

CIVIL RULE.

Before Rankin C. J. and Costello J.

1927

June 22.

FAZOO MIA

v.

SULTAN AHAMAD CHAUDHURY.*

Sale—Setting aside sale—Purchaser of a portion of a non-transferable occupancy holding, if entitled to make a deposit to set aside sale—Civil Procedure Code (Act V of 1908), O. XXI, r. 89.

The purchaser of a portion of a non-transferable occupancy holding is entitled to make a deposit under rule 89 of Order XXI of the Code of Civil Procedure to set aside an auction sale.

Omar Ali Majhi v. Moonshi Basirudeen Ahmad (1), followed.

Held further that for the purposes of rule 89 of Order XXI of the Code of Civil Procedure—

(i) it is immaterial whether the purchaser is a purchaser of a part or of the whole of a non-transferable occupancy *jote* ;

(ii) auction purchase by the landlord does not give him a title better than that *qua* landlord ; and

(iii) it is doubtful whether mere acceptance or withdrawal of a deposit operates to oblige the landlord to recognise the tenant.

CIVIL REVISION CASE.

The petitioner in this Rule was the decree-holder in a rent suit. He purchased the *raiya* holding, which was non-transferable by custom, in execution of his own rent decree. The opposite party, who was a purchaser of a portion of the holding, made a deposit under Order XXI, rule 89 of the Civil Procedure Code and the sale was set aside. Against the said order,

* Civil Rule No. 474 of 1927, against the order of the District Judge, Chittagong, dated March 15, 1927.

the petitioner filed an appeal. The appeal was unsuccessful. Thereupon, he moved the High Court and obtained this Rule.

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Babu Dharendra Lal Kastgir (with him *Babu Phanindranath De*), for the petitioners. The principles laid down in the Full Bench case of *Jharu Mandal v. Khetra Mohan Bera* (1), are applicable to this case. *Omar Ali Majhi v. Momshi Basirudeen Ahmad* (2), is distinguishable from the present case in view of the fact that section 310A of the Code of 1882 has undergone some alteration in the present Code of 1908.

Maulvi A. K. Fazlal Huq (with him *Babu Jahnavi Charan Das Gupta*) for the opposite party. The principles laid down in the case of *Omar Ali Majhi* (2), are applicable *in toto* in the present case notwithstanding the amendment of section 310A of the old Code, as the amendments do not affect the question involved here.

Babu Dharendra Lal Kastgir, in reply.

RANKIN C. J. This is an application by a decree-holder, who is at the same time the auction-purchaser of a non-transferable occupancy holding and the landlord. The landlord obtained a rent decree and has purchased the holding at the execution sale. Thereupon, the opposite party, who claimed to have purchased the entire holding from the tenant, but who has been found by both the Courts below to have purchased a part only of the holding from the tenant, seeks to exercise the right given by rule 89 of Order XXI of the Code of Civil Procedure. The Courts below have both held that he is entitled to exercise

(1) (1926) I. L. R. 54 Calc. 15.

(2) (1908) 7 C.L. J. 282.

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that right and the landlord applies in revision to us to hold that the purchase of a part of a non-transferable occupancy holding is not within the language of rule 89. The matter is a very important one and it is difficult not to have recourse to a comparison with section 170 of the Bengal Tenancy Act. At first, the course of decisions under section 170 appears to have tended in favour of a purchaser of the non-transferable *jote*, but it is now settled by decisions that such a purchaser does not come within the description of sub-section (3) of section 170—"any person having in the tenure or holding any interest voidable on the sale". Now the language of that section is different from the language of rule 89, which speaks of a person "either owning such property or holding an interest therein by virtue of a title acquired before such sale". It is now settled, as I have said, that such a person as the opposite party before us does not hold an interest voidable on the sale. That seems to be reasonably clear upon the wording of sub-section (3), because, if the sale is to stand at all, it is quite clear that the transfer to the previous purchaser cannot subsist with it. An interest voidable on the sale means an interest, the existence of which is compatible with the auction purchase, though a qualification of it, as for example, an encumbrance. We have, however, to apply rule 89, and we find that both the Courts below have proceeded upon the decision in the case of *Omar Ali Majhi v. Moonshi Basirudeen Ahmad* (1), where it was definitely laid down under section 310A of the Code of Civil Procedure of 1882 that such a person as the opposite party before us, has the right to have a sale set aside on paying the money prescribed as a deposit under

(1) (1908) 7 C. L. J. 282.

section 310A of the previous Code, I am far from saying that the question is an easy one. To my mind there are three governing principles. In the first place, it does not seem to me to matter, for purposes of rule 89, whether the purchaser is a purchaser of a part or of the whole of a non-transferable occupancy *jote*. In the second place, it seems to me unreasonable that any difference should be operated by the fact that the landlord happens to be the auction-purchaser himself. It is anomalous that the landlord by using the machinery of the Code should be able to give a better title to himself as an auction purchaser than he could have given in the same way to a third party auction-purchaser.

The other matter that seems to me to govern the consideration of this question is this:—If the withdrawal of the deposit made under rule 89 is to mean that the landlord has recognised the depositor, as tenant of this non-transferable occupancy *jote*, then it does seem anomalous that such a person as the opposite party here should have the right to make the deposit. It clearly cannot be the law that the landlord by the machinery of rule 89, can be obliged either to go without his rent or to recognise the transferee whom he does not wish to recognise in the case of a non-transferable *jote*.

There are other difficulties and serious difficulties in the question before us and when I find that as far back as 1902 this question was decided by a Division Bench in favour of a purchaser of a portion of a non-transferable occupancy holding, I am obliged to follow that ruling, unless I can be persuaded that it is a ruling from which this Court ought to differ. In that case it would be our duty to refer the matter and a very important matter—to a Full Bench for decision. On the whole I am not prepared to say that I differ

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from the ruling laid down in the case of *Omar Ali Majhi* (1). I doubt extremely whether it is true that a mere acceptance or withdrawal of this deposit would operate to oblige the landlord to recognise this tenant, but whether it be true or not, it is perhaps somewhat late in the day to abridge still further the rights of a transferee of a non-transferable occupancy *jote* in Bengal. It would be putting back the clock to overrule the decision which is more than 20 years old and to hold that the interest which such a person as the opposite party before us has obtained from the tenant is no interest at all or that merely because the landlord is the auction-purchaser he cannot exercise the right under rule 89. On the whole I think this is a case where we ought to obey the principle of *stare decisis*.

In my judgment this Rule should be discharged with costs.

COSTELLO J. I agree and for the same reasons.

S. M.

Rule discharged.

(1) (1908) 7 C. L. J. 282.