

**(1929) 08 CAL CK 0034**  
**In the Calcutta High Court**

Sudhinkumar Pal and Others

APPELLANT

Vs

Asgar and Others

RESPONDENT

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**Date of Decision :** 29-08-1929

**Acts Referred:**

Bengal Embankment Act, 1882 — Section 74, 86  
Criminal Procedure Code, 1898 (CrPC) — Section 145

**Citation :** AIR 1930 Cal 797 : 129 Ind. Cas. 774

**Hon'ble Judges :** S.K. Ghose, J;B.B. Ghose, J

**Bench :** Full Bench

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**Judgement**

B.B. Ghose, J.—These appeals arise out of several suits brought by different persons for declaration of their right to and recovery of possession of certain lands, on the ground that these lands appertained to their several tenures under defendants 1 to 4, who are the zamindars with regard to the property in question. A mourasi mokarrari tenure of be bighas odd was held by two persons, Ramsebak Biswas and Ramgati Biswas, the predecessors-in-interest of defendants 5 to 9. The tenure was reduced to some extent by acquisitions being made by the Government for constructing embankments. Nothing turns upon that fact. The original tenure-holders subsequently sold specific plots of land to the plaintiffs in the different suits, out of which the appeals before us have arisen. The zamindar landlords recognized these different sales and constituted the different plots of land so sold into different tenures bearing separate shares of the original rent. Subsequently it appears that there were dues under the Bengal Embankment Act (Beng. 2 of 1882) which had to be realized from the estate and, according to the provisions of Sections 59 and 68 of that Act, the Collector had to apportion the cesses due under the Act between the zamindar, the owner of the estate, and the tenure-holder. What was done apparently was that the names of the holders of the original tenure, viz. Ramsebak and Ramgati, were only given to the Collector who made a certain allotment as payable by those tenure-holders. Defendants 5 to 7 allowed their share of the embankment charges to fall into arrears and the zamindars thereupon proceeded to sell the

entire original tenure under the provisions of the Embankment Act. The sale was held on 17th June 1915, and the tenure, as described by the zamindar landlords, stated to comprise the original lands in the possession of the heirs of Ramsebak and Ramgati, was sold and purchased by defendant 10. The plaintiffs however remained in possession of their different allotments and defendant 10 tried to obtain possession of those lands on the strength of his auction-purchase. There was a struggle between the parties and the inevitable proceedings u/s 145, Criminal P.C. were launched. The Magistrate attached the disputed properties under the provisions of Section 146, Criminal P.C. by his order, dated 26th August 1920. Thereupon the plaintiffs brought their several suits in August 1921. The Munsif decreed the suits; but, on appeal, the Subordinate Judge reversed the decision of the Munsif and dismissed the suits. The plaintiffs have appealed to this Court.

2. The learned Subordinate Judge took the view that the apportionment made by the Collector cannot be questioned by the civil Court. That view is quite correct, having regard to the provisions of Section 86, Embankment Act. The learned Subordinate Judge next refers to Section 72 of the Act and held that under that section the embankment cesses are a first charge on the tenure. Apparently, he misread that section, which only says that the embankment charges should be a first charge on the estate and that section only refers to the amount recoverable by the Government only from the estate as well as its subordinate tenures. The section that refers to the right of the zamindars to recover the share of the embankment charges payable by tenure-holders under him is Section 74 and the question is whether the lands within the tenures created by the zamindars passed under the provisions of that section. The learned Subordinate Judge decided the case on the supposition that all the provisions of a patni sale apply to the sale for recovery of embankment charges. It is quite true that by the sale under the Patni Regulation, if properly conducted, the whole interest in the patni passes and it is not necessary to serve notice on each of the defaulting proprietors. The question, however, is whether all the provisions of the Patni Regulation apply to such a sale as this, and the most; important thing to consider is the proviso to Section 74, which runs thus:

Provided that the right or interests of any person holding from the defaulter shall not be affected by any sale held under these provisions.

3. There is no question that the plaintiffs are persons whose interest is held from the defaulters and, if that is so, then their interest would not pass by a sale u/s 74 of the Act. It is contended by Dr. Rasak, on behalf of the respondent, that that proviso refers only to persons holding an interest subordinate to that of the defaulter; or in other words, he asks us to read the words "from the defaulter" as "under the defaulter." I do not see any reason for restricting the interpretation of the word in that way. The word "from" is wider than the word "under" and I do not find any reason why a transferee from the defaulter should not fall within that proviso. There is however a further important point in this case which has

been lost sight of by both the Courts below. The Collector is to apportion the embankment charges between the zamindars and the holders of tenures under him. It is true that there was originally one tenure of 80 bighas under the zamindars in this case. But it appears that this one tenure was split up at the instance of the zamindars into several smaller tenures. If the zamindars represented to the Collector that there was only one tenure and the Collector made an apportionment on that basis, the zamindars have no right to bring all the several tenures to sale by taking proceedings against the holders of one of the tenures u/s 74, Embankment Act, and affect the interests of all the other tenure-holders, who hold lands comprising different tenures, on the parent tenure being split up into several other tenures. The whole proceedings before the Collector would amount to a nullity, so far as the holders of the newly created tenures are concerned. When the zamindars represented to the Collector that there was only one tenure to be dealt with in making the apportionment, no doubt notices must have been served upon the owners or their representatives of the original tenure and they would be bound by the apportionment made by the Collector and the lands which they held must be held to have passed by the sale. But this sale cannot affect the interests of the plaintiffs, because the zamindars had themselves created several tenures in the place of one original tenure.

4. The learned Subordinate Judge lays great stress upon the fact that no kharij fee was paid to the zamindars and therefore the transfer was not according to law. I confess I fail to understand this view. The zamindars may make a kharij, that is, register the name of a purchaser in their books, without demanding any fee at all. But the next observation which the learned Subordinate Judge makes seems to be against obvious facts. He says that there was no transfer according to law, as no fee was paid by the purchaser. As the documents were registered, the registering officer must have demanded the usual statutory fee. There is one important fact, which the Munsif has noticed in his judgment, which shows that there was a separation of the lands purchased by the plaintiffs at the instance of the zamindars, as he says in deciding Issue 10, amongst other things, that when the landlords applied to the Collector for steps to realize embankment cesses from the defaulter, on that very day they filed a suit to recover arrears of rent from the holders of a separated tenancy. That shows beyond all controversy that the landlords did split up the original tenure into several distinct tenures. On this ground; the appeals must be allowed, the judgment and decree of the Subordinate Judge set aside and those of the Munsif restored with costs in both the Courts.

S.K. Ghose, J.

5. I agree.