CIVIL REFERENCE.

Before Lort-Williams and M. C. Ghose JJ.

1933
Nov. 27; Dec. 20.

MAFIJUDDIN MUHURI
v.
MAFIJUDDIN.*

Rent—Arrears—Sale of holding—Application to set aside—Mortgagee—Deposit—Bengal Tenancy Act (VIII of 1885), ss. 174(3), 174A.

An applicant, other than a judgment-debtor, whose interests are affected by the sale of a holding for arrears of rent, must either deposit the amount recoverable in execution of the decree, or satisfy the court that no such deposit is necessary.

If relief be granted and the sale set aside, the deposit may, in a proper case, be used towards the satisfaction of the decree.

Such deposit is not to be made before the application is heard, but before it is allowed or granted.

CIVIL REFERENCE at the instance of the mortgagee.

The facts of the case and the arguments advanced at the hearing of the Reference appear sufficiently in the judgment.

No one appeared for the parties.

Abinashchandra Ghosh appeared as *amicus curiae.*

Cur. adv. vult.

LORT-WILLIAMS J. This is a reference made by the Munsif of the central court, Comilla, under Order XLVI, rule 1 of the Code of Civil Procedure. None of the parties have appeared, but Mr. Abinashchandra Ghosh has very kindly and ably assisted the Court as *amicus curiae.*

The case arose on an application made by mortgagees, under section 174(*3*) of the Bengal

*Civil Reference, No. 7 of 1933, made by the Munsif, Central Court at Comilla, under Order XLVI, rule 1, of the Code of Civil Procedure, dated July 5, 1933.

Tenancy Act, as persons, whose interests were affected by the sale of a holding for arreas of rent.

The decree-holder was willing to allow the sale to be set aside, on condition that the mortgagees paid to him the decretal amount. This they were unwilling to do, on the ground that proviso (*b*) to the sub-section did not apply to them, because no amount was recoverable from them in execution of the decree.

The questions, which we are asked to decide, are:

(*a*) Whether an applicant, other than a judgment-debtor, whose interests are affected by the sale must either deposit the amount recoverable in execution of the decree, or satisfy the court, that no such deposit is necessary?

(*b*) If relief be granted, and the sale be set aside, whether the deposit made by such an applicant ought to be used to satisfy the decree, or returned to the applicant?

(*c*) Ought such deposit to be made before the application is heard?

Sections 174 and 174A of the Bengal Tenancy Act have been adapted from Order XXI, rules 89, 90, 92 and 93 of the Code of Civil Procedure. Of section 174, sub-sections (*1*) and (*2*) are founded upon Order XXI, rule 89, sub-section (*3*) and proviso (*a*) thereto on rule 90, while section 174A is founded upon rules 92 and 93.

But proviso (*b*) to sub-section (*3*) is new, and has been added to the scheme thus outlined in the Code, without clearly defining its incidence and its terms, and without sufficient consideration of its bearing on the rest of the sections. Hence the difficulties, which have arisen in applying the sub-section.

The relevant provisions are:—Sub-section (*3*):

Where a tenure or holding has been sold for arrears of rent due thereon, the decree-holder, the judgment-debtor, or any person whose interests are affected by the sale, may, at any time within six months from the date for

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the sale, apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting the sale :

Provided as follows :—

(a) no sale shall be set aside on any such ground unless the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud ; and

(b) no application made by a judgment-debtor or any person whose interests are affected by the sale under this sub-section shall be allowed unless the applicant either deposits the amount recoverable from him in execution of the decree or satisfies the court, for reasons to be recorded by it in writing, that no such deposit is necessary.

Sub-section (*4*). Rule 91, Order XXI in schedule 1 to the Code of Civil Procedure, 1908, shall not apply to any sale under this Chapter.

Sub-section (*5*). An appeal shall lie against an order setting aside or refusing to set aside a sale :

Provided that where the court has refused to set aside the sale on the application of the judgment-debtor or any person whose interests are affected by the sale and the amount recoverable in execution of the decree is not in deposit in Court, no such appeal shall be admitted unless the appellant deposits such amount in Court.

The word "applicant" in proviso (*b*) is applicable both to a "judgment-debtor" and to a "person, whose "interests are affected by the sale," but the "amount "recoverable from him in execution of a decree" cannot be said to be recoverable from a mortgagee or other person interested, except by a misuse of language. On the other hand, it is clear from the very words of the proviso that the legislature intended it to apply to persons so interested, otherwise it was unnecessary to include such persons within its terms.

Moreover, the object of the proviso was stated in the Notes on Clauses to be the prevention of false and vexatious applications, and this object clearly applies to persons interested as well as to judgment-debtors. And the proviso to sub-section (*5*) requires the appellant to make such a deposit, whether he be the judgment-debtor or a person interested, though the Select Committee had recommended that only in the case of a judgment-debtor should this be required.

Therefore, the words "from him" in proviso (*b*) must be construed as meaning "from the judgment-"debtor" or must be regarded as intended to cover a person interested, in the sense that the debt is recoverable indirectly out of his interest and,

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therefore, from him, or they must be treated as redundant, and the proviso read as in the proviso to sub-section (*5*).

Consequently, the answer to question (*a*) is in the affirmative.

Questions (*b*) and (*c*) must be considered together. The object and destination of the deposit provided in sub-section (*1*) is stated therein, as it is in the analogous Order XXI, rule 89, but no such statement is made in proviso (*b*) to sub-section (*3*).

The object was stated in the Notes on Clauses, already referred to, and the intended destination must be sought for in the light of that statement, so far as it is helpful. Otherwise, the deposit must be disposed of by the court according to principles of equity and good conscience. Thus, for example, if the sale be set aside on the ground that the decree-holder has been guilty of fraud, it would not be just to allow him to benefit by that fraud, by ordering payment of the decretal amount by the applicant. If, however, the decree-holder be innocent, then the judge may consider it both equitable and conducive to a saving of further litigation and costs, to order the applicant to deposit the amount recoverable towards the satisfaction of the decree. These examples are intended only as suggestions and obviously are not exhaustive.

If the sale be not set aside it is difficult to determine what the legislature intended to be done with regard to any deposit. Obviously none would be required to satisfy the decree, because the purchase money would be available for that purpose.

It is difficult to see how these matters can be decided until the court has considered the evidence, and the present case can only be decided after hearing such evidence, unless the parties agree.

This leads to the conclusion that the time for requiring the deposit to be made is after and not before the hearing of the application. It is true that such a provision cannot be very effective in preventing false and vexatious applications. On the other hand,

in most cases the court will not be in a position to decide whether any deposit is necessary, until it has heard the evidence, and it cannot have been intended that the evidence should be heard twice.

Moreover, proviso (*b*) states that no "application "made" shall be "allowed" unless the applicant "deposits" the amount recoverable or "satisfies" the court that no deposit is necessary. Strictly speaking to "allow" means to "permit." But the context makes it clear that the proviso does not refer to "allowing" the application "to be made," but to "granting" the relief asked for in the application. That the word "allow" is intended to be used in this sense is clear from the terms of section 174A, sub-sections (*1*) and (*2*), and the analogous Order XXI, rule 92, in all of which a distinction is drawn between making, and allowing or disallowing the application.

Consequently, question (*c*) must be answered in the negative. And this disposes of the outstanding doubts raised in question (*b*), because, as I have shown, the question of returning the deposit cannot arise.

The necessity for the amendment and clarification of these sections of the Bengal Tenancy Act, when opportunity arises, should be brought to the attention of the Local Government.

M. C. GHOSE J. I agree. The difficulty of interpreting section 174 (*3*) (*b*) has arisen from the use of the expression "from him" after the words "the amount recoverable." On a plain view it would appear that the decretal amount was recoverable only from the judgment-debtor and not from any other person, whose interests are affected by the sale. It was on this view that the mortgagees declined to deposit the amount. It is clear, however, that this sub-section (*3*) (*b*) to section 174 of the Bengal Tenancy Act was meant to cover the case of all persons and not merely the judgment-debtor, who intended to have the sale set aside. The provision for the deposit of the decretal amount was made with

the object of preventing false and vexatious applications. It may be said that every person, whose interest is affected by the sale, has to pay the decretal amount, if the sale is to be set aside: for, unless the sale is set aside, his interests cannot be safeguarded.

In the present case, the mortgagee under section 72 of the Transfer of Property Act may deposit the amount of the decree and add it to the mortgage money and recover the same from the debtor. Under section 65 of the Bengal Tenancy Act the rent is the first charge on the holding and under section 159, upon sale for arrears of rent, the interest of the mortgagee, which is not a "protected interest" would disappear. In this view, it may be said that the decretal amount is recoverable from the mortgagee, if he desires to safeguard his interests.

Whether the amount of the deposit should be paid at the time of the application or after the court has gone into the evidence and come to a conclusion, the use of the word "allowed" is in my opinion conclusive in the matter. If the legislature had intended that the amount should be deposited before the court had gone into the evidence, they would have used the word "admitted" as they have done in sub-section (*5*) to section 174 of the Bengal Tenancy Act.

On the question whether, when the sale is set aside, the amount should be returned to the depositor or be paid to the auction-purchaser or the decree-holder, I agree with my learned brother that this question cannot be answered in the abstract. It must be considered on the facts of each case. If it be found upon evidence that the decree-holder was guilty of fraud, then in fairness he should not be allowed to be benefited by his own fraud. If, however, it be found that the decree-holder was not guilty of fraud but the sale was set aside on the ground of negligence or otherwise of the person, who served the processes, the court may in its discretion order the deposit to be paid to the decree-holder.

G. S.