, and the judgment-debtor on the other, a relationship which is dependent as much on the landlord remaining the landlord as on the tenant remaining the tenant at the material time. The relationship is mutual, as is in fact implied in the very definition of "landlord" in the Bengal Tenancy Act, which is declared to mean "a person immediately under whom a tenant holds." If A is B's landlord B is necessarily A's tenant, and vice versa. If, therefore, on A's ceasing to be landlord, B ceases to be his tenant, then on B's ceasing to be tenant, A must equally cease to be his landlord. In either case will the relationship of landlord and tenant have come to an end, and on no conceivable principle can the rule in *A.H. Forbes v. Maharaj Bahadur Singh* ("14) 1 AIR 1914 P.C. 111 be held to apply in one case, and not in the other. Looking

at the matter from a slightly different point of view, the case of the tenant ceasing to be a tenant may be brought even within the letter of the Privy Council decision, for when A obtains a rent decree against B as his tenant, and B thereafter parts with his interest as tenant, A in executing the decree against B will obviously not be the landlord vis a vis the judgment-debtor, and will accordingly not be entitled to execute the decree as a rent decree.

6. In our judgment there is thus no escape from the conclusion that the conditions were wanting under which alone the patnidars in the present case could enforce their decree for arrears by sale of the defaulting holding. Gobardhan was no doubt the tenant when the decree was passed, but the person in whom the tenant's interest was vested at the time of execution was Binapani, and she was not made a party to the execution proceeding. We must consequently hold that as the holding did not pass, Binapani's interest was unaffected by the sale.

7. Apart from the foregoing considerations, we think it right to point out that it would be wrong to hold that a holding could be brought to sale in execution of a rent decree under the Bengal Tenancy Act without the tenancy being represented by any one having an interest in it. The Act no doubt declares that, the holding will be liable to sale in execution (Section 65), but that cannot be supposed to mean that the landlord may proceed against the holding irrespective of whether the holding is duly represented or not. So to hold would be to sanction a procedure opposed to elementary principles of justice and fairness, and there is surely nothing in the Bengal Tenancy Act or in the provisions of the CPC which are applicable in this behalf to countenance such a course. It is incontestable that in order to justify a rent decree which will be binding on the holding, the tenant must be made a defendant in the suit, or where there are several tenants, they must either be all joined as defendants or be sufficiently represented by parties joined as defendants (Section 146A). It seems to us to be an inevitable corollary from this proposition that in order to justify a sale of the holding in execution of such a decree similar representation is equally necessary in the execution proceeding. The necessity of such representation is in fact expressly recognised in Section 146A in the case of cosharer tenants. The only reason, we may point out in passing, why Sub-section (2) of Section 146A as worded does not separately provide for representation at the execution stage is that the same representation is assumed to continue from the institution of the suit to the sale. Where, however, as in this case, there is no continuity of representation owing to the tenant (or tenants) having lost his (or their) interest in the holding, it follows that there must be fresh representation of the tenancy in the execution proceeding, and it will not do to proceed only against the original judgment-debtor (or judgment-debtors) if the sale is to pass the holding itself as under a rent decree. On these grounds also we must hold that the sale was not a rent sale and Binapani's interest could not, therefore, pass.

8. In so far as the suits prayed for a correction of the record of rights by

substituting the name of Banku in place of Binapani they must, therefore, be dismissed. There was a further prayer in Sukeshini's suit, asking for a declaration that the disputed holding was a distinct holding bearing a rental of Rs. 16-4-3 per year and did not appertain to a holding bearing a rental of Rs. 61-12-7 per year as alleged by the defendant. Both the Courts below had negatived the defence case on this point and no question was raised about it in the appeal in this Court. In regard to that part of the case, therefore, Sukeshini's suit must be decreed. The result therefore is that Second Appeal No. 523 of 1940, corresponding to Banku's suit, is allowed in full, with costs in all Courts as against the plaintiff and Second Appeal No. 524 of 1940, which arises out of Sukeshini's suit, is allowed in part, each party bearing its costs in all Courts.