
(1924) 07 CAL CK 0055
In the Calcutta High Court

Surendra Nath Bandopadhyaya and Others	APPELLANT
Vs	
Jabed Ali Talukdar and Others	RESPONDENT

Date of Decision : 31-07-1924

Acts Referred:

Bengal Tenancy Act, 1885 — Section 158B

Citation : 85 Ind. Cas. 747

Hon'ble Judges : B.B. Ghose, J

Bench : Single Bench

Judgement

B.B. Ghose, J.—This is an appeal by the plaintiffs and it arises out of a suit for rent with regard to a howla which is situated within a taluk under a zemindari. The defendants Nos. 1 and 2 are tenants of the howla. But the real question in dispute is between the plaintiffs and the defendant No. 9 as to the title to the superior taluki interest which the plaintiffs claim. The Court of first instance passed a decree in favour of the plaintiffs. On appeal by the defendants Nos. 1, 2 and 9 the decision of the Munsif, was reversed by the Subordinate Judge and the suit has been dismissed. The plaintiffs appeal to this Court, and their contention is that, on the facts found, the plaintiffs are entitled to the rent claimed from the defendants Nos. 1 and 2 and the defendant No. 9 has not acquired the superior title in the taluks of the plaintiffs by virtue of his purchase of the taluki interest.

2. The facts stand thus: There was a taluk called, Abdul Kasim the owner of which was one Akimannessa Bibi. This taluk was under the zemindari of which there are several co-sharers. The plaintiffs were the proprietors of the zemindari to the extent of one-anna odd share. They brought a suit for rent against the lady Akimannessa for their share of the rent of the taluk, Abdul Kasim and put the taluk to sale and, purchased it themselves on the 21st September 1909. One of the co-sharers of the zemindari was the Nawab of Dacca. In the year 1910 he brought a suit for the rent of the taluk Abdul Kasim and it appears that he purported to have framed his suit u/s 148-A of the Bengal Tenancy Act for the entire rent due on account of the taluk. The Nawab executed the decree and had

the taluk sold. It was purchased by the defendant No. 8 in the name of defendant No. 7 and the defendant No. 9 subsequently purchased it at a sale inter vivos from defendant N. 8.

3. The question in controversy turns upon the effect of the sale in execution of the Nawab's decree which was held on the 9th March, 1911. It is contended on behalf, of the plaintiffs that this sale did not affect the interest which he had purchased in 1909. On the other hand it is contended by defendant No. 9 that the sale by the Nawab was u/s 158-B of the Bengal Tenancy Act and it is the entire interest in the taluk Abdul Kasim free from all incumbrances which was purchased by the auction-purchaser and, therefore, the plaintiffs had no title which would be effective as against the title of defendant No. 9 under the auction-sale of the 9th March 1911.

4. Two points were raised by the defendants in their appeal before the Subordinate Judge. The first point was; was the sale held at the instance of the Nawab of Dacca and his co-sharers a rent sale or not and secondly, did the conduct of the plaintiffs-respondents in attaching the sale-proceeds in execution of the decree held at the instance of the Nawab and his co-sharer and in appearing in that case in which the decree was being executed as a rent-decree estop them from questioning the sale as a rent-sale and the decree as a rent-decree? The learned Subordinate Judge has decided both the points against the plaintiffs. The controversy is with regard to the fact that one co-sharer, Golam Ajam by name, of the zemindari was left out in the execution proceeding of the rent-decree of the Nawab. Section 158-B requires that in order to sell a tenure by one or more co-sharer landlords all the remaining co-sharer landlords should be made parties to the suit, and also that when one or more co-sharer landlords having obtained a decree in a suit properly framed applies for execution of a decree by the sale of the tenure notices of the application for execution should be given to all the co-sharers. If Golam Ajam was really a co-sharer in the zemindari then the execution sale by the Nawab could not have given the auction-purchaser a title free from all incumbrances, because admittedly Golam Ajam was not a party either in the suit nor was any notice of the execution proceeding given to him. The Trial Court found that Golam Ajam was a co-sharer in the zemindari. It is contended by the learned Vakil for the respondents that the effect of the finding of the Subordinate Judge is that Golam Ajam was not a co-sharer. The kobala by which Golam Ajam purported to have purchased 1 kara share in the zemindari is dated the 27th November 1909. The Subordinate Judge deals with the question in this way and it is necessary I think to quote some passages from his judgment: "The important question, therefore, arises whether. Golam Ajam was a necessary party in the rent-suit. Golam Ajam does not come forward: "again Golam Ajam gave ijara of his 1 kara share to plaintiff No. 1's son (Hari Prosad's son). Hari Prosad must have been the ijaradar though the deed might have been in the name of one of his sons. It is clearly proved that Hari Prosad was in possession of the share as ijaradar of Golam Ajam." Then lower down: "The said sale and decree cannot but be a rent sale and decree as Hari

Prosad as co-sharer as well as ijaradar of Golam Ajam was a party in the case." Upon these findings he comes to the conclusion, "I, therefore, hold that the sale in question was a rent sale." The finding is clear that Golam Ajam had a share which was given in ijara. There is, however, another passage where the Subordinate Judge has said this: "It can be safely inferred, therefore, that Golam Ajam was no proprietor before and he was no necessary party in the Nawab's rent suit." This observation of the Subordinate Judge is probably with reference to the fact that Golam Ajam's name was not registered under the Land Registration Act till 19th August 1910 and the rent-suit of the Nawab was brought on the 15th April 1910. It seems to me that the Subordinate Judge was in error in thinking that although Golam Ajam had purchased a share in the zemindari because his name was not registered under the Land Registration Act" he should be considered as no proprietor till his name was registered. The special provision of the Bengal Tenancy Act which allows one or more co-sharer landlords to sell a tenure or holding in execution of their decree must be strictly followed in order to give complete title to the auction-purchaser and it will not be sufficient to say that the ijaradars under a particular co-sharer was a party in another capacity being himself a co-sharer in the zemindari and, therefore, the absent co-sharer was sufficiently represented in order to bring into operation the special provisions laid down in Section 158-B of the Bengal Tenancy Act. In my opinion, therefore, the special provision of the Bengal Tenancy Act not having been followed in the rent execution case by the Nawab, the auction-purchaser did not purchase the holding free from all incumbrances and the interest which the plaintiffs acquired by their purchase in 1909 was not affected by the subsequent sale.

5. Then comes the question as regards estoppel. I feel great difficulty in understanding how the Subordinate Judge comes to the conclusion that the plaintiffs are precluded from asserting their title in the property. It is contended by the learned Vakil for the respondents. that it was the duty of the plaintiffs to give notice of the fact that all the co-sharers in the zemindari had not been made parties in the rent-suit or had not been served with notice of the execution u/s 158-B as the plaintiffs had appeared in the suit and in the execution proceedings before the Court. I cannot see that there was any duty cast upon the plaintiffs who were made pro forma defendants in the suit to give notice to intending purchasers that the rent-suit of the Nawab or the execution sale or the proceeding's in execution were not such as to confer title on the purchaser as contemplated under the special provision of the Bengal Tenancy Act. If there was no such duty cast upon him his silence could not have influenced the conduct of the auction-purchaser in any way and it cannot be said that the plaintiffs are estopped by this conduct of theirs in asserting their title.

6. It is next urged that the plaintiffs are precluded from asserting their interest by reason of the fact that they had attached the surplus sale-proceeds of the execution sale under the Nawab's decree. But they did not draw out the money, and the mere fact that they had attached the surplus sale-proceeds in order to

satisfy any decree obtained by them but did not proceed further cannot preclude them from claiming title to the property. It is then urged by the learned Vakil for the respondents that the plaintiffs had abandoned the title acquired by their purchase in 1909 because they had subsequently brought a suit for rent against Akimannessa Bibi in 1911 for the period subsequent to the date of sale. It appears that the sale of the plaintiffs was confirmed in 1913. Under the new Code u/s 65 there is no doubt that the title of the purchaser vests from the time of the sale. But apparently the parties were under the impression that till confirmation the plaintiffs' title had not been completed and that seems to have been the impression in the mind of the Subordinate Judge also. In any case, however, this question of abandoning the right of the plaintiffs was not raised in the Court of Appeal below, and I do not think that it would be proper to allow the defendants to raise this question in second appeal for the first time. An endeavour was made by the learned Vakil for the respondents to argue that the plaintiffs' conduct amounted to fraud. But no question of fraud was raised either in the Court of first instance or in the Court of Appeal.

7. On these grounds I am of opinion that the judgment and decree of the Subordinate Judge dated the 17th February 1922 should be set aside and those of the Munsif restored with costs in this Court and in the Court below.