APPELLATE CIVIL.

Before Rankin C. J. and Mukerji J.

NIHARBALA DEBI

v.

SHASHADHAR RAY CHAUDHURI.*

1930

May 6, 8.

Estoppel—Rent sale—Conduct of co-sharer landlord—Bengal Tenancy Act (VIII of 1885), ss. 148A, 158 B(2)—Indian Evidence Act (I of 1872), s. 115.

Where a co-sharer landlord has been impleaded in a suit under section 148A of the Bengal Tenancy Act and has taken no part in the proceedings, there is no room for the doctrine of equitable estoppel by standing by.

Sarat Chunder Dey v. *Gopal Chunder Laha* (1) referred to.

The object of giving notice under section 158B, sub-section (2), of the Bengal Tenancy Act is to give a co-sharer landlord an opportunity to look after his interest in the sale being properly and regularly conducted. If the co-sharer landlord does not appear, he does not forfeit such rights as he has, under the law, as against the tenant or in respect of the tenure or holding. He is under no obligation to come forward and state that there is any defect in the frame of the suit, although such defect be known to him.

Jabed Ali Talukdar v. *Surendra Nath Bandopadhaya* (2) discussed.

APPEAL by decree-holder.

The facts of the case appear sufficiently in the judgment of Mukerji J.

Bijankumar Mukherji and *Apurbadhan Mukherji* for the appellant.

Gopendranath Das and *Rashbihari Ghosh* for the respondent.

Cur. adv. vult.

MUKERJI J. This appeal has arisen out of an order passed by the District Judge of Burdwan, affirming, on appeal, an order made by the Munsif, First Court, by which the objection of the respondent to the execution of a decree for rent by sale of the defaulting tenure was upheld. The decree-holder has preferred this appeal.

*Appeal from Appellate Order, No. 122 of 1929, against the order of B. K. Basu, District Judge of Burdwan, dated Aug. 18, 1928, affirming the order of Jogindrakumar De, Munsif of Katwa, dated Nov. 30, 1927.

(1) (1892) I. L. R. 20 Calc. 296; L. R. 19 I. A. 203.

(2) (1925) 42 C. L. J. 477.

The appellant is a co-sharer landlord. In 1920, one of the co-sharers of the appellant instituted a suit for rent on a plaint framed in accordance with the provisions of section 148A of the Bengal Tenancy Act. The appellant was made a party to that suit. The rent claimed was for a period ending with the year 1326B.S. The appellant did not appear in the suit and the co-sharer, who had instituted it, obtained a decree for his share of the rent, in accordance with the provisions of the said section; in execution of the decree that was obtained, the appellant's co-sharer put up the tenure to sale and it was purchased by the respondent. The respondent thereafter made an application to set aside the sale upon the ground that what had passed to him under the sale was the right, title and interest of the judgment-debtor tenant and that, although the sale purported to be one in execution of a decree for rent, in point of fact it had not that character. The application made, as aforesaid, by the respondent was rejected. Before the tenure was put up to sale, a notice appears to have been served upon the appellant in accordance with the provisions of section 158B, sub-section (*2*) of the Bengal Tenancy Act. The appellant, however, did not appear in the proceedings, with the result that the sale took place as stated above. Thereafter, the appellant instituted another suit for rent for the years 1327 to 1330B.S. This was a period subsequent to the one for which the previous suit for rent had been instituted and anterior to the date of the respondent's purchase. She obtained a decree and then put the decree into execution. The respondent objected that the decree could not be executed as against the tenure which was now in his hands. It is this objection that has been upheld by the two courts below.

The courts below have held that, in point of fact, two of the co-sharer landlords had been omitted from the suit which was instituted by the appellant's co-sharer in 1920 and that, although the plaint in that suit purported to be one framed in accordance

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with the provisions of section 148A of the Bengal Tenancy Act, the decree that was obtained in that suit would not in law have the effect of a rent decree. It has also been found by both the courts below that the appellant was aware of the fact that the said two co-sharers had been omitted from the suit. These findings have not been challenged before us and indeed, on the materials upon which they have been come to by the courts below, they cannot possibly be challenged. The view upon which the courts below have proceeded is expressed by the learned District Judge in these words :—"The appellant is estopped from questioning "the validity of the rent sale as a rent sale—she having "been a party to the decree and to the execution "thereof as a rent decree, having got notices under "section 158B of the Bengal Tenancy Act." I am clearly of opinion that this view of the law is not correct.

In a plaint framed under section 148A of the Bengal Tenancy Act, the co-sharer landlord is made a party in order that certain adjudication may be made in his presence and in order to give him an opportunity of taking the benefit of such adjudication. It is quite open to him to appear in the suit or not. If he does appear, he is bound by the decree. If he does not appear, then the result is that he is bound by such adjudication as is actually made and is necessary to be made in giving proper relief to the plaintiff in accordance with the provisions of the section. The notice contemplated by section 158B of the Bengal Tenancy Act is given to a co-sharer landlord for his benefit in order that he may avail of those rights which are given to him by the law. If he chooses to take the benefit which the law reserves to him in this respect, he is bound by the proceedings. But if he does not choose to appear in the proceedings or to contest the sale that is to take place, I find it extremely difficult to hold that he forfeits such right as he has under the law as against the tenant or in respect of the tenure or holding. Indeed, it would not appear that he has any power to resist the sale.

The sale would take place even if he chooses to appear and contest the proceedings. I do not find any provision in Chapter XIV or in any other part of the Bengal Tenancy Act, which expressly provides for an adjudication of the question as to the character of the sale upon an objection taken by a co-sharer landlord. The sale takes place and, if the proceedings are in conformity with the provisions of section 148A and the subsequent sections, its effect is that of a rent sale; otherwise it is to be regarded as a sale held in execution of a decree for money. I am, therefore, of opinion that the view upon which the courts below have held that the appellant is estopped from questioning the validity of the rent-sale as a rent sale is not correct.

On behalf of the respondent, our attention has been drawn to a decision of this Court passed in a Letters Patent Appeal in the case of *Jabed Ali Taluqdar* v. *Surendra Nath Bandopadhaya* (1), and to a finding which the learned Munsif in this case has recorded in his judgment. In the case aforesaid cited on behalf of the respondent, this question arose upon somewhat similar circumstances and Mr. Justice B. B. Ghose who heard the appeal to this Court sitting as a single Judge observed thus: "I cannot "see that there was any duty cast upon the plaintiffs "who were made *pro formâ* defendants in the suit to "give notice to intending purchasers that the rent suit "of the Nawab or the execution sale or the proceedings "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." From this decision an appeal was taken under the Letters Patent. In the judgment of Mr. Justice Greaves, who was one of the Judges who heard the appeal, he observed on the question of

(1) (1925) 42 C. L. J. 477.

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estoppel that Mr. Justice Ghose had negatived the contention and had held that the mere fact that the plaintiffs were on the record in the Nawab's suit as co-sharers did not involve on them any obligation of stating the facts to the purchaser and, in that respect, he agreed entirely with the conclusion at which Mr. Justice B. B. Ghose had arrived. He further observed that, in his opinion, the mere fact that the plaintiffs as co-sharers were on the record in the Nawab's suit did not involve any obligation on them of stating the encumbrance at the time of the sale. So far, therefore, as the question of estoppel, based upon the silence of the co-sharers as parties to the suit, is concerned, it is quite clear that the learned Judges were of the same view as Mr. Justice B. B. Ghose. The learned Judges, however, found that, in the appellate judgment of the Subordinate Judge, there was a finding, which they were bound to regard as a finding of fact and which was to the effect that the plaintiffs had knowledge of the fact that there were some other co-sharers, and professing to act upon the said finding the learned Judges held that, by the doctrine of equitable estoppel, the fact of the co-sharer landlords' standing by, and allowing the purchaser in believing that he was purchasing free from encumbrance precluded them from now asserting that the decree that had been obtained was not a rent decree. It is not possible for me, at the present moment, to ascertain what the actual facts of that case were; but, if the finding of the learned Subordinate Judge was not based upon any other evidence regarding the actual conduct of the co-sharer landlords, but was merely a statement of a legal position which arose from the fact that the co-sharer landlords, who had been made parties to the suit and had been given notice under section 158B had not appeared and that, therefore, it should be taken that they were standing by and allowing the purchaser to make the purchase in the belief that the sale was a sale in execution of a decree for rent, with the utmost respect I feel that I cannot agree in the view. That

would mean that there is a duty cast upon the co-sharer landlord who has knowledge of some defect in the frame of the suit, when he receives notice under section 158B of the Bengal Tenancy Act, to come forward and to state that fact before the court. I do not find that the law anywhere casts any such obligation upon him. It is quite clear that, unless there is such a duty cast upon him, his silence cannot possibly amount to an acquiescence, giving rise to an estoppel as against him. Moreover, it is impossible to conceive that the silence of a co-sharer landlord, under such circumstances, can afford any encouragement to a reasonably minded man who intends to purchase the tenure or holding to do so, in the belief that the sale was a rent sale and so create an estoppel against him under the provisions of section 115 of the Evidence Act. The view I take is in accord with the decision of the Judicial Committee in the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1). The finding of the Munsif in the present case, on which the respondent relies, is clearly the statement of a legal position and nothing more. For the reasons given above, I am of opinion that no question of estoppel can possibly arise in this case and that the view upon which the courts below have proceeded is wrong.

In this view of the matter, I would allow the appeal and, setting aside the decisions of the courts below, direct that the execution do proceed against the tenure now in the hands of the respondent. The appellant will be entitled to her costs in these proceedings throughout, the hearing-fee in this Court being assessed at one gold mohur.

RANKIN C. J. I entirely agree. With reference to the case to which my learned brother has referred, namely, *Jabed Ali Taluqdar* v. *Surendra Nath Bandopadhaya* (2), I desire to add that it appears to me that the view taken by Mr. Justice B. B. Ghose

(1) (1892) I. L. R. 20 Calc. 296 (314); L. R. 19 I. A. 203 (219).

(2) (1925) 42 C. L. J. 477.

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was correct, since, in cases where a co-sharer landlord has been impleaded and has taken no part in the proceedings, there is no room for the doctrine of equitable estoppel by standing by. What is that doctrine? It is the doctrine set forth in section 115 of the Evidence Act. In the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1), to which my learned brother has referred, after carefully considering the word "intentionally" as it appears in that section, Lord Shand says this "A person who, by his "declaration, act, or omission, had caused another to "believe a thing to be true and to act upon that belief, "must be held to have done so 'intentionally' within "the meaning of the statute, if a reasonable man "would take the representation to be true, and believe "it was meant that he should act upon it." That is the very highest at which the doctrine can be put. If that standard be applied to the present case and one asks oneself whether it is open to any auction purchaser to say that he purchased on the strength of the fact that the co-sharer landlord who was impleaded as a defendant took no steps in the matter and did not inform him as to the existence of the other co-sharer landlords and that, relying upon this silence, he proceeded to purchase, it is obvious that such a case as that is out of all relation to the facts. It was said by Lord Macnaughten "Silence is innocent "and safe, when there is no duty to speak" [*Chadwick* v. *Manning* (2)]. Even if that proposition is not absolutely and for all purposes true, it is, at any rate, very necessary to take care that persons are not landed in liability merely because they have not given information to some one over whose interests they have no duty to take care. In this class of cases, there is no room for the application of the doctrine of estoppel by standing by in the absence of some definite and particular conduct on the part of the *pro formâ* defendant other than the mere fact that he has been made a party and has taken no share in the proceedings. I agree too with the

(1) (1892) I. L. R. 20 Calc. 296 (314); (2) [1896] A. C. 231, 238. L. R. 19 I. A. 203 (219).

doctrine that was laid down in the case of *Rajani Kanta Ghose* v. *Rahaman Gazi* (1). The object of giving notice under section 158B of the Bengal Tenancy Act is merely that a co-sharer landlord, who has an interest in the sale being properly and regularly conducted, may look after his own interest and see that the sale is conducted in accordance with law and so gets the best price. That puts no obligation upon him. It gives him an advantage in the sense that it gives him an opportunity to take a share in seeing that the sale is properly conducted.

Appeal allowed.

S. M.

(1) (1922) 27 C. W. N. 765.